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New York (State) Laws, statutes, etc. Codes, Civil procedure
The Code of civil procedure of the state of New York cf
by R. M. Stover. 6th ed. 1902

SUPPLEMENT

(1902-1907.)

TO THE

NEW YORK ANNOTATED CODES

BY AMASA J. PARKER, JR.

Of the Albany County Bar.

From 1902	167 N. Y. 60 App. Div. 34 Misc.	to Oct. 26, 1907	189 N. Y. 206 120 App. Div. 224 55 Misc. 64

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CODE AMENDMENTS 1903-1907, Inc.

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AND

Code Amendments — 1903-1907, inc.

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§ 2. Courts of record enumerated.

a. **City Court of N. Y.**—The city court of the city of New York, though enumerated as a court of record in § 2, is only a local statutory court of inferior jurisdiction and the facts necessary to the jurisdiction will not be presumed, but must be made to appear affirmatively; an affidavit of the service of a summons in an action brought in that court which affidavit does not specify the venue, is a nullity and is fatal to the validity of a judgment entered in the action upon the defendant's default: Frees v. Blyth, 99 App. Div. 541; 91 N. Y. Supp. 103.

§ 4. General provision as to jurisdiction, etc.

b. No jurisdiction is acquired over a New York stockholder in an English corporation by serving him in New York with the process in an action in an English court which will support a personal judgment and which will have force in New York to bind either him or his property: Bank of China v. Morse, 168 N. Y. 458; aff'g 44 App. Div. 435, 61 N. Y. Supp. 268.

c. **Patent.**—The courts of this state have no jurisdiction of an action for the infringement of a patent: Moore v. Coyne, 113 App. Div. 52.

§ 6. Courts not to sit on Sunday, except in special cases.

d. **Conviction on Sunday.**—The words "commit or discharge" as used in § 6 mean that persons arrested can be discharged on Sunday by a magistrate if there be no ground for holding them, or that they can be committed for a hearing if that be the proper course, and further authorize the magistrate to try, convict and sentence a prisoner on Sunday: People ex rel. Price v. Warden, etc., 73 App. Div. 174.

e. A trial on Sunday upon the complaint of being a vagrant is not authorized by § 6, and a conviction and commitment rendered on that day is void: People ex rel. Donohue v. Walton, 35 Misc. 320; 71 N. Y. Supp. 85.

§ 7. General powers of courts of record.

§ 1370 of the Consolidation Act formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 8. Criminal contempts defined.

See Penal Code, § 143, Criminal contempts.

See § 853, post, Penalty for disobedience to subpoena.

See § 1444, post, Violation of order to prevent waste of real property.

See § 2870, post, Criminal contempts in justices' courts.

f. **Mandamus.**—The failure of a fire commissioner to obey a peremptory writ of mandamus for two hours, after which he takes an appeal, is not "willful disobedience to its lawful mandate" within the meaning of § 8: Matter of Croker v. Sturgis, 38 Misc. 596.

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a. **Injunction.**—Persons knowing of the existence of an injunction order and its terms and clearly understanding the nature of their acts, who act contrary to such injunction, are properly adjudged guilty of a criminal contempt for willful disobedience tending to cast discredit upon the administration of justice; costs are not allowable in a proceeding to punish for a criminal contempt: People ex rel. Stearns v. Marr, 181 N. Y. 463; 34 Civ. Pro. R. 300, mod'y 88 App. Div. 422; 84 N. Y. Supp. 965.

b. What acts do not constitute willful disobedience of an injunction order; an order will not be sustained as an adjudication of a criminal contempt under §§ 8 and 9 of the Code of Civil Procedure when it requires the payment of both costs and fine to the plaintiff's attorney instead of to the public and where the facts do not justify a finding that the violation of the injunction order was willful: Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. 532; 77 N. Y. Supp. 287.

c. An owner of a building and the contractor employed in tearing the building down are both guilty of criminal contempt under § 8 and subd. 3 when they proceed to tear down the building after they have been enjoined *pendente lite* by the supreme court from interfering with the tenant, even though the owner subsequently recovered possession of the premises in dispossession proceedings: Matter of Ganz, 38 Misc. 666.

d. **Review.**—The defendant in an action who, on the trial in the presence of the court, abstracts a contract which is the subject of the action, which the plaintiff's attorney had placed in front of such defendant, is guilty of a criminal contempt within the meaning of § 8, subd. 1; the proper way of reviewing a ruling adjudging a person guilty of criminal contempt is by certiorari and not by an appeal from the order adjudging the party guilty of contempt: Matter of Teitelbaum, 84 App. Div. 351; 82 N. Y. Supp. 887.

§ 9. Punishment for criminal contempts.

e. What acts do not constitute willful disobedience of an injunction order; an order will not be sustained as an adjudication of a criminal contempt under §§ 8 and 9 of the Code of Civil Procedure when it requires the payment of both costs and fine to the plaintiff's attorney instead of to the public, and where the facts do not justify a finding that the violation of the injunction order was willful: Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. 532; 77 N. Y. Supp. 287.

§ 10. Such contempts in view of court; how punished.

f. The defendant in an action who, on the trial in the presence of the court, abstracts a contract which is the subject of the action, which the plaintiff's attorney had placed in front of such defendant, is guilty of a criminal contempt within the meaning of § 8, subd. 1; the proper way of reviewing a ruling adjudging a person guilty of criminal contempt is by certiorari and not by an appeal from the order adjudging the party guilty of contempt: Matter of Teitelbaum, 84 App. Div. 351; 82 N. Y. Supp. 887.

§ 11. Requisites of commitment.

g. **Circumstances.**—The commitment in a proceeding for contempt in the immediate view and presence of the court must specify the particular circumstances of the relator's offense, as required by § 11, and such an omission is fatal upon a review of the proceedings by certiorari, although the papers before the reviewing tribunal clearly established the sufficiency of the proof to sustain the conviction of the relator; the statement in the commitment or final order, to the effect that the relator, in the immediate view and presence of the court, behaved in an insolent and disorderly manner, which tended to interrupt the proceedings of the court and impair the respect due to its authority, is not a sufficient statement of the peculiar circumstances of the offense: People ex rel. Palmieri v. Marean, 86 App. Div. 278.

h. An order adjudging a party guilty of a criminal contempt for disobeying an injunction which does not set out the particular circumstances of the offense is fatally defective under § 11; a mere statement that defendants disobeyed the injunction is insufficient: Roncoroni v. Gross, 92 App. Div. 366.

i. An order committing a person for contempt in failing to appear as a witness in supplementary proceedings on a day named or on other days and times not named does not sufficiently set forth the particular circumstances of the offense, and is too indefinite to authorize arrest and incarceration: Matter of Depue, 185 N. Y. 60.

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§ 14. Contempts punishable civilly.

See § 1241, post, When judgment enforced by contempt proceedings.

See § 2266 et seq., post, Proceedings to punish civil contempt.

See § 2457, post, Penalty for disobedience of order in supplementary proceedings.

See § 2555, post, Enforcement of surrogate's decrees by punishment for contempt.

a. **Judgment creditor's rights.**—An order, adjudging a judgment debtor examined in proceedings supplementary to execution, guilty of contempt of court which does not adjudge that any of the rights or remedies of the judgment creditor have been impaired by the alleged misconduct of the judgment debtor is fatally defective, and this is so particularly where there is no evidence of such impairment; it would seem that if the judgment debtor falsely testified on his examination a contempt proceeding is not proper: Matter of Ryan, 73 App. Div. 137.

b. **Service of order.**—Unless there is a formal service of the order on the person sought to be punished for contempt in disobeying such order, the court cannot adjudge him in contempt; merely exhibiting a certified copy of the order is not sufficient: American Mortgage Co. v. Sire, 103 App. Div. 396.

c. **Injunction.**—What acts do not constitute willful disobedience of an injunction order; an order will not be sustained as an adjudication of a criminal contempt under §§ 8 and 9 when it requires the payment of both costs and fine to the plaintiff's attorney instead of to the public, and where the facts do not justify a finding that the violation of the injunction order was willful: Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. 532; 77 N. Y. Supp. 287.

d. **Purchaser at foreclosure.**—A motion to punish a purchaser at a foreclosure sale for a contempt for having failed to comply with an order directing him to complete his sale must be instituted by an order to show cause and cannot be upon a notice of motion; the papers are defective unless they show facts from which the court can adjudge that any right of the plaintiff has been defeated, etc.: Dunlop v. Mulry, 40 Misc. 131; 81 N. Y. Supp. 260.

e. A purchaser at a judicial sale of real property who refuses to complete his purchase may be adjudged guilty of contempt and compelled to pay the deficiency on the re-sale, if any, together with the extra costs and expenses: Rowley v. Feldman, 84 App. Div. 400; 82 N. Y. Supp. 679.

f. **Fictitious surety.**—A surety on an undertaking to secure a stay of proceedings pending an appeal to the court of appeals, who is adjudged guilty of contempt for falsely swearing that he was worth $10,000 when he was insolvent, should be fined the amount of damages sustained by the injured party to the action: Buffalo L., T. & S. D. Co. v. Medina G. & E. L. Co., 68 App. Div. 414; 74 N. Y. Supp. 486.

g. **Subdivision 3.**—Where an order directing a re-sale of real estate sold in a foreclosure action does not adjudge the payment of a particular or specified sum, the purchaser cannot, under subd. 3 of § 14, be punished for contempt until such purchaser has an opportunity to be heard and have ascertained the amount due from him on such re-sale: Rowley v. Feldman, 66 App. Div. 463; 73 N. Y. Supp. 385.

h. The refusal of a judgment creditor to obey an order directing the restitution by him of a sum of money, paid to him by a receiver in supplementary proceedings under an order which has been vacated, may be punished by proceedings for contempt under § 14 when construed in connection with §§ 2266 and 2268 of the Code: Newell v. Hall, 74 App. Div. 278; 77 N. Y. Supp. 610.

i. As § 779 provides that an execution against the personal property of a party may be issued when an order directs the payment of a sum of money, it is doubtful whether the court has authority under § 14, subd. 3, to punish plaintiffs for contempt upon their failure to pay a sum of money found to be due their attorney on an application by them for a substitution of a new attorney and the determination of the amount due their original attorney: Kane v. Rose, 87 App. Div. 101; 84 N. Y. Supp. 111.

j. Consent of attorneys confers no power upon the court to compel, by order in a summary proceeding, payment of money in his hands as an agent; judgment and execution is the proper manner: Matter of Langslow, 167 N. Y. 314, mod'y 52 App. Div. 635; 66 N. Y. Supp. 1148.

k. **Attorney.**—An attorney is guilty of contempt, when, in an action of libel, he procures an order of arrest and furnishes an undertaking with the knowledge that one surety is not worth sufficient and that the other is fictitious; the surety who has not sufficient property is also guilty of contempt under § 14, subd. 2 and 4: Nuccio v. Porto, 72 App. Div. 88; 76 N. Y. Supp. 96.

l. **Subdivision 4.**—Merely showing that a third person visited a woman and urged her to settle an action for separation brought by her, offering her a sum of money to sign a paper and suggesting that she ignore her attorney's advice, is not sufficient to establish that her husband and the third person were

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guilty of contempt of court under § 14, subd. 4; punishment for contempt is a matter which rests largely in the discretion of the court which has immediate jurisdiction of the parties, and a strong case must be presented to the appellate court to justify it in reversing an order refusing to punish a person for contempt: Herrmann v. Herrmann, 82 App. Div. 437.

a. **Witness.**—An order punishing a witness for contempt in failing to appear before a referee, in pursuance of an order, and testify in supplementary proceedings, is void: Matter of Depue, 185 N. Y. 60.

b. **Injunction.**—A defendant should not be punished for contempt for a failure to obey an injunction restraining him from instituting summary proceedings against the plaintiff on the ground that prior summary proceedings were determined in plaintiff's favor, where it appears that the defendant discontinued the action prior to the motion to punish him, and such proceedings were instituted by him on the theory that the injunction had expired through failure of the plaintiff to give a bond as required: Jones v. Burgess, 109 App. Div. 888.

c. A municipal corporation engaged in a municipal work, which is restrained by order of the court and which continues such work in violation of the injunction, which results in an injury to the property of a private individual, may be punished for the violation of such injunction at the instance of the person injured to the extent of the damages sustained by him: Marson v. City of Rochester, 112 App. Div. 51; 97 N. Y. Supp. 881, aff'd 185 N. Y. 74.

d. **Interlocutory judgment.**—An interlocutory judgment which, among other things, directs the recovery of money, is not like one directing money to be paid into court or ordering restitution of money paid out of court, and it cannot be enforced by contempt proceedings: Potter v. Rossiter, No. 2, 109 App. Div. 35; 95 N. Y. Supp. 1036.

e. A defendant who, by an interlocutory judgment, has been ordered to transfer and deliver to plaintiffs certain stock and bonds, which, by stipulation of parties, have been deposited with a trust company to be held subject to the order of the court, and who intends to appeal from the final judgment thereon, should not be adjudged to be in contempt of court for failing so to deliver the stock; the defendant has a right to review the interlocutory judgment on an appeal from the final judgment: Potter v. Rossiter, No. 1, 109 App. Div. 32; 95 N. Y. Supp. 1037.

f. **Surrogate's court.**—A provision in a decree of the surrogate's court rendered upon the judicial settlement of an administrator's accounts, directing the administrator to pay personally a specified amount of costs to the contestants, cannot be enforced by contempt proceedings pursuant to § 2555: Matter of Banning, 108 App. Div. 12.

g. **Receiver.**—When a foreign corporation is dissolved by judicial decree and a permanent receiver is appointed, it ceases to exist, and an order appointed subsequent to such dissolution decreeing an executrix to be in contempt for failure to obey a direction to pay over moneys to said corporation, should be set aside: Matter of Skelly, 109 App. Div. 58.

h. **Executor.**—A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of §§ 2714 and 2552, conclusive that he has money in his hands and, on his refusal to pay, payment may be compelled by contempt proceedings under § 2555; if the executor is insolvent, he may be relieved from imprisonment under § 2286. Matter of Strong, 111 App. Div. 281; 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

§ 15. No imprisonment for non-payment of interlocutory costs.

i. In an action of tort, in which the defendant is liable to arrest and imprisonment if the plaintiff is successful, a judgment in favor of the defendant for costs may be enforced by an execution against the person and not under the provisions of this section: Saffier v. Haft, 86 App. Div. 284; 83 N. Y. Supp. 763.

j. § 2555 is to be construed in connection with § 15: Matter of Banning, 108 App. Div. 12.

k. When a judgment in favor of a defendant in an action for trespass, which was tried in justice's court, was reversed on appeal to the county court, an execution against the defendant's person for costs was properly issued: Losaw v. Smith, 109 App. Div. 754.

§ 16. Id.; money due upon a contract.

See § 548 et seq., Arrest and bail in civil actions.

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§ 17. Rules of courts of record, how made and revised.

See § 915, post, Rules to obtain testimony for use without the state.

See § 976, post, Rules may prescribe place of trial.

See § 997, post, Rules may prescribe settlement of cases and exceptions.

See § 1361, post, Rules apply to appeals in special proceedings.

See § 1381, post, Rules on application for leave to issue execution against decedent's property.

a. **Rules of practice.**—Rules of practice must be consistent with and subordinate to statutory enactments prescribing methods of procedure: Auerbach v. D. L. & W. R. R. Co., 66 App. Div. 201; 73 N. Y. Supp. 118.

b. The general rules of practice must be made pursuant to § 17 and they have the force and effect of statutes: Smith v. Warringer, 41 Misc. 94; 83 N. Y. Supp. 655.

§ 19. Courts to order calendar printed.

See §§ 789-793, post, Preferred and deferred causes.

See rule 36 (Sup. Ct.), Calendar practice.

See §§ 978-979, post, Arrangement and disposition of issues.

§ 22. Writs, etc., in the name of the people, and in English; abbreviations.

See rule 19 (Sup. Ct.), Certain papers to be marked with folios.

§ 23. Id.; teste and return.

See § 721, post, Mistakes, defects, etc., in writs.

§ 24. Id.; to be subscribed or endorsed; when error, etc., not to vitiate.

See § 721, post, Mistakes, defects, etc., in writs.

c. A subpoena in proceedings supplementary to execution can not be signed by the attorney for a party. Lowther v. Lowther, 115 App. Div. 307.

§ 25. No discontinuance by reason of vacancy, etc.

d. An order of reference made at special term by a justice, who, at the time, had been appointed to the appellate division, is a nullity and in violation of article 6, § 2 of the New York Constitution: Owasco Lake C. Co. v. Teller, 110 App. Div. 450. 229.

§ 26. When one judge may continue proceedings commenced before another.

See § 771, post, That motion may be transferred to another judge when latter is absent.

See § 3333, post, "Action " defined.

See § 3334, post, " Special proceeding " defined.

e. Proceedings supplementary to execution, under an order for the examination of a judgment debtor made by a judge of the city court of the city of New York, may be continued before another judge of the same court: Matter of Morrison, 49 Misc. 464.

f. An order for the examination of a judgement debtor in proceedings supplementary to execution, made by a justice of the City Court of the City of New York a short time before his resignation, is sufficient to require the judgment debtor to attend before his successor in office, sitting at the same term of the court and at the time and place designated in the order: Dodge v. Albers, 54 Misc. 37.

g. Under § 26 an order made by the judge of the City Court of N. Y. for the examination of a judgment debtor upon a judgment obtained in the Municipal Court may only be vacated by a judge of the City Court, or, under § 2433, upon a motion in the Supreme Court if the execution was issued from that Court: McAlpin v. Stoddard, 54 Misc. 647.

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§ 27. Provisions respecting the seals of courts.

See Public Officers' Law, chap, 681 of 1892, § 40, Official seals of court of appeals and state officers.

§ 28. Seals of counties.

See County Law, chap. 686 of 1892, § 235, Official seals of county officers.

§ 30. New seals.

See County Law, chap. 686 of 1892, § 235, When seal of county official becomes unfit for use.

§ 37. Causes tried elsewhere than at court-house.

See § 239, post, In relation to trial at special terms adjourned to chambers.

a. Where a case pending before the supreme court is brought on for trial in the county court house, an adjournment of the trial of the case to another place in the same county, in which no justice of the supreme court resides or has his chambers, is unauthorized, unless the parties execute the written stipulation required by § 37, as the oral consent of the parties granted in open court will not take the place of the written stipulation required by said section: Armstrong v. Loveland, 99 App. Div. 28.

§ 44. No action or special proceeding abated, etc., by failure or adjournment of court.

§ 1390 of the Consolidation Act formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 45. Trial once commenced may be continued beyond term.

b. There is nothing in the Codes or Constitution which prevents the continuation of a Trial Term beyond the duration of the original time set, even though in the meantime another term of the court is appointed to be held; in fact the provisions of this section and § 432 of the Code of Criminal Procedure authorize the continuation of a term beyond the expiration of the time appointed: People ex rel. Weick v. Warden, 117 App. Div. 154; 102 N. Y. Supp. 334, aff'd 188 N. Y. 549.

§ 46. Judge not to sit when he is a party, etc., or has not heard argument.

A judge shall not sit as such in, or take any part in the decision of, a cause or matter to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity, or affinty to any party to the controversy within the sixth degree. The degree shall be ascertained by ascending from the judge to the common ancestor, and descending to the party, counting a degree for each person in both lines, including the judge and party, and excluding the common ancestor. But a judge of the court of appeals, or a justice of the appellate division of the supreme court, shall not be disqualified from taking part in the decision of an action or special proceeding in which an insurance company is a party or is interested, by reason of his being a policyholder therein. A judge other than a judge of the court of appeals, or of the appellate division

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of the supreme court, shall not decide or take part in the decision of a question, which was argued orally in the court, when he was not present and sitting therein as a judge.

2 R. S. 275 (Part 3, c. 3, tit. 1), § 2; L. 1847, c. 280, § 81; L. 1850, c. 41, § 2.

Amended by chap. 234 of 1883, chap. 267 of 1895, chap. 268 of 1897, chap 216 of 1903.

See N. Y. Const., Art. VI, § 3, judges not to sit in review of their own decisions.

a. The word "judge" as used in this section includes a justice of the peace under the provisions of § 3343 of the Code of Civil Procedure; statements of a judge that he would not believe the defendant or his counsel under oath constitute bias which is not expressly provided for by § 46: Truesdell v. Winne, 44 Misc. 451.

b. **Criminal trials.**—This section relating to the disqualification of judges to preside at a trial of a cause, applies both to civil and criminal trials, and in order to invoke the provisions of that section, it is not necessary to establish that the former relations of lawyer and client once existed between the judge and the litigant as to the cause or matter in question, as the section contemplates service in any cause, even though the services were rendered gratuitously: People v. Haas, 105 App. Div. 119.

c. **Civil actions.**—In the light of §§ 3333 and 3334 the words "cause or matter" in § 46 were intended to refer only to actions or special proceedings in which a judge might sit or take part, the word "cause" meaning cause of action and the word "matter" referring only to some judicial matter or proceeding, and under the Code is included in special proceedings for the enforcement of civil rights: Keefe v. Third Nat. Bank, 177 N. Y. 305, aff'g 79 App. Div. 644; 80 N. Y. Supp. 1137.

Where a judgment was entered in an action brought upon certain promissory notes by a firm of lawyers, a member of which thereafter became a judge, which judgment was partly satisfied, the attorneys paid, the relation of attorney and client between them and the plaintiff permanently terminated, and prior to the assumption of his judicial duties the firm was dissolved, the judge retaining no connection therewith or interest in its business, he is not disqualified from hearing and determining a subsequent action brought by another attorney, the purpose of which is to enforce a resulting trust in certain property held for the benefit of one of the judgment debtors, upon the ground that it is brought in aid of the judgment in the former action, and that the two actions should be regarded as one, thus falling within the inhibition of § 46 of the Code of Civil Procedure: Id.

d. **Practice.**—Upon an appeal from a judgment of the county court, because the county judge was related to one of the defendants within the sixth degree, it is better practice for the appellate division to dismiss the appeal and remit the parties to their remedy by a motion in the county court to set aside the judgment: Elmira Realty Co. v. Gibson, 103 App. Div. 140.

e. The relationship of father and son, existing between a judge and one whose sole connection with a capital case is that, as an assistant district attorney, he opposed defendant's motion for a new trial upon the ground of newly discovered evidence, does not legally disqualify the judge from taking part in the hearing and decision of an appeal: People v. Patrick, 183 N. Y. 52.

§ 47. Judge not to be interested in costs.

See § 50, post, Judge's partner or clerk not to practice before him.

§ 50. Judge's partner or clerk not to practice before him; judge not to practice in a cause which has been before him.

See Art. VI, § 20, N. Y. Const., As to right of judges to practice as attorneys.

§ 52. Substitution of one officer for another in special proceeding.

f. **County court.**—The provisions of §§ 52 and 53 of the Code of Civil Procedure seem to contemplate, in case of inability on the part of the county judge to act, that the proceeding shall be transferred to a like officer in an adjoining county, who shall proceed thereon as though the proceeding were originally brought in his own jurisdiction: Matter of Munson, 95 App. Div. 23; 88 N. Y. Supp. 509.

g. **Supreme court.**—A proceeding instituted by freeholders of a town for an investigation into its financial affairs under § 3 of the general municipal law is a "special proceeding," and when begun before a justice of the supreme court who is subsequently disqualified, may, by vir-

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tue of § 52, be continued before a justice of the supreme court of an adjoining county: Matter of Town of Hadley, 44 Misc. 265.

a. An order for the examination of a judgment debtor in proceedings supplementary to execution, made by a justice of the city court of the city of New York a short time before his resignation, is sufficient to require the judgment debtor to attend before his successor in office, sitting at the same term of the court and at the time and place designated in the order: Dodge v. Albers, 54 Misc. 37.

§ 53. Proceedings before substituted officer.

b. **County court.**—The provisions of §§ 52 and 53 of the Code of Civil Procedure seem to contemplate, in case of inability on the part of the county judge to act, that the proceeding shall be transferred to a like officer in an adjoining county, who shall proceed thereon as though the proceeding were originally brought in his own jurisdiction: Matter of Munson, 95 App. Div. 23; 88 N. Y. Supp. 509.

c. An order for the examination of a judgment debtor in proceedings supplementary to execution, made by a justice of the city court of the city of New York a short time before his resignation, is sufficient to require the judgment debtor to attend before his successor in office, sitting at the same term of the court and at the time and place designated in the order: Dodge v. Albers, 54 Misc. 37.

§ 55. Party may appear in person or by attorney.

d. A board of supervisors has no power to employ counsel under a general retainer at a yearly salary, and, therefore, an attorney cannot recover against the county on such general retainer: Vincent v. County of Nassau, 110 App. Div. 730.

§ 58. Exemptions to graduates of certain law schools.

Nothing contained in the last two sections prevents the court of appeals from dispensing, in the rules established by it, with the whole or any part of the stated period of clerkship, required from an applicant, or with the examination where the applicant is a graduate of the Albany law school, being the law department of Union university, or of the law department of the university of the city of New York, or of the law school of Columbia college, or of the law school of the university of Buffalo or the New York law school or of the college of law, Cornell university, or of the school of law, Syracuse university, or the Brooklyn law school of Saint Lawrence university, and produces his diploma upon his application for admission.

L. 1871, c. 486, § 3; L. 1872, c. 260.

Amended by chap. 416 of 1877, chap. 163 of 1903 and chap. 195 of 1905.

§ 63. None but attorneys to practice in New York city.

§ 1077 of the Consolidation Act formerly relating to this section repealed by Greater N. Y. Charter, chap. 378 of 1897, as amended by chap. 466 of 1901.

e. **Effect of judgment.**—Where a person, not regularly admitted to practice in the courts of record of the state of New York and not a party to an action, conducts it in the municipal court of the city of New York, the judgment rendered therein is void as violative of §§ 63 and 64: Kaplan v. Berman, 37 Misc. 502.

f. The attorney for a defendant in an action, who sent a person not admitted to practice by § 63 to appear for the defendant, cannot avail himself of the imposture, if such it was, which he made possible, and cannot claim that a general appearance for the defendant was not made: Kerr v. Walter, 104 App. Div. 45; 93 N. Y. Supp. 311.

g. **Municipal court.**—Permitting those not attorneys to practice in the municipal court is a violation of the provisions of § 64 and § 63 of the Code of Civil Procedure, which does not permit those not attorneys to practice in the municipal court: Matter of Bolte, 97 App. Div. 551; 90 N. Y. Supp. 499.

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§ 64. Penalty for violation, or suffering violation of last section.

a. **Effect of judgment.**—Where a person, not regularly admitted to practice in the courts of record of the state of New York and not a party to an action, conducts it in the municipal court of the city of New York, the judgment rendered therein is void as violative of §§ 63 and 64: Kaplan v. Berman, 37 Misc. 502.

b. **Municipal court.**—Permitting those not attorneys to practice in the municipal court is a violation of the provisions of § 64 and § 63 of the Code of Civil Procedure, which does not permit those not attorneys to practice in the municipal court: Matter of Bolte, 97 App. Div. 551; 90 N. Y. Supp. 499.

§ 65. Death or disability of attorney; proceedings thereupon.

c. **After submission.**—Where an attorney dies after the case has been submitted to a referee, there is no provision of § 65 which prevents the referee from delivering his report, particularly if the thirty days specified in § 65 would not expire until after the 60 days allowed the referee under § 1019 in which to make his report: Agricultural Insurance Co. v. Darrow, 70 App. Div. 413.

§ 66. Compensation of attorney or counsellor.

d. **Evidence.**—Before a claim for 250 days' service as an attorney, at $100 per day, can be allowed against an insolvent corporation, evidence highly satisfactory and convincing must be presented that the services were, in fact, rendered: People v. N. Y. Bldg. Loan Banking Co., 112 App. Div. 166.

e. **Substitution.**—Although a client has an absolute right to substitute attorneys, an attorney not guilty of misconduct should be allowed to retain his client's papers on such substitution until the amount due him is ascertained by a reference and paid: Anglo-Continental Chemical Works, Ltd., v. Dillon, 111 App. Div. 418.

f. Clients who, after retaining an attorney, have discharged him and substituted other attorneys, and thereafter, finding that his services are necessary by reason of his special fitness, have re-employed him under written contracts giving him a contingent fee, cannot thereafter complain that he drove a hard bargain: Burke v. Baker, 111 App. Div. 422; 97 N. Y. Supp. 768; aff'd 185 N. Y. 597.

g. **Defendant's attorney.**—The attorney for a defendant who recovers costs on the dismissal of a complaint has a lien thereon for his services, although no counterclaim was set up in the answer: Agricultural Ins. Co. v. Smith, 112 App. Div. 840.

h. **Unconscionable agreement.**—Whether a contract to pay an attorney fifty per cent of the amount recovered is unreasonable and unconscionable is a question of fact depending upon the character of the claim and the amount of services to be rendered in prosecuting it to judgment, the mere fact that the attorney was to receive one-half of the sum recovered does not render the agreement unconscionable, unless it appears from the evidence that it was induced by fraud, or, in view of the nature of the claim, that the compensation provided for was so excessive as to evince a purpose on the part of the attorney to obtain an improper and undue advantage over his client: Morehouse v. Brooklyn Heights R. R. Co., 185 N. Y. 520, rev'g 102 App. Div. 627; 92 N. Y. Supp. 1134.

i. The mere fact that an attorney was to receive a certain portion of the recovery, does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation was so excessive as to evince a purpose to obtain an an improper or undue advantage; the agreement that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings" does not render it champertous within the meaning of § 74: Ransom v. Cutting, 188 N. Y. 447, aff'g 112 App. Div. 150.

j. The lien of an attorney for his services and disbursements in an action is superior to the right of the parties to set off judgments recovered by them against each other: Smith v. Cayuga Lake Cement Co., 107 App. Div. 524.

k. When the plaintiff, a lawyer, has been employed by landowners to procure the drainage of swamp lands under an unconstitutional statute, he is entitled to recover the value of his services, although the statute under which he proceeded was unconstitutional: Sanford v. Bronson, 109 App. Div. 835.

l. **Reference.**—In an action by an attorney against his client for services rendered, a reference will be refused when the defendant has filed a stipulation admitting the rendition of all the items of the account, with the exception of two, and contests only the value of the services: Hoff v. Reid & Co., 110 App. Div. 95.

m. A reference had in a summary proceeding to compel an attorney to pay over moneys to a client is for the purpose of informing the conscience of the court and the latter may adopt or

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disregard the report of the referee. The report, however, is entitled to consideration by reason of the fact that the referee saw and heard the witnesses: Matter of Jones & Co., 117 App. Div. 776.

a. A reference in an action by an attorney for professional services cannot be ordered against objection, even though ninety items of services are claimed: Moyer v. Village of Nelliston, 110 App. Div. 602.

b. **Contract.**—A contract between an attorney and client will be closely scrutinized to prevent fraud: Matter of Holland, 110 App. Div. 799.

c. An attorney's contract of retainer whereby the client agrees to pay him twenty-five per cent of such property as he may secure contemplates a collection of the claim before the percentage is recoverable, and the client is not liable when it is not shown that any amount was collected; the fact that the attorney at the instance of the client gave a substitution is not such breach of the contract of retainer as renders the client liable when no collection has been made; when an attorney fails to show performance of the contract of retainer his recovery, if any, must be based upon a *quantum meruit* and not upon contract: Roake v. Palmer, 119 App. Div. 64.

d. The rule that an attorney seeking to avail himself of a contract made with his client must establish affirmatively that it was made by the latter with full knowledge of all the material circumstances known to the former, and was in every respect free from fraud, etc., has no application to mere contracts of retainer, whereby the relation of attorney and client is established: Title Guarantee & Trust Co. v. Stemberg, 119 App. Div. 29.

e. **Void Agreement.**—An agreement by an attorney to collect for a contingent fee all claims which may be defended upon the ground that they were gambling debts is contrary to public policy and void. The court will not aid in its enforcement: Delehunty v. Canfield, 118 App. Div. 883.

f. **Settlement.**—A plaintiff may settle his action at any time, whether his attorney consents or not, and, having done so and released the defendant, it is error to refuse to dismiss the complaint: Van Der Beck v. Thomason, 50 Misc. 524; 99 N. Y. Supp. 538.

g. Under an agreement by which an attorney is to receive one-half of a recovery contingent upon success, an amount received by the client in settlement of the action stands in place of the cause of action and the attorney has a lien thereon only for the percentage set by the contract: Matter of Snyder, 119 App. Div. 277.

h. **Surrogate.**—A surrogate has power under this section to determine the value of services rendered by an attorney to executors and to charge the same as a lien upon the estate: Matter of Smith, 111 App. Div. 23.

i. **Board of supervisors.**—A board of supervisors has no power to employ counsel under a general retainer at a yearly salary, and, therefore, an attorney cannot recover against the county on such general retainer: Vincent v. County of Nassau, 110 App. Div. 730.

j. **Corporation counsel.**—A corporation counsel receiving a fixed salary for all services is not entitled to an attorney's lien on judgments recovered by the city, except when the city has been successful in collecting its claim, with costs, from the adverse party: Sutherland v. City of Rochester, 112 App. Div. 712.

k. **Procedure.**—A proceeding to enforce an attorney's lien should not be summarily determined upon the petition and affidavits, but the issue should be determined in open court or before a referee after a complete and thorough hearing of all the facts: Matter of Speranza, 186 N. Y. 280, rev'g 114 App. Div. 913.

l. The attorney's lien may be enforced against both the client and the person with whom he settles, and the attorney may proceed against both without first exhausting his remedy against the client; in such an action the client is a necessary party; if the client settles without costs, the attorney is not entitled to a lien for costs under a contract which gives him "all costs and interest recovered or to which he may be entitled:" Oishei v. Metropolitan Street Ry. Co., 110 App. Div. 709; 97 N. Y. Supp. 447.

m. **Order.**—When an order discontinuing an action, but preserving jurisdiction as to attorney's costs, is not an adjudication to his right thereto: Valentine v. Stevens, 109 App. Div. 284.

n. **Alimony.**—An agreement by a wife to compensate her attorney for services in prosecuting an action for separation by giving him a percentage of the alimony recovered is void as against public policy; an attorney can have no lien on property on which his client has no claim: Matter of Brackett, 113 App. Div. 257.

o. **Discontinuance.**—An attorney's lien will not be determined on a motion for discontinuance on the affidavit of the attorney setting out the facts which is not served upon the client. Such affidavit cannot be treated as a petition under this section, and the attorney will be remitted to proper proceedings against the client under this section: Sullivan v. McCann, 113 App. Div. 61; 98 N. Y. Supp. 947.

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a. **Recovery.**—In an action to enforce their lien against defendants who have settled with their client, attorneys cannot recover more than the sum to which they were entitled under their contract with the client: Neu v. Brooklyn Heights Railroad Co., 113 App. Div. 446.

b. **Agent.**—Although the court may enforce an attorney's statutory or common-law lien on motion of either attorney or client, yet this remedy will be exercised only when the relation is professional, and not when the attorney is acting as a mere business agent for another: Matter of Ney Co., 114 App. Div. 467.

c. **Reference.**—A client may discharge an attorney at will, but the latter must be protected to the extent of the services which he performed; when a client wishes to end a litigation a reference should be had to take proof of the compensation to which the attorney is entitled, and when paid the attorney should be ordered to discontinue the action: Matter of Cable, 114 App. Div. 375.

d. **Stipulation.**—When parties to an action have stipulated as to the amount attorneys shall receive as compensation, the special term cannot reduce the amount so long as the stipulation remains in force: People v. Federal Bank, 114 App. Div. 374.

e. **Forty per cent.**—An agreement by a son who has been disinherited by his father to give an attorney forty per cent of the sum recovered in case of litigation and ten per cent in case of settlement is not unconscionable: Ransom v. Cutting, 112 App. Div. 150; 98 N. Y. Supp. 282.

f. **Common-law lien.**—An attorney has a lien upon the papers of his client in his possession, in addition to the statutory lien given to him by § 66, which entitles him to retain such papers until his claim for services is paid: Matter of McGuire, 106 App. Div. 131; 94 N. Y. Supp. 97.

g. **How construed.**—This section is remedial in character and, hence, should be construed liberally in aid of the object sought by the Legislature, which was to furnish security to attorneys by giving them a lien upon the subject of the action: Fischer-Hansen v. Bklyn. Heights R. R. Co., 173 N. Y. 492; 33 Civ. Pro. R. 326, rev'g 63 App. Div. 356; 71 N. Y. Supp. 513.

h. **Counsel.**—A counsel employed by an attorney to conduct an action has no lien upon recovery for the amount of disbursements advanced by him, but should seek his remedy by an action at law for the amount of the money advanced: Matter of Dailey v. Wellbrock, 65 App. Div. 523; 72 N. Y. Supp. 848.

i. **Amount.**—Where an order is made setting aside a portion of an award to which attorneys claim to be entitled by agreement, a referee, appointed to determine the amount due, is limited to a distribution of the amount so set aside: Matter of Dept. of Public Works of N. Y. City, 167 N. Y. 501, mod'y 58 App. Div. 459; 69 N. Y. Supp. 413.

j. **Compensation.**—An agreement is not unconscionable *per se* by which the attorney is to receive as his compensation fifty per cent of the recovery, in view of the fact that the litigation involved two trials, an appeal to the appellate division, several motions and considerable other practice: Serwer v. Serwer, 91 App. Div. 538; 86 N. Y. Supp. 838.

k. **Percentage.**—Where a client agrees to pay his attorney in a special proceeding ten per cent "of whatever award may be obtained," the attorney is entitled to ten per cent of the award but to no percentage of interest which accrued thereon: Matter of Bassford, 36 Misc. 732; 74 N. Y. Supp. 397, aff'd 71 App. Div. 617, mod'd 172 N. Y. 488.

l. **Equitable assignment.**—An equitable assignment in an award is constituted by a written agreement by the owner of lands to assign and pay to an attorney a sum equal to fifty per cent (50 %) of whatever sum should be allowed: Deering v. Schreyer, 171 N. Y. 451, rev'g 58 App. Div. 322; 68 N. Y. Supp. 1015.

m. **Counterclaim.**—An attorney for a defendant who succeeded in an action cannot acquire under § 66 any lien in an action where the answer contained no counterclaim and, when, subsequently he attempted to assert such a lien, the attorney's demurrer to the answer should result in the dismissal of his complaint: Fromme v. Union Surety & Guaranty Co., 39 Misc. 105.

n. When, in an action against an attorney to recover a loan, the attorney counterclaims for professional services, and gives evidence of their value without counterproof by the plaintiff, the jury are not bound by the evidence of defendant and his experts, but may determine the value of the services from their own judgment and experience: Jetter v. Zeller, 119 App. Div. 179.

o. It is impossible for an attorney for a defendant to have a lien under § 66, where his client has not claimed in his pleadings any affirmative recovery or relief, but the court has inherent power to protect attorneys from fraud or collusion in the settlement of cases by parties: Saranac & Lake Placid R. R. Co. v. Arnold, 37 Misc. 514; 75 N. Y. Supp. 1013, aff'd 72 App. Div. 620.

p. **Settlement.**—An attorney has a lien upon his client's cause of action, but the existence of his lien does not permit him to stand in the way of an honest settlement of the parties: Cohn v. Pol-

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stein, 41 Misc. 431; 84 N. Y. Supp. 1022, aff'd 94 App. Div. 619.

a. The attorney for a defendant doweress in an action for partition, who has served no answer before a settlement of the action, is not entitled to an attorney's lien upon the property involved, but is merely entitled to his taxable costs, on the payment of which the discontinuance should be conditioned: Horn v. Horn, 115 App. Div. 293.

b. An attorney's lien cannot bar a settlement and the attorney's remedy is not a motion in the action, but a proceeding under § 66 or an action in equity to establish and enforce his lien: Russo v. Darmstadt, 116 App. Div. 887.

c. After the entry of judgment in favor of the plaintiff his attorney has a lien on the judgment which cannot be affected by a settlement between the parties; an attorney whose retainer entitled him to a percentage upon the judgment entered, and the amount of the lien is not diminished by reason of the fact that the client, pending an appeal by the defendant, satisfies the judgment for a less sum: Baxter v. Connor, 119 App. Div. 450.

d. A genuine settlement of an action by the parties thereto extinguishes the cause of action forever and the lien of the attorney is transferred to the sum agreed upon as a settlement and may be enforced by suit in equity; notice of the lien need not be given the defendant, as § 66 is of itself notice: Fenwick v. Mitchell, 34 Misc. 617; 70 N. Y. Supp. 667.

e. Where the plaintiff, without the knowledge of her attorneys, makes a settlement of the action, the attorneys may, if the plaintiff is financially irresponsible, enforce their lien either in an action in equity or in a proceeding under § 66; the court rarely will permit the action to be continued for the benefit of the attorneys; an application by the attorneys for an order under § 66 will be denied unless the moving papers show the amount of the compensation claimed by the attorneys or that the plaintiff is financially irresponsible: Smith v. Acker Process Co., 102 App. Div. 170; 92 N. Y. Supp. 351.

f. A plaintiff's attorney upon bringing an action has a lien by virtue of § 66 which cannot be affected by any settlement between the parties before or after judgment. Hence, when before judgment the defendant settles the action with the plaintiff without knowledge of his attorney, the lien attaches to the fund and the defendant makes payment to the plaintiff at his peril: Olshei v. Pennsylvania Railroad Co. 117 App. D.v. 110; 102 N. Y. Supp. 368.

g. The lien of an attorney on the cause of action or on the judgment is necessarily subject to the client's right to settle, which always was and now is absolute; the lien of the attorney for compensation attaches to the amount paid in settlement: Morehouse v. Brooklyn Heights R. R. Co., 43 Misc. 414; 89 N. Y. Supp. 332.

h. The plaintiff's attorneys are not entitled, where the plaintiff has settled for a sum less than his full demand, to prosecute the action to judgment to enforce their lien under § 66, where it appears that the settlement was not made with the intention of prejudicing the attorneys and that the plaintiff is solvent and abundantly able to pay the costs to which his attorneys are entitled: Young v. Howell, 64 App. Div. 246; 72 N. Y. Supp. 5.

i. **Discontinuance.**—Power of supreme court to impose costs upon discontinuance, by stipulation of action in which no counterclaim is interposed: National Exhibition Co. v. Crane, 167 N. Y. 505, aff'g 54 App. Div. 175; 66 N. Y. Supp. 361.

j. When no money has been paid or agreed to be paid upon the discontinuance of an action against trustees for the construction of a will and an accounting, the plaintiff's attorney in a proceeding for the enforcement and determination of his lien on the plaintiff's cause of action is not entitled to have the defendant trustees brought in or directed to pay the amount of the lien: S. v. McC., 115 App. Div. 146.

k. **Power of court.**—The statutory lien given to an attorney by § 66 is not exclusive, but cumulative; the power to ascertain and enforce an attorney's lien had been exercised by courts of equity prior to the enactment of the Code provisions; the lien of an attorney upon the papers of his client, attaches, not only for costs and charges in the particular suit, but for any general balances in other professional business: Mathot v. Triebel, 98 App. Div. 328; 90 N. Y. Supp. 903.

l. Where an attorney and client for whom a judgment was recovered dispute as to the attorney's compensation, the client may collect the judgment and execute a satisfaction piece without the consent of the attorney, but the satisfaction of the judgment does not displace the lien of the attorney, who may, under § 66, institute proceedings to enforce his lien: Corbit v. Watson, 88 App. Div. 467; 85 N. Y. Supp. 125.

m. In an action by an infant *in forma pauperis*, the surrogate should not pass upon the attorney's right to compensation; a contract for a contingent fee in such an action is unenforcible: Matter of Tyndall, 117 App. Div. 294; 102 N. Y. Supp. 211.

n. Where prior to the four months' period a bankrupt recovers a judgment for a sum of money, the title of his

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trustee to the judgment is subject to the lien of the attorney for the bankrupt in the action; and, in the absence of any restraining order, the court in which the judgment was recovered may proceed to enforce the lien: Kneeland v. Pennell, 54 Misc. 43.

a. The power conferred on the court by § 66, as amended by chap. 61 of 1899, providing that the court upon the petition of an attorney or his client may determine and enforce the attorney's lien, by necessity includes the power to determine in a summary way whether a lien exists: Radley v. Gaylor, 98 App. Div. 158.

b. Where a client becomes dissatisfied with the terms of an agreement with an attorney and refuses to proceed thereunder, the surrogate's court has jurisdiction to ascertain and determine the amount of the attorney's lien: Matter of Pieris, 82 App. Div. 466; 81 N. Y. Supp. 927, aff'd 176 N. Y. 566.

c. Under this section the court not only has jurisdiction but must itself or by a reference determine the amount due an attorney from a client for services rendered principally before the amendment by chap. 61 of 1899, since the amendment merely provides a new remedy for an existing right and is constitutional: Matter of King, 168 N. Y. 53, mod'y 61 App. Div. 152; 70 N. Y. Supp. 356.

d. Where a mortgagee dies before entry of judgment in an action for the foreclosure of the mortgage and his executrix employs another attorney to continue the action to judgment, and buys in the mortgaged property, the original attorney may, under § 66, maintain an equitable action against her as executrix to have his services declared a lien upon the mortgaged premises, irrespective of the question whether he has an adequate remedy at law; a variance, that the original attorney declared on his contract of employment and recovered as upon a *quantum meruit*, is not material: Skinner v. Busse, 38 Misc. 265; 77 N. Y. Supp. 560.

e. Where the plaintiff in an action, after the dismissal of his complaint, made a motion for an order substituting a new attorney for his original attorney, the court may order a reference to determine the compensation of the attorney thus superseded: Kane v. Rose, 87 App. Div. 101; 84 N. Y. Supp. 111.

f. Where an attorney has a lien for his services upon a fund in court, the court has power to determine and enforce such lien upon the attorney's petition and to order a reference to ascertain its amount, where the attorney claims upon a *quantum meruit:* Matter of Thomasson v. Latourette, 63 App. Div. 408; 72 N. Y. Supp. 177.

g. An attorney has a lien under this section for services rendered in surrogate's court, and the surrogate has power, upon the application of the attorney, to vacate a satisfaction of a decree, made without regard to the attorney's rights, in order to protect the lien of the attorney: Matter of Regan, 167 N. Y. 338; 32 Civ. Pro. R. 98, rev'g 58 App. Div. 1; 68 N. Y. Supp. 527.

h. The municipal court of the city of New York has no equitable control over its judgment such as empowers it to enforce an attorney's lien by vacating, to the extent of the lien, a satisfaction executed by the client and issuing an execution for the lien: People ex rel. Jaffe v. Fitzpatrick, 35 Misc. 456; 71 N. Y. Supp. 191.

i. Although the municipal court of the city of New York has no jurisdiction to enforce an attorney's lien, an attorney who has rendered services in an action brought in that court is entitled to a lien under § 66 and may maintain an action in the supreme court to enforce it: Tynan v. Mart, 53 Misc. 49.

j. **Trust fund.**—The income from a trust fund directed to be paid over to the beneficiary for the support and education of the beneficiary and his family, although exempt from the claims of general creditors so far as it is required for his support, is not exempt from a claim for necessary services rendered by an attorney employed by him to compel a trustee to pay over the income necessary for his support, and the attorney has a lien for services under this section: Matter of Williams, 187 N. Y. 286, rev'g 114 App. Div. 904.

k. **Incompetency of client.**—While the relation of attorney and client is terminated by the judicial declaration that the client is an incompetent, the attorney has a lien upon bank books that came into his possession in the course of his employment; and an order directing the surrender of the books and papers in the attorney's possession to the committee of the incompetent's property should contain a provision directing the committee to retain in its hands sufficient funds to satisfy the amount which may be awarded on a reference simultaneously ordered to determine the amount of the attorney's lien: Matter of Stenton, 53 Misc. 518.

l. **Summary proceeding.**—When after ten years a special guardian begins a summary proceeding to compel an attorney to pay over the proceeds of a mortgage and the attorney shows that he applied the proceeds as directed by the special guardian, the court in is discretion may deny the summary remedy and leave the petitioner to an action. The granting of a summary remedy against attorneys is wholly within the discretion of the court: Matter of Nellis, 116 App. Div. 94.

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a. In a summary proceeding on a petition of a client to compel an attorney to pay over moneys, the court must determine the controversy, and a reference is merely for the purpose of assisting the court; a referee has no power to hear and determine, and even when by error authorized to determine, no judgment can be entered except by direction of the court: Matter of Cartier v. Spooner, 118 App. Div. 342.

b. **Fraud.**—An attorney at law who obtains his client's property by fraud acquires no lien thereon; when the beneficiaries of trust property agree that the securities shall be withdrawn from the trustee and placed with another trustee, and that an attorney shall deduct the amount of his bill from the trust securities of which he is given possession, the possession so acquired by the attorney is not fraudulent, and the securities are subject to a lien in his favor. The lien once acquired by lawful possession cannot be destroyed by subsequent protests by the clients: Heyward v. Maynard, 119 App. Div. 66.

c. An attorney at law neither during the continuance of his employment nor after its termination can, without the client's consent, avail himself of the information so acquired and purchase property, the sale of which he was once employed to prevent: Nichols v. Riley, 118 App. Div. 404.

d. **Dissolution of firm.**—Where a firm of attorneys dissolve, a client of the firm may select one of the partners to continue his action, but the substitution does not affect the lien of the attorneys at the date of such substitution: Schneible v. Travelers' Insurance Co., 36 Misc. 522; 32 Civ. Pro. R. 273.

e. **Foreign trustee.**—Where a foreign trustee employs attorneys to recover securities wrongfully hypothecated by his predecessor, such trustee will not be permitted to withdraw them from the state without first satisfying the lien of the attorney under § 66: Matter of King, 34 Misc. 10; 69 N. Y. Supp. 399.

f. **Action for services.**—An action by an attorney to recover of his client a percentage of the damages awarded is not an action to enforce a lien under § 66 and the municipal court has jurisdiction: Flannery v. Geiger, 46 Misc. 619.

g. Where an action is brought by an attorney to recover the value of professional services, a judgment for the plaintiff on the pleadings should be granted where the answer fails to deny the employment, the rendition of the services and their value: Pierce v. Newlin, 46 Misc. 122.

h. In an action to recover the value of legal services, the value of the services is a question of fact and a direction of a verdict for the plaintiff is error; when in an action by an attorney to recover the value of services rendered it appears that they were performed under a contract giving him a percentage of the recovery, he is not entitled to recover on a *quantum meruit* but only under the contract: McDonald v. De Vito, 118 App. Div. 566.

i. In an action by an attorney to recover for services rendered, where the defendant sets up a separate agreement that the attorney would render the services without any charge therefor, it is error for the court to refuse to charge that the burden of proof as to the separate agreement is on the defendant: Bogart v. Tannenbaum, 53 Misc. 310.

§ 67. Suspension from practice.

j. An attorney who, in order to secure his own compensation, settles with the party against whom he has been retained to enforce claims, assigns his contracts of retainer and notifies his clients to settle directly with such party, agreeing that to the extent of his liability he will facilitate any settlement that the latter may desire to make, is guilty of malpractice under § 67: Matter of Clark, 184 N. Y. 222, aff'g 108 App. Div. 150; 95 N. Y. Supp. 388.

k. **Misconduct.**—An attorney who, on obtaining letters of administration for his client, deposits the moneys of the estate to his own credit in a bank where a part of the money was applied to make good his own overdraft, is guilty of misconduct, and will be suspended from practice for six months: Matter of Freedman, 113 App. Div. 327.

l. **Fraud and deceit.**—An attorney who procures admission to practice at the bar of this State on papers showing that he had been duly admitted to practice law in Texas and had practiced in that state for twelve years, but who suppresses the fact that after leaving Texas and before coming to this state he had for several years practiced in Virginia under another name and had there been disbarred for forging a decree of divorce, is guilty of fraud and deceit, and will be disbarred: Matter of Marx, 115 App. Div. 448.

m. An attorney who, seeking to prevent the extradition of a client, aids him in escaping from the state where he was admitted to bail, is guilty of unprofessional conduct and should be disbarred; an attorney who continues to practice under the name of a firm, one member of which is dead and the other suspended from practice, is guilty of deceit and malpractice and should be disbarred: Matter of Kaffenburgh, 115

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App. Div. 346; 101 N. Y. Supp. 507, aff'd 188 N. Y. 49.

a. **Personal letter.**—An attorney who, after being defeated in a cause, writes a personal letter to the trial justice complaining of his conduct and reflecting upon his integrity as a justice, is guilty of misconduct, and will be disciplined by the court: Matter of Manheim, 113 App. Div. 136.

b. **Surrogate.**—The appellate division has no jurisdiction, under § 67, to suspend from practice or remove from office a surrogate who practices during his term in violation of § 20, art. 6, of the state Constitution; it seems that if a surrogate is practicing in violation of such constitutional provision, it is within the power of any court of record, in which he attempts to practice, to prohibit him from so doing: Matter of Silkman, 88 App. Div. 102.

c. **Other punishment.**—The court is not limited to the punishments prescribed in § 67 to punish an attorney, but its power may be exercised under the general control of the attorney as an officer of the court and may require the attorney to submit to a reprimand in open court: Matter of Reifschneider, 60 App. Div. 478.

d. **Reference.**—Where a stipulation is made that the court hear and determine all differences between the parties, the court is only authorized to determine the amount due and has no power to direct its payment by an order, a breach of which would be punishable as a contempt: Matter of Langslow, 167 N. Y. 314, mod'y 52 App. Div. 635; 66 N. Y. Supp. 1148.

§ 68. Must be on notice.

Before an attorney or counsellor is suspended or removed as prescribed in the last section, a copy of the charges against him must be delivered to him personally or, in case it is established to the satisfaction of the court, that he cannot be served within the state, the same may be served upon him without the state by mail or otherwise as the court may direct, and he must be allowed an opportunity of being heard in his defense. It shall be the duty of any district attorney within the department, when so designated by the appellate division of the supreme court, to prosecute all cases for the removal or suspension of attorneys and counsellors as aforesaid. The presiding justice of the appellate division making the said order of designation aforesaid, or the order of reference in such cases, may make an order directing the expenses of such proceedings to be paid by the county treasurer of the county where the attorney or counsellor removed or suspended, or against whom charges were made as aforesaid, at his last known place of residence or principal place of business, which expenses shall be a charge upon such county.

1 R. S. 109 (Part 1, c. 5, tit. 4), § 24.

Amended by chap. 528 of 1890, chap. 946 of 1895, chap. 557 of 1896 and chap. 327 of 1903.

§ 70. Punishment for deceit, etc.

See § 148, Penal Code, providing for punishment of violation of this section as a misdemeanor.

§ 71. Id.; wilful delay of action.

See § 148, Penal Code, providing for punishment of violation of this section as a misdemeanor.

§ 72. Attorney not to lend his name.

See § 149, Penal Code, attorney permitting his name to be used is a misdemeanor.

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§ 73. Attorney not to buy claim.

a. **Who is an attorney**—A person, admitted to the bar in 1893 but who never filed the certificate required by chap. 225 of 1899, cannot be deemed an attorney within § 73, and where such person buys a note and employs an attorney to sue the note, the maker cannot defend under § 73: Thompson v. Stiles, 44 Misc. 334.

b. **Res adjudicata.**—Where a demurrer to the complaint in an action brought to recover fees under a contract is sustained upon the theory that the contract is invalid, and a judgment, from which no appeal is taken, is entered dismissing the complaint upon the merits, such judgment is *res adjudicata* against the right of the plaintiff to maintain a subsequent action to recover other fees alleged to be due under the same contract, notwithstanding that it appears from a decision of the court of appeals rendered in an action between third parties that the contract in question was not invalid: Hirshbach v. Ketchum, 84 App. Div. 258; 82 N. Y. Supp. 739, aff'd 177 N. Y. 582.

c. **Application of section.**—§§ 73 and 77 do not operate to preclude parties who purchase stock relying upon false representations from assigning their claims to some of their number for the purpose of enabling the latter to bring an action to recover the entire damages resulting from the fraud: Benedict v. Guardian Trust Co., 91 App. Div. 103; 86 N. Y. Supp. 370.

d. An agreement by an attorney by the terms of which he contracts to prosecute, at his own expense for a contingent fee of one-half the recovery, proceedings to recover moneys paid by merchants to the government, is contrary to the statutes with respect to the champerty and maintenance: Stedwell v. Hartmann, 74 App. Div. 126; 77 N. Y. Supp. 498, aff'd 173 N. Y. 624.

e. Although this section prohibits an attorney from making certain contingent agreements, yet a broker may maintain an action against an attorney to recover part of a claim collected by such attorney under an agreement that the attorney and broker should share any sums recovered: Irwin v. Curie, 171 N. Y. 409, rev'g 56 App. Div. 514; 67 Supp. 380.

f. Where one attorney at the request of another induced a law firm to retain the latter as its attorney in certain legal proceedings and the latter attorney was to receive as his fee fifty per cent of the recovery and agreed to pay the first attorney one-half of such fee: *Held*, that in the event of the second attorney's refusing to pay the said one-half, the first attorney was not entitled to maintain a summary proceeding, but was remitted to his action at law: Matter of Hirshbach, 72 App. Div. 79; 76 N. Y. Supp. 117.

g. **One-half.**—An agreement between an attorney and client by the terms of which the attorney is to receive one-half of moneys to be collected in a litigation, from which he agrees to pay counsel, is not champertous within the meaning of § 73, as the mere fact that the attorney was to receive one-half of the recovery does not render the agreement unconscionable where no fraud is shown: Matter of Fitzsimmons, 174 N. Y. 15, rev'g 77 App. Div. 345; 79 N. Y. Supp. 194.

h. A contract whereby an attorney and counsellor-at-law employs a person to solicit owners of lands abutting upon highways in which telephone and telegraph poles have been erected to retain such counsel to prosecute for a contingent fee of a percentage of the recovery actions to enforce their claims against the telephone and telegraph companies maintaining such poles, and agrees to pay such solicitor for each claim so secured one-half the proceeds realized by the attorney therefrom, is within the condemnation of §§ 73, 74 and 75: Matter of Clark, 108 App. Div. 150; 95 N. Y. Supp. 388.

i. **Intent.**—This section condemns only the purchase of claims with the "intent and for the purpose of bringing an action" that he may involve parties in costs and annoyance, when such claims would not be prosecuted if not stirred up by the attorney in his efforts to secure costs: Wightman v. Catlin, 113 App. Div. 24.

§ 74. Certain loans prohibited.

An attorney or counselor shall not, by himself, or by or in the name of another person, either before or after action brought, promise or give, or procure to be promised or given, a valuable consideration to any person, as an inducement to placing, or in consideration of having placed, in his hands, or in the hands of another person, a demand of any kind, for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy for the recovery thereof. But this

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section does not apply to an agreement between attorneys and counselors, or either, to divide between themselves the compensation to be received.

Amended by chap. 542 of 1879 and chap. 700 of 1907.

See § 66, ante, Compensation of attorney or counsellor.

a. **Chose in action.**—Although an attorney cannot enforce a chose in action which he purchased for the purpose of bringing an action thereon, yet he acquires a good title and may transfer the chose in action either by gift or otherwise, and his donee or assignee may enforce such chose in action, although cognizant of the unlawful purpose for which the attorney purchased it; if it appears that the action brought by the donee or assignee was brought in the interest of the attorney the court should refuse relief, but the presumption is that the action was brought solely in the interest of such donee or assignee, even though she be related to the attorney: Beers v. Washbond, 86 App. Div. 582; 82 N.Y. Supp. 993.

b. **Agreement not champertous.**—When purchase money mortgage is not champertous; judicial sales are not within the condemnation of the statute of champerty, real property law, chap. 547 of 1896, § 225, formerly 1 R. S. 739, §§ 147 and 148: De Garmo v. Phelps, 176 N. Y. 455, rev'g 64 App. Div. 591.

c. An agreement is not champertous, although it provides that the client shall not be called upon to pay disbursements if the client voluntarily goes to the attorney and the attorney does not seek the retainer or do anything to induce it: Ransom v. Cutting, 112 App. Div. 150; 98 N. Y. Supp. 282.

d. **One-half.**—An agreement is not champertous within the meaning of this section which provides that the attorney is to receive one-half of the money obtained in the action, and from which he agrees to employ and pay counsel: Matter of Fitzsimons, 174 N. Y. 15, rev'g 77 App. Div. 345; 79 N. Y. Supp. 194.

e. **Champerty.**—§ 74 prohibits attorneys or counsellors from paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorney's hands for enforcement; such conduct is champertous and subjects the offending attorney to punishment as for a misdemeanor, and also to removal from his office: Matter of Clark, 184 N. Y. 222, aff'g 108 App. Div. 150; 95 N. Y. Supp. 388.

f. The mere fact that an attorney was to receive a certain portion of the recovery, does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation was so excessive as to evince a purpose to obtain an improper or undue advantage; the agreement that the attorneys should not call upon him "for any sum or sums of money to pay the necessary disbursements required in the said proceedings" does not render it champertous within the meaning of § 74: Ransom v. Cutting, 188 N. Y. 447, aff'g 112 App. Div. 150.

g. **Attorney's retainer.**—An attorney's written retainer cannot be held to be invalid as procured by a promise to pay the client a valuable consideration in violation of § 74 when the evidence does not show that the attorney's agent who procured the contract and who intimated that the plaintiff would receive help in his household expenses, made such promise before the retainer was signed or that the client was induced thereby to execute it: O'Neill v. Campbell, 118 App. Div. 64.

h. A contract whereby an attorney and counsellor-at-law employs a person to solicit owners of lands abutting upon highways in which telephone and telegraph poles have been erected, to retain such counsel to prosecute for a contingent fee of a percentage of the recovery, actions to enforce their claims against the telephone and telegraph companies maintaining such poles and agrees to pay such solicitor for each claim so secured one-half the proceeds realized by the attorney therefrom, is within the condemnation of §§ 73, 74 and 75: Matter of Clark, 108 App. Div. 150; 95 N. Y. Supp. 388.

i. **Contrary to section.**—An agreement by an attorney by the terms of which he contracts to prosecute, at his own expense for a contingent fee of one-half the recovery, in proceedings to recover moneys paid by merchants to the government, is contrary to the statutes with respect to champerty and maintenance: Stedwell v. Hartmann, 74 App. Div. 126; 77 N. Y. Supp. 498, aff'd 173 N. Y. 624.

j. Although this section prohibits an attorney from making certain contingent agreements, yet a broker may maintain an action against an attorney to recover part of a claim collected by such attorney under an agreement that the attorney and broker should share any sums recovered: Irwin v. Curie, 171 N. Y. 409, rev'g 56 App. Div. 514; 67 N. Y. Supp. 380.

k. Where one attorney at the request of another induced a law firm to retain the latter as its attorney in certain legal proceedings and the latter attorney was to receive as his fee fifty per cent. of the recovery, and agreed to pay the first attorney one-half of such fee: *Held*, that

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in the event of the second attorney's refusing to pay the said one-half the first attorney was not entitled to maintain a summary proceeding, but was remitted to his action at law: Matter of Hirshbach, 72 App. Div. 79; 76 N. Y. Supp. 117.

a. Where a demurrer to the complaint, in an action brought to recover fees under a contract, is sustained upon the theory that the contract is invalid, and a judgment, from which no appeal is taken, is entered dismissing the complaint upon the merits, such judgment is *res adjudicata* against the right of the plaintiff to maintain a subsequent action to recover other fees alleged to be due under the same contract, notwithstanding that it appears from a decision of the court of appeals, rendered in an action between third parties, that the contract in question was not invalid: Hirshbach v. Ketchum, 84 App. Div. 258; 82 N. Y. Supp. 739, aff'd 177 N. Y. 582.

§ 75. Penalty.

See § 136, Penal Code, buying demands for suit by an attorney is a misdemeanor.

b. § 74 prohibits attorneys or counsellors from paying or agreeing to pay any layman, out of the prospective profits of cases, for services in inducing desired clients to place their claims in the attorney's hands for enforcement; such conduct is champertous, and subjects the offending attorney to punishment as for a misdemeanor, and also to removal from his office: Matter of Clark, 184 N. Y. 222, aff'g 108 App. Div. 150; 95 N. Y. Supp. 388.

c. A contract whereby an attorney and counsellor-at-law employs a person to solicit owners of lands abutting upon highways in which telephone and telegraph poles have been erected, to retain such counsel to prosecute, for a contingent fee of a percentage of the recovery, actions to enforce their claims against the telephone and telegraph companies maintaining such poles and agrees to pay such solicitor for each claim so secured one-half the proceeds realized by the attorney therefrom, is within the condemnation of §§ 73, 74 and 75: Matter of Clark, 103 App. Div. 150; 95 N. Y. Supp. 388.

§ 77. Application of last four sections.

The last four sections apply to a person prosecuting an action in person and to a corporation engaged in the business of conducting litigation and providing counsel therefor, who or which does an act which an attorney or counselor is therein forbidden to do.

Amended by chap. 700 of 1907.

d. **Application of section.**—§§ 73 and 77 do not operate to preclude parties who purchased stock in reliance upon false representations from assigning their claims to some of their number, for the purpose of enabling the latter to bring an action to recover the entire damages resulting from the fraud: Benedict v. Guardian Trust Co., 91 App. Div. 103, 86 N. Y. Supp. 370.

§ 78. Partner of district attorney, etc., not to defend prosecutions.

See § 670, Penal Code, providing for punishment of attorneys defending criminal prosecution carried on by their partners.

§ 79. Attorney not to defend when he has been public prosecutor.

See § 670, Penal Code, providing for punishment of district attorneys defending criminal prosecutions instituted by them.

§ 81. Limitation of provisions.

See § 671, Penal Code, attorneys may defend themselves.

§ 82. Qualifications of stenographers.

Each stenographer, specified in this act, is an officer of the court or courts, for and by which he is appointed; and, before entering upon the discharge of his duties, must subscribe the constitutional oath of office, and file the same in the office of the clerk of the court, or, in the supreme court, in the office of the clerk of the county where the term sits, or the judge resides, by which or by whom he is appointed. A person shall not be

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appointed to the office of stenographer, unless he is skilled in the stenographic art. No stenographer of any court in this state shall be, or become, interested, directly or indirectly, as contracting party, partner, stockholder or otherwise, in, or in the performance of, any contract, work or business relating to the preparation or printing of any case, or any case and exceptions, or any case containing exceptions on appeal, or any bill of exceptions, or papers on appeal from non-enumerated motions, or briefs or points of counsel in any case in any court of this state. If any such stenographer shall be, or become, so interested in any such work of preparation or printing, unless the same shall be devolved upon him by law, he shall forfeit his office.

New (derived from various special acts).
Amended by chap. 467 of 1903.

§ 83. General duty of stenographers; notes, when to be filed.

a. The minutes of the court stenographer are not legal evidence, and, in the absence of counsel, should not be read to the jury while they are deliberating: Otto v. Young, 43 Misc. 628; 88 N. Y. Supp. 188.

§ 86. To furnish like copies to parties, district attorney and attorney-general; compensation.

See § 3311, post, Fees chargeable.

Each stenographer, specified in this act, must likewise, upon request, furnish, with all reasonable diligence, to the defendant in a criminal cause, or a party, or his attorney in a civil cause, in which he has attended the trial or hearing, a copy, written out at length from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment, by the person requiring the same, of the fees allowed by law. If the district attorney, the attorney-general or the judge presiding at the trial in a criminal cause, requires such a copy, the stenographer is entitled to his fees therefor, but he must furnish it upon receiving a certificate of the sum to which he is so entitled, which shall be a county charge and must be paid by the county treasurer upon the certificate like other county charges.

Amended by chap. 388 of 1906.

§ 89. Clerks of appellate division and special deputy clerks.

The justices of the appellate division in each department shall, from time to time, appoint and shall have the power to remove a clerk, who shall keep his office at a place to be designated by the said justices. In counties containing a city of the first class wholly within the county, the justices of the supreme court residing in the county, or a majority of them, shall appoint and at pleasure remove a special deputy to the county clerk for each part or term of the courts of which he is clerk, whose duty it shall be to attend each session of the part or term of the court to which he is assigned and keep the minutes thereof and to per-

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form such other duties as shall be prescribed by the rules made by such justices; such special deputy clerks shall be subject to the supervision of the county clerk, and shall possess the same power and authority as the county clerk at any sitting or term of the court which he attends, with respect to the business transacted thereat; the minutes and records kept by such special deputy clerks shall be part of the records of the court and shall be kept by the county clerk in his office and he shall give extracts from such minutes and records as now prescribed by law. The salary of such special deputy clerks shall be fixed by the justices of the supreme court residing in the county, or a majority of them, and when so fixed shall be paid from the court funds of said county. In every other county each county clerk may, subject to the approval of the justices of the supreme court residing within the judicial district of the appointee, from time to time, by an instrument in writing filed in his office, appoint, and at pleasure remove, one or more special deputy clerks to attend upon any or all of the terms or sittings of the courts of which he is clerk, and in any county having a population of more than sixty thousand at the last enumeration, and except in the county of Queens, where the salary of the chief or principal clerk in attendance at each of said courts shall be the sum of three thousand dollars, the salary of such special deputy clerks shall be fixed by a justice of the supreme court, residing in such county and when the said salary shall be so fixed the same shall be paid from the court funds of said county or from an appropriation made therefor. Each person so appointed must, before he enters upon the duties of his office, subscribe and file in the clerk's office the constitutional oath of office; and he possesses the same power and authority as the clerk at any sitting or term of the court which he attends, with respect to the business transacted thereat. The provisions of this section shall not apply to the first judicial department.

Amended by chap. 211 of 1851, chap. 710, §§ 1, 2 of 1871, chap. 46 of 1877, chap. 542 of 1879, chap. 946 of 1895, chap. 604 of 1899, chap. 629 of 1903, chap. 629 of 1906 and chap. 188 of 1907.

§ 90. Clerk in New York county not to be referee, etc.

§ 1097 of the Consolidation Act formerly relating to this section, repealed by Greater N. Y. Charter, chap. 378 of 1897, as amended by chap. 466 of 1901.

§ 91. Criers for courts of record.

The county judge of each county except Kings and Erie, from time to time, may appoint and at pleasure remove, a crier for the courts of record held in his county who is entitled to a compensation fixed and to be paid as prescribed by law, except in the county of Westchester where the compensation of such crier shall be fixed by the county judge, not to exceed the sum of one thousand two hundred dollars a year to be paid in equal monthly payments by the treasurer of Westchester county in full compensation for all services rendered by him, and except in the county of Queens where

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the compensation of such crier shall be the sum of one thousand eight hundred dollars a year, to be paid in equal monthly payments, and to be a county charge. The justices of the supreme court residing in the eighth judicial district, together with the county judge of Erie county, or a majority of them, shall appoint, and may at pleasure remove one or more criers for all the courts of record held in the said county of Erie. Such criers appointed for Erie county shall each receive one thousand two hundred dollars a year, to be paid in equal monthly payments by the treasurer of Erie county in full compensation for all services rendered by them.

Chap. 588 of 1866.

Amended by chap. 389 of 1883, chap. 946 of 1895, chap. 387 of 1901, chap. 601 of 1903 and chap. 629 of 1906.

a. **Crier.**—The crier of the courts of record must be a resident of the political subdivision for which he shall be chosen and the office becomes vacated when he ceases to be such resident: Matter of Buhler, 43 Misc. 140; 88 N. Y. Supp. 195.

§ 94. Interpreters for courts of record in Kings and Queens counties.

The justices of the supreme court for the second judicial district, residing in Kings county, or a majority of them, the justice or justices of the supreme court residing in Queens county, or a majority of them; the county judge of Queens county, may appoint an interpreter or interpreters to attend the terms of those courts, except the county court and surrogate's court held in Kings county, at which issues of fact are triable and fix the salaries of such interpreters, except that such interpreters so appointed in the county of Queens shall receive a salary of one thousand eight hundred dollars a year, to be a county charge, and such interpreters shall hold office during good behavior.

Chap. 510 of 1864.

Amended by chap. 249 of 1869, chap. 416 of 1877, chap. 724 of 1895, chap. 92 of 1897 and chap. 629 of 1906.

§ 95. Attendants and messengers, how appointed in Kings, Queens and Richmond counties.

The justices of the supreme court for the second judicial district residing in Kings county, or a majority of them; the justice or justices of the supreme court residing in Queens county, or a majority of them; the justice or justices of the supreme court residing in Richmond county, or a majority of them; the county judges of Kings county, the county judge of Queens county, and the surrogate of Kings county may appoint, and at pleasure remove all attendants and messengers, and court officers in their respective courts in said counties.

Amended by chap. 946 of 1895, chap. 629 of 1906 and chap. 614 of 1907.

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§ 96. Duties of persons appointed under last section.

Each of the persons, appointed as prescribed in the last section, must attend, from day to day, the terms and sittings, within their respective counties, of the court to which he is assigned, to preserve order, and to perform whatever services may be required of him by the judge presiding thereat. Each of said court attendants so appointed in the county of Queens shall receive a salary of one thousand five hundred dollars per annum, except the chief attendants in each court in said county, who shall receive a salary of one thousand eight hundred dollars per annum, to be a county charge. Each of said attendants, so appointed in the county of Richmond, shall receive a salary to be fixed by the justice or justices residing in Richmond county, or by a majority of them; such salary, so fixed, shall be subject to the approval of the board of estimate and apportionment of the city of New York, in its discretion, and shall be a county charge.

Amended by chap. 629 of 1906 and chap. 614 of 1907.

§ 97. Sheriffs to notify constables, etc., to attend courts.

The sheriff of each county, except New York and Kings, must within a reasonable time before the sitting, in his county, of any term of court, notify, in writing or personally, as many constables or deputy sheriffs of his county, as he deems necessary, to appear and attend upon the term during its sitting. In addition to such constables, or deputy sheriffs, the justices of the supreme court of the eighth judicial district residing in the county of Erie, or a majority of them, shall, in their discretion, appoint and at their pleasure may remove one or more court officers, whose duty it shall be to attend at the justices' chambers and at special terms of the supreme court held in said county of Erie. The county judge and the surrogate of Erie county may each appoint, and at pleasure remove, one court officer to attend their respective courts in said county, and to perform such duties in respect thereto as the said county judge and the surrogate may prescribe. Such officers shall possess all the powers of officers designated by sheriffs to attend upon such courts, and shall each receive a salary not to exceed one thousand two hundred dollars a year, to be paid in equal monthly payments by the treasurer of the county of Erie. The sheriff of said county of Erie shall not be required to attend or designate any officer to attend at justices' chambers or at special terms of the supreme court, or at any term of the county court and surrogate's court held in said county of Erie unless requested so to do by the justice, judge or surrogate presiding thereat. Each of the justices of the supreme court residing in Kings county may appoint and at pleasure remove, a clerk to such justice at a salary not exceeding two thousand five hundred dollars

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a year, to be raised and paid in the same manner as the salaries of attendants and officers.

2 R. S. 289 (Part 3, c. 3, tit. 2), § 83.

Amended by chap. 946 of 1895, chap. 891 of 1896, chap. 138 of 1900, chap. 517 of 1903, chap. 745 of 1904 and chap. 93 of 1905.

§ 98. Number.

In any county where the compensation of such attendants is now fixed by statute at the sum of three dollars per day and mileage, the number of attendants to be appointed for any one term of court, pursuant to the last preceding section, shall not exceed eighteen.

Added by chap. 517 of 1903.

§ 99. Penalty for neglect of officer to attend court.

Each constable or deputy sheriff, seasonably notified, as prescribed in the last two sections, must attend the term accordingly; and for each day's neglect he may be fined by the court, at the term which he was notified to attend, a sum not exceeding five dollars.

2 R. S. 289 (Part 3, c. 3, tit. 2), § 85.

Amended by chap. 517 of 1903.

§ 102. Sheriff to execute process, etc.; may return by mail.

See §§ 172, 173, post, When mandate to be delivered to coronor for execution.

See §§ 182-189, post, Service by incoming and outgoing sheriff.

See § 2270, post, Notice to delinquent officer to show cause.

See § 3343, subd. 2, post, Definition of mandate.

§ 104. Sheriff may command the power of the county, to overcome resistance.

See § 143, Penal Code, Criminal contempts.

See § 457, Penal Code, Combinations to resist execution of process.

§ 106. Punishment for refusing to assist.

See § 121, Penal Code, Refusal to aid officer in making an arrest, a misdemeanor.

§ 109. Expenses, how paid.

See § 657, post, Claim of property, how tried.

See § 658, post, Claim of property, proceedings if claimant succeeds.

See § 1418, post, Claim of property by third persons, how tried.

See § 1419, post, Proceedings if claimant succeeds.

§ 110. Prisoner, how kept; support of.

See County Law, chap. 686 of 1892, § 90, Use of jails.

§ 111. Imprisonment on execution.

a. **Discharge.**—This section, like § 3221, is self-executing, and the defendant is entitled, at the expiration of the time limited, to his discharge: Padreshefsky v. Walton, 65 App. Div. 432.

§ 131. Service of papers on prisoner.

See § 799, post, When paper to be served on attorney.

§ 133. Prisoners under United States process.

b. **U. S. prisoners.**—The sheriff is under legal obligations to receive prisoners committed to jail by the United States courts, and is made responsible

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for their safe keeping in the courts of the United States according to the laws thereof: Matter of Blust v. Collier, 62 App. Div. 478; 70 N. Y. Supp. 774.

§ 135. When jail becomes unfit, etc., another to be designated.

a. **Contagious disease.**—It is the duty of the sheriff when he discovers that one of the prisoners is suffering from a contagious disease to remove that prisoner from the jail to a suitable place and there keep him in custody until he has served his sentence: Matter of Boyce, 43 Misc. 297; 88 N. Y. Supp. 841.

b. **U. S. prisoners.**—The sheriff is under legal obligations to receive prisoners committed to jail by the United States courts, and is made responsible for their safe keeping in the courts of the United States according to the laws thereof: Matter of Blust v. Collier, 62 App. Div. 478; 70 N. Y. Supp. 774.

§ 145. Jail liberties in certain counties.

The following are the liberties of the jail for each of the counties specified, to wit: For the county of New York, the whole of said county; for the county of Onondaga, the whole of the city of Syracuse; for the county of Monroe, the whole of the city of Rochester; for the county of Erie, the whole of the city of Buffalo; for the county of Dutchess, the whole of the city of Poughkeepsie; for the county of Kings, the whole of that county; for the county of Albany, the whole of the city of Albany; for the county of Jefferson, the whole of the city of Watertown; for the county of Herkimer, the whole of the village of Herkimer; for the county of Rensselaer, the whole of the city of Troy; for the county of Niagara, the whole of the city of Lockport; for the county of Steuben, the whole of the village of Bath; for the county of Nassau, the whole of the town of Hempstead; for the county of Broome, the whole of the city of Binghamton.

L. 1846, c. 32; L. 1851, c. 202; L. 1859, c. 198; L. 1861, c. 61 and c. 73; L. 1863, c. 186; L. 1872, c. 16 and c. 538; L. 1873, c. 196 and c. 603.

Amended by chap. 42 of 1895, chap. 113 of 1900, chap. 311 of 1902, chap. 384 of 1904 and chap. 439 of 1905.

§ 149. Who admitted to liberties.

A person in the custody of a sheriff, by virtue of an order of arrest; or of an execution in a civil action; or in consequence of a surrender in exoneration of his bail; is entitled to be admitted to the liberties of the jail, upon delivering to the sheriff an approved undertaking as prescribed in the next section.

Id., § 40.

Amended by chap. 648 of 1886 and chap. 384 of 1904.

See § 15, ante, No imprisonment for non-payment of interlocutory costs.

c. **Rights of imprisoned.**—Where a defendant is imprisoned under an order of arrest, he is entitled to jail liberties upon giving the undertaking prescribed by § 149, and is entitled to be completely discharged from arrest upon giving the undertaking prescribed by § 575. These sections of the Code do not conflict: Horowitz v. Olenick, 62 App. Div. 283.

d. **Jail liberties.**—Where a defendant has been taken into custody under an execution against the person, in the action for moneys received in a fiduciary capacity, he is entitled to the liberties of the jail: Matter of Langslow, 167 N. Y. 314, mod'y 52 App. Div. 635; 66 N. Y. Supp. 1135.

e. One imprisoned upon execution against him for violating the Forest, Fish and Game Law, chap. 20 of 1900, is entitled to the liberties of the jail: People v. Monaco, 54 Misc. 25.

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§ 150. Undertaking to be executed by prisoner; its contents.

The undertaking must be executed by the prisoner, and one or more sufficient sureties, residents, and householders or freeholders of the county; in a penalty at least twice the sum, in which the sheriff was required to hold the defendant to bail, if he is in custody under an order of arrest, or has been surrendered in exoneration of his bail, before judgment; or directed to be collected by the execution, if he is in custody under an execution; or remaining uncollected upon a judgment against him, if he has been surrendered after judgment; conditioned, that the person so in custody shall remain a prisoner, and shall not, at any time, or in any manner, escape or go without the liberties of the jail, until discharged by due course of law. Upon the giving and the approval by the court or a judge thereof, or a county judge, of such an undertaking, the prisoner shall be released from the custody of the sheriff and the sheriff shall thereupon be exonerated from liability. But after the allowance of the undertaking as hereinafter prescribed, the same must be delivered by the clerk, on request, to the party at whose instance the prisoner was in custody. Within two days after the approval by the court, judge, or county judge, the undertaking must be filed by the sheriff with the clerk, and a copy delivered to the party at whose instance the prisoner was in custody, or to his attorney, who shall within three days thereafter serve upon the surety or sureties, or the attorney for the prisoner, a notice that he does not accept him, or them, as bail; otherwise he is deemed to have accepted them. Within three days after the receipt of such notice, the surety or sureties, or the attorney for the prisoner, may serve upon the party, or attorney for the party, at whose instance the prisoner was in custody, notice of justification of the same or other bail before the court or a judge thereof, or a county judge, at a specified time and place; the time to be not less than five days nor more than ten days thereafter, and the place to be within the county where one of the bail resides or where the defendant was arrested. Except as otherwise expressly prescribed in this article, the provisions regulating the substitution of new sureties or a new undertaking, and the examination and qualification of the new sureties, and the allowance of the undertaking after justification, contained in article third of title first of chapter seventh of this act, shall govern. If the bail shall not be allowed, the court, judge or county judge shall remand the prisoner to the custody of the sheriff.

2 R. S. 433 (Part 3, c. 7, tit. 6), §§ 41, 42.

Amended by chap. 648 of 1886 and chap. 384 of 1904.

See § 573, post, Defendant to be discharged on bail or deposit.

See § 730, post, Amending defects in bonds.

a. **Rights of imprisoned.**—Where a defendant is imprisoned under an order of arrest, he is entitled to jail liberties upon giving the undertaking prescribed by § 149, and is entitled to be completely discharged from arrest upon giving the undertaking prescribed by § 575. These sections of the Code do not conflict: Horowitz v. Olenick, 62 App. Div. 283.

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§ 151. For whom undertaking to be held.

An undertaking so taken is held for the indemnity of the party at whose instance the prisoner executing it is confined.

2 R. S. 434 (Part 3, c. 7, tit. 6), § 43.
Amended by chap. 648 of 1886 and chap. 384 of 1904.

§ 157. Prisoner committed for contempt.

a. The jurisdiction of the supreme court is always presumed; and its order, discharging on habeas corpus a judgment debtor in supplementary proceedings committed as for a contempt, regular and apparently valid on its face, is a protection and defense to the sheriff executing the order of discharge, even though, in fact, said order was void for want of jurisdiction because made without notice to the judgment creditor, as required by § 2038: Levy v. Melody, 50 Misc. 509.

§ 158. Sheriff's liability for escape.

Where a prisoner, in a sheriff's custody, goes or is at large beyond the liberties of the jail, without the assent of the party at whose instance he is in custody, the sheriff is answerable therefor until an undertaking provided for in section 150 of this article has been given and approved, as follows:

1. If the prisoner was in custody by virtue of an order of arrest, or in consequence of a surrender in exoneration of his bail, before judgment, the sheriff is answerable to the extent of the damages sustained by the plaintiff.

2. If the prisoner was in custody by virtue of any other mandate, or in consequence of a surrender in exoneration of his bail, after judgment, the sheriff is answerable for the debt, damages, or sum of money, for which the prisoner was committed.

3. Upon the giving and approval of the undertaking in this article mentioned, no action for an escape shall be maintained against the sheriff.

2 R. S. 437 (Part 3, c. 7, tit. 6), §§ 62, 63.
Amended by chap. 648 of 1886 and chap. 384 of 1904.

b. Escape.—Where a debtor, held by a sheriff within the liberties of a jail upon a body execution on a debt provable in bankruptcy, files a petition therein, procures a discharge and, thereupon, of his own motion, goes and remains beyond the liberties, the sheriff is not liable to the creditor in the execution as for an escape: Walker v. Harder, 39 Misc. 749; 80 N. Y. Supp. 948.

c. Liability of surety.—Where a judgment debtor, arrested under a body execution is admitted to the jail liberties upon giving the usual undertaking, and subsequently escapes therefrom, the surety upon the undertaking is liable to the judgment creditor for the amount of the debt for which the judgment debtor was committed, notwithstanding the fact that the judgment debtor is insolvent: Flynn v. Union Surety & Guaranty Co., 61 App. Div. 170; 70 N. Y. Supp. 403, aff'd 170 N. Y. 145.

§ 160. Defense in action by sheriff on undertaking.

d. The fact that a judgment debtor returned to the jail limits is not a defense to an action on an undertaking, where it appears that the action was commenced by the service of the summons upon the judgment debtor when he was actually outside of the jail limits: Flynn v. Union Surety & Guaranty Co., 61 App. Div. 170; 70 N. Y. Supp. 403, aff'd 170 N. Y. 145.

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§ 167. Recovery of damages for breach of condition.

The person so electing may maintain an action on the undertaking, where an action might have been heretofore maintained by the sheriff, and he may recover the same damages for the breach of the condition, which he might heretofore have recovered in an action against the sheriff for the escape.

2 R. S. 436, § 56.
Amended by chap. 648 of 1886 and chap. 384 of 1904.

§ 169. Defense to action.

In an action brought as provided for in the last three sections, the defendant may make any defense, which he might heretofore have made, if the action was brought by the sheriff.

2 R. S. 436, § 58.
Amended by chap. 648 of 1886 and chap. 384 of 1904.

§ 171. Defense of sheriff in action for escape.

In an action against a sheriff or other officer, for the escape of a prisoner, it is a defense, that the escape was without the assent of the defendant, and that at the commencement of the action, he had the prisoner within the liberties, either by his voluntary return or by recapture, or that an undertaking required to be given by sections 149 and 150 of this act, was given and approved.

2 R. S. 437, § 64.
Amended by chap. 384 of 1904.

§ 172. Duties of coroner when sheriff is a party.

See County Law, chap. 686 of 1892, § 187, when coroner to act as sheriff.

§ 190. The jurisdiction of the court of appeals in civil actions.

See §§ 1324-1339, post, General provisions as to appeals to court of appeals.

a. The court of appeals has no jurisdiction to hear an appeal from a judgment rendered by the appellate division affirming a judgment of a county court modifying a judgment of a court of special sessions convicting the defendant of petit larceny: People v. Johnston, 187 N. Y. 319; 112 App. Div. 812.

b. **Question not raised below.**—The court of appeals will not consider a question which was not raised below, as for instance, part of the summing up of counsel, which was an appeal to their passions, and resulted in an excessive verdict, unless a proper exception was taken: Dimon v N. Y. C. & H. R. R. Co., 173 N. Y. 356, aff'g 74 App Div. 626.

c. Where a party to an action fails to object to certain accounts filed in an action to settle accounts of trustees or to raise any question by objection or exception the court of appeals will not reverse on any question not specifically and properly raised in the court below: Brinckerhoff v. Farias, 170 N. Y. 427, aff'g 52 App. Div. 256; 65 N. Y. Supp. 358.

d. An objection to the erroneous exclusion of evidence cannot be invoked on the appeal so as to sustain the judgment: Seidenspinner v. Met. Life Ins. Co., 175 N. Y. 95, rev'g 70 App. Div. 476; 74 N. Y. Supp. 1108.

e. **Constitutionality.**—The court of appeals will not consider the constitutionality of an act inflicting a penalty, unless the question was raised at the trial: Dodge v Cornelius, 168 N. Y. 242, rev'g 40 App. Div. 18; 57 N. Y. Supp. 791.

f. **Final order in special proceeding.**—An order of the appellate division directing the state board of railroad commissioners to issue a certificate of public convenience is a final order in a special proceeding, and in the absence of any provisions of the Railroad Law giving a right to appeal to this court, it is reviewable as a matter

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of right, under § 190, so far as the questions of law are concerned: Matter of Wood, 181 N. Y. 93; 34 Civ. Pro. R. 127.

a. An application by a purchaser of real property at a partition sale to be relieved from his purchase is a special proceeding, and an order of the appellate division reversing, solely upon questions of law, an order of the special term denying such application, made after final judgment confirming the sale had been entered in the action, is reviewable by the court of appeals: Parish v. Parish, 175 N. Y. 181, rev'g 77 App. Div. 267; 78 N. Y. Supp. 1089.

b. An order of the appellate division reversing an order of the special term granting an application made under § 2471a of the Code of Civil Procedure to compel the delivery of books and papers to a public officer and which denied the application, is a final order in a special proceeding, and is reviewable by the court of appeals: Matter of Brenner, 170 N. Y. 185, aff'g 67 App. Div. 375; 73 N. Y. Supp. 689.

c. **Finding.**—The rule is that the appellants are entitled to the benefit of the findings most favorable to them; the court of appeals examines a referee's findings and holds that there is no necessary conflict: Isham v. Post, 167 N. Y. 531, aff'g 51 App. Div. 605; 64 N. Y. Supp. 1137.

d. Where the findings, in an action to establish the rights and lien of a firm of attorneys in and to a fund recovered in a legal proceeding, under a written agreement of retainer, do not contain the agreement *in extenso* but only the substance thereof, omitting one important clause, such clause cannot be read into the findings by reason of the fact that the entire agreement is a part of the pleadings constantly referred to in the progress of the case through the courts and is printed in full at least three times in the record: Ransom v. Cutting, 188 N. Y. 447, aff'd 112 App. Div. 150.

e. **Findings of referee.**—On appeal from a decision of a referee, the court of appeals is confined to the findings of fact made by the referee: Sweet v. Henry, 175 N. Y. 268, rev'g 66 App. Div. 383; 72 N. Y. Supp. 868.

The erroneous admission of immaterial evidence which has no bearing on the issues is not reversible error: Id.

f. A referee's finding, upon conflicting evidence adopted by the special term and affirmed by the appellate division, is conclusive in the court of appeals: Matter of Langslow, 167 N. Y. 314, mod'y 52 App. Div. 635; 66 N. Y. Supp. 1135.

g. **Final order.**—A special term order which modifies a final order in a special proceeding becomes the final order, and is reviewable by the court of appeals when reversed by the appellate division: Matter of Board of Education, 169 N. Y. 456, rev'g 59 App. Div. 258; 69 N. Y. Supp. 572.

h. An order of the appellate division denying a motion for a new trial made upon exceptions, pursuant to § 1001, between the interlocutory and final judgments, is not a final order and is not reviewable by the court of appeals, unless an appeal is allowed by the appellate division: Young v. Gilmour, 167 N. Y. 500, dismissing appeal 59 App. Div. 612; 69 N. Y. Supp. 214.

i. An order in a *habeas corpus* proceeding, which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable under § 2058 since it is not a final order, and an order of the appellate division reversing it and dismissing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceeding, and is, therefore, reviewable by the court of appeals: People ex rel. Duryee v. Duryee, 188 N. Y. 440, rev'g 109 App. Div. 533.

j. **Creditor's action.**—Under this section, no appeal lies to the court of appeals from an order denying a "motion herein to vacate and set aside the warrants of attachments and * * * judgment in this action," unless allowed by the appellate division: Hammond v. National Life Association, 168 N. Y. 262, dismissing appeal 58 App. Div. 453; 69 N. Y. Supp. 585.

k. **Order granting a new trial.**—An order granting a new trial is not appealable, unless it appears from the record that the order was affirmed as to the facts or the appeal therefrom dismissed: Bank of China v. Morse, 168 N. Y. 458, aff'g 44 App. Div. 435; 61 N. Y. Supp. 268.

l. Where the appellate division, by a divided court, reverses a judgment and orders a new trial "upon questions of law only, the facts having been examined and no errors found therein," the court of appeals upon an appeal from the order of reversal can review the questions of law that were before the appellate division, since such order means that the appellate division did not permit the judgment to stand because it reached the conclusion that the most favorable view of the evidence, accepting it as true, fell short of supporting the judgment: Serano v. N. Y. C. & H. R. R. Co., 188 N. Y. 156, rev'g 114 App. Div. 684.

A determination of the appellate division upon the question whether the damages found by the jury are excessive or not is not reviewable in the court of appeals, since the court cannot consider

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the weight of evidence or questions relating to an excessive verdict: Id.

a. **Discretionary order.**—An appeal does not lie to the court of appeals from an order affirming an order denying a motion for a peremptory writ of mandamus which does not show that it was refused on a question of law only: People ex rel. Lentilhon v. Coler, 168 N. Y. 6, dismissing appeal 61 App. Div. 223; 70 N. Y. Supp. 482.

b. Where the denial of a motion for a new trial upon the ground of the misconduct of a juror is, upon the facts as disclosed, discretionary with the trial court, the court of appeals, as a general rule, will not interfere: People v. Koepping, 178 N. Y. 247.

c. An order directing payment of allowances to the guardian of an infant is not appealable: Matter of White, 95 App. Div. 104; 88 N. Y. Supp. 564.

d. **Discretionary order.**—An appeal from an order will not be dismissed on the grounds that it may have been made in the exercise of discretion, where the appellate division allows the appeal and certifies a question of law for review: Matter of Davies, 168 N. Y. 89.

Abstract questions.—The appellate division has no power to certify abstract questions, and the court of appeals has no power to answer such questions: Id.

e. **Custody of children.**—A judgment granting a divorce to plaintiff, but awarding the custody of the children to the defendant is within the discretion of the supreme court, and where it does not exceed its power, an affirmance by the appellate division is not reviewable: Osterhoudt v. Osterhoudt, 168 N. Y. 358, dismissing appeal 48 App. Div. 74; 62 N. Y. Supp. 529.

f. **Order.**—An order of the appellate division cannot be reviewed upon appeal by taking an appeal direct from a decree of the surrogate's court and not from the order of the appellate division modifying such decree: Matter of Union Trust Co., 172 N. Y. 494, dismissing appeal 70 App. Div. 5; 75 N. Y. Supp. 68.

g. **Former judgment.**—The question whether a former judgment is a bar to a subsequent action cannot be considered by the court of appeals where it was not pleaded, although it was read in evidence in the trial, and the trial court made no finding concerning it: Fritz v. Tompkins, 168 N. Y. 524, rev'g 39 App. Div. 73; 56 N. Y. Supp. 847.

h. **Absence of exceptions.**—Questions of law not raised on the trial by proper exceptions cannot be reviewed by the court of appeals, although the decision of the appellate division was not unanimous: Wangner v. Grimm, 169 N. Y. 421; aff'g 53 App. Div. 626; 65 N. Y. Supp. 1145.

i. The objection that an action of ejectment cannot be maintained for nonpayment of rent cannot be considered by the court of appeals where no motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action was made at the trial: Jones v. Reilly, 174 N. Y. 97, rev'g 68 App. Div. 116; 74 N. Y. Supp. 243.

j. **Surrogate's court.**—Where exceptions have been taken to conclusions of law made by a surrogate in dismissing a proceeding before him, questions are raised reviewable by the court of appeals in an appeal from an order of the appellate division affirming a decree entered in accordance with such conclusions: Matter of Killan, 172 N. Y. 547, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

k. An application by attorneys in a proceeding in a surrogate's court for an accounting, to vacate the satisfaction of a decree rendered therein, is a special proceeding, and an order of the surrogate vacating the satisfaction is a final order in that proceeding, reviewable by the court of appeals: Matter of Regan, 167 N. Y. 338, rev'g 58 App. Div. 1; 68 N. Y. Supp. 527.

l. An order of the appellate division reversing an order of the surrogate's court, which, upon the petition of an attorney for the contestant, continued a proceeding for a compulsory accounting by an administratrix who had made a secret and collusive settlement with his client and had procured his agreement to withdraw his objections and his consent that her account be allowed as filed, for the purpose of allowing the attorney, who claimed a lien upon any recovery to which his client would have been entitled on the accounting, to establish such lien, which order of the appellate division denied and dismissed the petition, ordered the objections to the account withdrawn and the account as filed approved, is a final order in a special proceeding and is reviewable by the court of appeals: Matter of Fitzsimons, 174 N. Y. 15, rev'g 77 App. Div. 345; 79 N. Y. Supp. 194.

m. The court of appeals has jurisdiction of an appeal from an order of the appellate division reversing a surrogate's decree upon the law and facts where the inferences from the uncontradicted evidence all point in one direction, so that but one conclusion could be drawn by any reasonable mind: Matter of Totten, 179 N. Y. 112, rev'g 89 App. Div. 368; 85 N. Y. Supp. 928.

n. Even though a referee is appointed by a surrogate, under § 2546, to examine the account of an administratrix and to hear and determine the questions arising upon its settlement, yet his report is not final, as his conclusions are to be reported to the surrogate, who may confirm, modify or reject the report, and the surrogate's decree is the

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first binding adjudication, and from it only an appeal can be taken: Matter of Barefield, 177 N. Y. 387, rev'g 82 App. 463; 81 N. Y. Supp. 843.

a. **Exceptions.**—In an action for negligence, exceptions to a charge and refusal to charge as to defendant's duty, without any request for the direction of a verdict or for a nonsuit, entitle the defendant to have the question raised passed upon by the court of appeals, although it is one necessarily determined by a denial of the motion to dismiss the complaint and a judgment entered upon a verdict has been unanimously affirmed by the appellate division: McGuire v. Bell Telephone Co., 167 N. Y. 208, aff'g 52 App. Div. 635; 66 N. Y. Supp. 1148.

b. Where the appellate division states in its order that the judgment and order appealed from were reversed upon questions of law only, the court of appeals in their review are confined to errors of law to which exceptions were duly taken: Cooper v. N. Y., O. & W. Ry. Co., 180 N. Y. 12.

c. Where the exception was general to the decision of the trial judge and to each and every part thereof, with no specific exception to any particular finding or conclusion, such exception is insufficient to present any question of law for review: Colby v. Town of Day, 177 N. Y. 548, rev'g 75 App. Div. 211; 77 N. Y. Supp. 1022.

d. **Sufficiency of evidence.**—Where the appellant, after the denial of his motion to dismiss, made at the close of the plaintiff's evidence, proceeded with the trial and introduced evidence, and at the close of his case moved for a dismissal only upon other grounds, and not on the ground that the evidence was insufficient, such appellant waives his exception to the refusal of his first motion, although he asked for the direction of the verdict, which was denied, and a verdict directed for plaintiff, but took no exceptions to the rulings on such motions: Sigua Iron Co. v. Brown, 171 N. Y. 488, aff'g 58 App. Div. 436; 69 N. Y. Supp. 295.

e. **Modification of judgment.**—The appellate division should not modify an order of the special term which awarded special damage to one party, without granting a new trial, and, on appeal, the court of appeals will modify a judgment in that respect: Van Siclen v. City of New York, 172 N. Y. 504, mod'y 64 App. Div. 437; 72 N. Y. Supp. 209.

f. Where, in an action to foreclose a mechanic's lien, a judgment has been entered which does not give to a claim the priority over all the other claims to which it is entitled, but places it last in the order of payment, and the claimant appeals, perfecting his appeal as to some of the parties, but not as to the others, the judgment should be modified, where it can be done without doing injustice to any of the parties, by giving the claimant priority over those claimants against whom he perfected the appeal: Hall v. City of New York, 176 N. Y. 293, mod'y 79 App. Div. 102; 79 N. Y. Supp. 979.

g. The modification of a judgment and not the granting of a new trial is required when the appellate division reduces the amount, and it is not possible upon such trial that the facts can be altered: Heerwagen v. Crosstown St. Ry. Co., 179 N. Y. 99, mod'y 90 App. Div. 275; 86 N. Y. Supp. 218.

h. A perpetual injunction restraining the building and operation of an electric street railway may be modified by the court of appeals on the appeal to that court: Peck v. Schenectady Ry. Co., 170 N. Y. 298, aff'g 67 App. Div. 359; 73 N. Y. Supp. 794.

i. **Unanswered questions.**—An objection to a question requesting a witness to state the contents of a telegram is not sufficient to raise the question on appeal, where the witness did not answer such questions and subsequently stated the contents of the telegram, to which no objection was made and as to which no motion to strike out was made: Chainless Cycle Mfg. Co. v. Security Ins. Co., 169 N. Y. 304, aff'g 52 App. Div. 104; 64 N. Y. Supp. 1060.

j. **Certified question.**—A certified question which fails to state sufficient facts cannot be answered by the court of appeals: Malone v. Saints Peter and Paul's Church, 172 N. Y. 269, dismissing appeal 69 App. Div. 420; 74 N. Y. Supp. 1005.

k. Under the provisions of § 191, subd. 2, it is sufficient if the appellate division certify that, in its opinion, a question of law is involved which ought to be reviewed by the court of appeals, but under § 190, subd. 2, the questions are required to be certified by the appellate division: Kurz v. Doerr, 180 N. Y. 88, aff'g 86 App. Div. 507; 83 N. Y. Supp. 736.

l. The question certified, being as to the propriety of the supreme court exercising its discretion on a state of facts not presented by the complaint, is not reviewable by the court of appeals: Steinway v. von Bernuth, 167 N. Y. 498, dismissing appeal 59 App. Div. 261; 69 N. Y. Supp. 1146.

m. Form and substance of questions which may be sent to the court of appeals considered: Neresheimer v. Smyth, 167 N. Y. 202, aff'g 35 App. Div. 632; 55 N. Y. Supp. 1147.

n. **Asumption as to facts.**—On appeal by plaintiff from a verdict directed in her favor for an undisputed minor item on dismissal of the complaint as to all other claims upon defendant's motion therefor, without the introduction of any evidence on its part, all the facts

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warranted by the evidence must, for the purpose of appeal, be assumed as settled in plaintiff's favor: Becker v. City of New York, 170 N. Y. 219, rev'g 63 App. Div. 615; 71 N. Y. Supp. 1133.

a. The rule, that all facts warranted by the evidence and necessary to support a judgment rendered on a decision in the short form will, on appeal, be presumed to have been found, is not applicable to that part of a judgment dismissing the complaint as to one defendant, since as to that defendant the plaintiff has no judgment to be supported by such a presumption: Deering v. Schreyer, 171 N. Y. 451, rev'g 58 App. Div. 322; 68 N. Y. Supp. 1015.

b. On appeal to the court of appeals, it will be assumed that the books of a corporation were properly received in evidence against the former officers thereof, in an action to recover money alleged to have been received and retained by them for their individual benefit: The Saranac, etc., Co. v. Arnold, 167 N. Y. 368, rev'g 41 App. Div. 482; 58 N. Y. Supp. 710.

c. **Alternative writ.**—On the trial of issues on an alternative writ, where both parties request the direction of a verdict, a verdict for the relator has the same effect as if found by a jury, and when the judgment is affirmed by the appellate division, the facts are deemed found in favor of such relator: People ex rel. Gleason v. Scannell, 172 N. Y. 316, aff'g 69 App. Div. 400; 75 N. Y. Supp. 122.

d. **Nonsuit.**—A motion for a dismissal of the complaint on various grounds, one of them being that the contract testified to by the plaintiff was void as against public policy, which the referee granted, is simply a nonsuit and the plaintiff is entitled to have it so treated, and gives him the right to have it reviewed in the light of the facts and inferences most favorable to him: Veazey v. Allen, 173 N. Y. 359, aff'g 61 App. Div. 119; 70 N. Y. Supp. 457.

e. On appeal from a judgment dismissing the complaint at the close of address of plaintiff's counsel, every material fact in issue will be presumed to be established in favor of plaintiff: Hoffman House v. Foote, 172 N. Y. 348, rev'g 50 App. Div. 163; 63 N. Y. Supp. 784.

f. **Wrong reason.**—A correct decision will not be reversed because based on a wrong reason where the ground of the decision cannot be claimed to have misled a party and injured him: Ward v. Hasbrouck, 169 N. Y. 407, aff'g 52 App. Div. 627; 65 N. Y. Supp. 200.

g. **Contempt.**—The court of appeals has power to review an order of the appellate division affirming an order punishing a witness for contempt in refusing to disclose information which was not privileged: Matter of King v. Ashley, 179 N. Y. 281, aff'g 96 App. Div. 143; 89 N. Y. Supp. 482.

h. **Foreclosure.**—A judgment of foreclosure cannot be sustained in the absence of a specific finding by the referee that there was a consideration for the giving of the mortgage where that question was in issue and the conclusion of law that the presumption of a consideration was not overcome by the evidence does not support the finding of such consideration: Alcock v. Davitt, 179 N. Y. 9, rev'g 84 App. Div. 632; 82 N. Y. Supp. 1093.

i. **Points of counsel.**—The court of appeals lays down certain rules and recommendations for the briefs of counsel presented to the court: Stevens v. O'Neill, 169 N. Y. 375, aff'g 51 App. Div. 364; 64 N. Y. Supp. 663.

j. **Immaterial, erroneous rulings.**—Rulings upon a trial, even if erroneous, unless of sufficient importance, will not justify the reversal of a judgment: Adams v. Elwood, 176 N. Y. 106, aff'g 72 App. Div. 632; 76 N. Y. Supp. 1008.

An objection to evidence upon which a ruling is reserved, but not made, must be treated as though it had been sustained and an exception taken: Id.

k. **Failure to find facts.**—Where a judgment is sustained by findings of fact and conclusions of law which are supported by evidence, the failure of the trial court to find other facts, claimed to have been established by evidence, is not an error of law reviewable in the court of appeals: N. Y. C. & H. R. R. Co. v. A. I. E. R. R. Co., 178 N. Y. 75, aff'g 79 App. Div. 645; 80 N. Y. Supp. 1144.

l. **Executors.**—When the executors and all the parties interested under a will have united in submitting a question in controversy to the appellate division, and none of the latter have appealed from its judgment, the executors have no such direct interest in the controversy as will entitle them to take an appeal to the court of appeals: Isham v. N. Y. Assn. for Poor, 177 N. Y. 218, aff'g 78 App. Div. 396; 79 N. Y. Supp. 1048.

m. **Two appeals on same question.**—Costs will be allowed against appellant on the dismissal of one of two appeals from the same judgment on two separate records which present the same question, although it was taken from an abundance of caution to make certain of the hearing of the question upon one record or the other and to settle a doubtful question of practice and the appellant is successful on the other appeal: Abbey v. Wheeler, 170 N. Y. 122, rev'g 58 App. Div. 451; 69 N. Y. Supp. 432.

A judgment of the general term reversing a judgment of the special

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term on demurrer and holding the demurrer well taken and directing a final judgment unless the plaintiff should amend within a certain time, does not, when perfected by entry of a final judgment dismissing the complaint on failure of the plaintiff to amend, become a final and actual determination by the general term upon the issue raised by the demurrer appealable to the court of appeals; but the proper mode of bringing the question to the court of appeals is by an appeal through the appellate division from the judgment so entered: Id.

c. **Certiorari.**—On appeal from an order confirming the proceedings of a commission on review by certiorari of their acts, the determination by said commission upon evidence that a certain kind of stone should be used in a public improvement, presents no question of law reviewable by the court of appeals: People ex rel. North v. Featherstonhaugh, 172 N. Y. 112, dismissing appeal 67 App. Div. 625; 73 N. Y. Supp. 1130.

b. **Mandamus.**—Where the appellate division has directed that a peremptory writ of mandamus should be granted requiring a board of supervisors to allow claims for services rendered on a *quantum meruit* "at such sums as are proper," an order entered thereon requiring their allowance at a specified amount is erroneous, and, upon an appeal therefrom, will be corrected so as to conform to the direction of the appellate division: People ex rel. Spaulding v. Supervisors, 170 N. Y. 93, mod'y 66 App. Div. 117; 72 N. Y. Supp. 782.

c. **Direction of verdict.**—The direction of a verdict in any case where the parties are entitled to a jury trial constitutes reversible error if a question of fact is presented by the evidence: Sundheimer v. City of New York, 176 N. Y. 495, rev'g 77 App. Div. 53; 79 N. Y. Supp. 278.

d. An order of the appellate division affirming an order denying a motion to settle the issues in an action is not appealable to the court of appeals unless leave is granted by the appellate division: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

e. **Reversal by appellate division.**—Upon appeals from the appellate division reversing judgments upon the facts as well as the law, if the evidence raises a question of fact, the orders will be affirmed in all cases except in rare instances where peculiar circumstances require the dismissal of the appeal in order to prevent injustice: Crooks v. People's Nat. Bank, 177 N. Y. 68, aff'g 72 App. Div. 331; 76 N. Y. Supp. 495.

f. An appeal may be taken from an order of the appellate division reversing an order of the special term appointing a referee to ascertain the value of petitioners' services and also denying the application: Matter of King, 168 N. Y. 53, mod'y 61 App. Div. 152; 70 N. Y. Supp. 356.

g. A final judgment entered pursuant to § 1222 upon an order of the special term sustaining a demurrer and dismissing the complaint upon the merits, is not appealable to the court of appeals after a reversal by the late general term of the judgment overruling the demurrer, the order of reversal allowing the plaintiff to amend, which he did not do, but which did not provide for final judgment if plaintiff did not amend: Leonard v. Barnum, 168 N. Y. 41, s. c. 167 N. Y. 595.

h. An appeal from an order of the appellate division reversing a judgment upon questions of fact and law and ordering a new trial, is reviewable in the court of appeals when there is no controverted fact upon which the decision of the question of law depends and there are no questions of fact to be resettled upon a new trial of the case to affect the questions of law involved: Erie Railroad Co. v. Steward, 170 N. Y. 172, aff'g 61 App. Div. 480; 70 N. Y. Supp. 698.

i. An order of the appellate division reversing a determination of the special term setting aside a verdict on the ground of newly discovered evidence, granting a new trial and affirming the judgment of the trial court entered upon the verdict, is not reviewable upon the merits by the court of appeals, and an appeal therefrom must be dismissed when the record does not disclose the entry of the judgment of affirmance, nor any appeal therefrom, if it had in fact been entered: Reiss v. Town of Pelham, 170 N. Y. 54, dismissing appeal 53 App. Div. 459; 65 N. Y. Supp. 1033.

j. An error of the special term in entering, on confirmation of a referee's report, a final judgment which fails to conform to the decision of the appellate division reversing in part and modifying so as to make interlocutory a final judgment previously entered by the court below, cannot be cured on appeal therefrom directly to the court of appeals, even if the determination of the appellate division be considered an affirmance of an interlocutory judgment within § 1336, authorizing such an appeal where a final judgment is rendered in the court below after affirmance, upon appeal to the appellate division, of an interlocutory judgment, since such an appeal brings up for review only the determination of the appellate division affirming the interlocutory judgment; and the remedy of appellant is either in an appeal to the appellate division or in an application to the special term to enter such an order as the interlocutory judgment of the appellate division calls for: Hollister v. Simonson, 170

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N. Y. 357, dismissing appeal 36 App. Div. 63; 55 N. Y. Supp. 372.

a. Where a motion to dismiss the complaint was granted and no exception taken thereto, and a motion for a new trial was made without specifying any grounds, and was denied, and no order thereon entered, the appellate division has no power to review or reverse on the facts, and where there are no exceptions taken to rulings which would authorize the reversal of the judgment, the court of appeals must reverse the order of reversal of the appellate division and affirm the judgment of the trial court: Collier v. Collins, 172 N. Y. 99, rev'g 58 App. Div. 550; 69 N. Y. Supp. 94.

b. Where a new trial is granted by the appellate division upon a question of fact, the court of appeals has no power to review rulings duly excepted to if there was a question of fact; but if the reversal is granted solely upon questions of law, the court may review such questions raised by exceptions, and if no exception was well taken, the order must be reversed and the judgment reinstated: Vollkommer v. Cody, 177 N. Y. 124, rev'g 85 App. Div. 57; 82 N. Y. Supp. 969.

Where the trial court, in orally assigning reasons for deciding in favor of plaintiff, declared there were contradictions by the defendant in comparison with his deposition, to which comment no objection was made or exception taken, and the formal decision did not embrace such remark, a reversal by the appellate division on the ground that the trial court did not consider the deposition as an admission but as evidence which was competent to impeach plaintiff's witnesses, cannot be sustained as the error was not properly raised by an exception: Id.

c. Where, on an appeal from an order of the appellate division reversing upon the law a judgment of the special term entered upon a dismissal of the complaint and granting a new trial, the objections and exceptions to the admission of evidence present no reversible error, and the conclusions of law are supported by the evidence, the order must be reversed and the judgment of the special term affirmed: Dunlap & Co. v. Young, 174 N. Y. 327, rev'g 68 App. Div. 137; 74 N. Y. Supp. 184.

d. An order of the appellate division that "the order and judgment so appealed from be and the same is hereby reversed and a new trial ordered, with costs to the appellant to abide the event, upon questions of law only, the facts having been examined and no error found therein," means that, although the appellate division reached the conclusion after examining all the evidence that the jury were justified in accepting as true in all instances of conflict in testimony that which was most favorable to the plaintiff, yet it could not permit the judgment to stand because that most favorable view of the testimony fell short of supporting the judgment; such order is, therefore, appealable and the court of appeals may review any of the questions of law that were before the appellate division: Albring v. N. Y. C. & H. R. R. Co., 174 N. Y. 179, aff'g 73 App. Div. 620; 77 N. Y. Supp. 1121.

e. **Order denying a new trial.**—An order denying a new trial is neither a judgment nor order finally determining an action or special proceeding, and is not appealable to the court of appeals: McGovern v. Manhattan R. Co., 112 App. Div. 184.

f. **Incompetent evidence.**—Where it appears, upon an appeal to the court of appeals from a judgment entered upon a decision of the appellate division unanimously affirming a judgment of the supreme court, entered upon a decision of the court at special term, that there is no evidence, except that held incompetent by the court of appeals, to justify the findings of fact made by the trial court, such evidence must be presumed to have controlled the result, and its admission requires a reversal of the judgment: Hindley v. Manhattan Ry. Co., 185 N. Y. 335.

g. **Exception under § 1023.**—While the appellate division will review an exception taken under § 1023, the court of appeals will not review such exception where the fact which the trial court was requested to find is a fact directly in conflict with a fact actually found by the trial court as the basis of its decision, or a fact which would necessarily nullify such finding, and where the finding as made has the support of an unanimous affirmance by the appellate division: Le Gendre v. Scottish Ins. Co., 183 N. Y. 392.

h. **Report of land commissioners.**—Where the first report of the commissioners of appraisal of lands for water purposes was set aside because improper evidence had been admitted, an appeal may be taken from the confirmation of the second report to the appellate division, the determination of which is reviewable by the court of appeals: Matter of Daly, 189 N. Y. 34, rev'g 116 App. Div. 798.

i. **Submission of Controversy.**—Where a controversy, submitted upon an agreed statement of facts under § 1279 presents a pure question of law, the supreme court has power to decide it, and the court of appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the supreme court is without jurisdiction, and a judgment entered upon such decision must be reversed and the proceeding dismissed:

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Marx v. Brogan, 188 N. Y. 431, rev'g 111 App. Div. 480.

a. **Certification of questions.**—The court of appeals cannot answer a question certified to it by the appellate division upon an appeal from the judgment of that court affirming a judgment of a county court, which affirmed a judgment of a city court, in the absence of a provision for a certification of questions upon the allowance of an appeal of such a character: Swan v. Inderlied, 187 N. Y. 378, rev'g 101 App. Div. 612; 92 N. Y. Supp. 1147.

b. **Act of apportionment.**—While the Constitution does not expressly confer jurisdiction upon the court of appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the appellate division; upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted: Matter of Sherrill v. O'Brien, 188 N. Y. 185, rev'g 114 App. Div. 890.

c. **Extra allowance.**—Where there is no dispute about the facts, the question whether a case is so difficult and extraordinary as to justify an extra allowance is a question of law reviewable by the court of appeals upon an appeal from a judgment: Campbell v. Emslie, 188 N. Y. 509, mod'y 113 App. Div. 905.

§ 191. Limitations, exceptions and conditions.

d. **Appealable.**—The court may review an order of the appellate division which reverses the order of the special term modifying a final order in the special proceeding: Matter of Board of Education, 169 N. Y. 456, rev'g 59 App. Div. 258; 69 N. Y. Supp. 572.

e. **Not appealable.**—An appeal does not lie from an order of the appellate division in certiorari proceedings to restore relator to the police force which imposes as a condition that relator will not claim back salary, but which does not contain a provision as to the refusal of the relator to accept the condition imposed: People ex rel. Hart v. York, 169 N. Y. 452, dismissing appeal 65 App. Div. 609; 72 N. Y. Supp. 1123.

f. An order of the appellate division denying a motion for a new trial made upon exceptions pursuant to this section between the interlocutory and final judgments is not a final order and is not reviewable by the court of appeals unless an appeal is allowed by the appellate division: Young v. Gilmour, 167 N. Y. 500, dismissing appeal 59 App. Div. 612; 69 N. Y. Supp. 191.

g. When the term at which an order of the appellate division was made has expired as well as the succeeding term, the court has no power to allow an appeal to the court of appeals and to certify that a question has arisen which should be reviewed by that court. The permission cannot be granted under the guise of an order *nunc pro tunc* as of the original term at which the order was made: Matter of City of New York (Massapequa), 119 App. Div. 74.

h. **Absence of exceptions.**—Questions of law not raised on the trial by proper exceptions cannot be reviewed by the court of appeals, although the decision of the appellate division is not unanimous: Wangner v. Grimm, 169 N. Y. 421.

i. **Certified question.**—Under the provisions of § 191, subd. 2, it is sufficient if the appellate division certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals but under § 190, subd. 2, the questions are required to be certified by the appellate division: Kurz v. Doerr, 180 N. Y. 88, aff'd 86 App. Div. 507; 83 N. Y. Supp. 736.

j. **Weight of evidence.**—The question that a finding is against the weight of evidence cannot be considered by the court of appeals: Fritz v. Tompkins, 168 N. Y. 524, rev'g 39 App. Div. 73; 56 N. Y. Supp. 847.

k. The court of appeals has no power to reverse a judgment affirming a judgment entered on the verdict of a jury which has some evidence to support it. The appellate division, only, has power to consider the weight of evidence: Merchants' Nat. Bank v. Barnes, 172 N. Y. 618, aff'g 57 App. Div. 630; 68 N. Y. Supp. 1143.

l. **Question of fact.**—When the trial court made no finding on the question whether the statute of limitations barred the plaintiff's claim in an action, and the reversal by the appellate division is not stated to be on the facts, the question is not reviewable in the court of appeals: Matteson v. Palser, 173 N. Y. 404, mod'y 56 App. Div. 91; 67 N. Y. Supp. 612.

m. Where it appears that the question before the court of appeals involves an inquiry of fact, an appeal from a judgment of the appellate division reversing, upon the law and the facts, a judgment of the special term will be

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dismissed: India W. Brewing Co. v. Bklyn. W. & W. Co., 173 N. Y. 168, dismissing appeal 59 App. Div. 83; 69 N. Y. Supp. 274.

a. A finding as to the law of a foreign country upon a given subject is a finding of fact, and, if unanimously affirmed by the appellate division, is conclusive upon the court of appeals: Spies v. National City Bank, 174 N. Y. 222, aff'g 68 App. Div. 70; 74 N. Y. Supp. 64.

b. Questions of law as to what the law of a foreign country is, where they depend upon the construction and effect of statutes or judicial opinions, are questions of law and not of fact: Bank of China, etc. v. Morse, 168 N. Y. 458.

c. An appeal to the court of appeals from an order of the appellate division must be dismissed where any question of fact is involved: Matter of Bd. of Education of New York, 173 N. Y. 321, dismissing appeal, 74 App. Div. 632; 77 N. Y. Supp. 1121.

d. On appeal from judgment unanimously affirming a judgment of the trial court in the short form, the court of appeals is concluded from examining the evidence as to its sufficiency to sustain the material facts alleged by the plaintiff, for the legal effect of a short decision is the same as of a judgment entered on a general verdict and the same presumptions apply; when finding that the cause of action was not barred by the statutes of limitations precludes court of appeals from determining when cause did arise: Hutton v. Smith, 175 N. Y. 375, aff'g 74 App. Div. 284; 77 N. Y. Supp. 523.

e. **Unanimous decision.**—The provision that no unanimous decision shall be reviewed confines the court of appeals to the examination of such questions as are raised by exceptions to rulings on evidence and the questions of law; the short form of the decision is to be treated as a general verdict, and if the findings of fact and the conclusions of law are separately stated, the facts are conclusive and the court is not only forbidden to examine the record to see if the findings of facts are supported by evidence, but cannot consider the question of law whether there are findings without any evidence to sustain them: City of Niagara Falls v. N. Y. C. & H. R. R. Co., 168 N. Y. 610, aff'g 41 App. Div. 93; 58 N. Y. Supp. 619.

f. An action to recover damages for malicious prosecution is for a personal injury, within the definition of § 3343, subd. 9, and hence, under § 191, subd. 2, no appeal lies to the court of appeals from a unanimous affirmance unless permitted in the way provided for in this section: Parr v. Loder, 180 N. Y. 531, dismissing appeal, 97 App. Div. 218; 89 N. Y. Supp. 823.

g. Upon an appeal from a judgment entered upon a verdict unanimously affirmed by the appellate division, the only questions are those raised by the exceptions to the charge of the trial judge or his refusal to charge as requested. The court of appeals cannot consider the sufficiency of the evidence: Rider v. Syracuse R. T. Ry. Co., 171 N. Y. 139, rev'g 64 App. Div. 624; 72 N. Y. Supp. 1152.

h. The disputed facts are deemed settled in favor of the party who received the unanimous affirmance from the appellate division; a defense that a bank failed to charge, etc., the endorser in a note cannot be raised for the first time in appeal: Nat. Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102, aff'g 54 App. Div. 342; 66 N. Y. Supp. 662.

i. The unanimous affirmance by the appellate division of a judgment entered on a verdict is conclusive upon the court of appeals that the evidence of defendant's negligence was sufficient to support the verdict: McGuire v. Bell Tel. Co., 167 N. Y. 208.

j. Although the appellate division has unanimously affirmed a judgment entered in a verdict directed on uncontroverted evidence, yet the court of appeals may determine whether the evidence justified the direction of the verdict: Bank of Monongahela Valley v. Weston, 172 N. Y. 259, rev'g 62 App. Div. 623; 71 N. Y. Supp. 1132.

k. Where the trial court has made certain findings of fact, and these findings have been unanimously affirmed by the appellate division, those questions have been effectually disposed of and cannot be determined by the court of appeals: Archer v. City of Mount Vernon, 171 N. Y. 639, dismissing appeal, 63 App. Div. 286; 71 N. Y. Supp. 571.

l. **Order of reversal.**—An order of reversal by the appellate division which fails to state that the reversal was on the facts will be assumed to be for errors of law: Townsend v. Bell, 167 N. Y. 462; appeal dis. 171 N. Y. 639.

m. An affirmance by the appellate division of a judgment entered upon a verdict dismissing a complaint in an action to recover for services in procuring a tenant for defendant's property, upon the ground that the defendant was entitled to a dismissal as a matter of law, sustained, there being evidence from which the jury might have found, as a matter of fact, that the parties had never agreed upon the terms of a lease: Levy v. McCreary Realty Corpn., 184 N. Y. 163, aff'g 102 App. Div. 611; 92 N. Y. Supp. 143.

n. **Unanimous affirmance.**—Where it appears, upon an appeal to the court of appeals from a judgment entered upon a decision of the appellate division unanimously affirming a judgment of the supreme court, entered upon a decision of the court at special term, that

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there is no evidence, except that held incompetent by the court of appeals, to justify the findings of fact made by the trial court, such evidence must be presumed to have controlled the result, and its admission requires a reversal of the judgment: Hindley v. Manhattan Ry. Co., 185 N. Y. 335.

a. An action brought to recover for services rendered is appealable to the court of appeals from a unanimous affirmance of a judgment by the appellate division with the permission of the latter court without any question of law being certified: Fisher v. Woods, 187 N. Y. 90.

b. Where the affirmance of a judgment of foreclosure by the appellate division is not unanimous, exceptions to refusals of the trial court to make certain findings of fact as requested by the appellant may be considered by the court of appeals: Arnot v. Union Salt Co., 186 N. Y. 501, rev'g 109 App. Div. 433.

c. Where, in an action to adjust and settle the affairs of a partnership, the referee states the account in detail and finds that the defendants are indebted to the plaintiff for the sums stated, which finding is unanimously affirmed by the appellate division, it is conclusive upon the court of appeals as contending that the statement of the balance is a mere legal conclusion is without merit: Blun v. Mayer, 189 N. Y. 153, aff'g 113 App. Div. 242.

d. **Mandamus.**—It is error for the appellate division to dismiss an appeal from a final order granting a peremptory writ of mandamus where the duty imposed is continuous, as a party affected by an order commanding him to do an act retains the right to appeal therefrom so long as the effect of the order may be to constrain his action in the future: People ex rel. Quinn v. Voorhis, 186 N. Y. 263; 100 N. Y. Supp. 927; 115 App. Div. 218, aff'd 187 N. Y. 327.

e. **Reversal by appellate division.**—Where the unanimous order of the appellate division, reversing a judgment rendered at special term on questions of law only, affirmatively declares that the facts have been examined and no error found therein, the facts found by the trial court are conclusive on the court of appeals, and the only question that can be determined by the latter court is whether those facts justified or required a reversal of the judgment rendered thereon by the special term: American Guild v. Damon, 186 N. Y 360.

f. While the appellate division will review an exception taken under § 1023, the court of appeals will not review such exception where the fact which the trial court was requested to find is a fact directly in conflict with a fact actually found by the trial court as the basis of its decision, or a fact which would necessarily nullify such finding, and where the finding as made has the support of an unanimous affirmance by the appellate division: LeGendre v. Scottish Ins. Co., 183 N. Y. 392.

g. An exception to the rule that the unanimous affirmance of a judgment by the appellate division precludes the court of appeals from looking into the record for facts not contained in the findings is not warranted by the fact that the plaintiff, in an action decided before the re-enactment of § 1023, did not have an opportunity to obtain at special term a ruling upon additional facts which they deemed established by the evidence: Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, rev'g 101 App. Div. 609, 92 N. Y. Supp. 1130.

h. **Re-application.**—This section does not authorize a re-application for leave to appeal to the court of appeals after a denial of the first application by one of the judges: Carlisle v. Barnes, 183 N. Y. 272.

i. **Reversal by appellate division.**—Where, upon appeal to the court of appeals from an order of the appellate division reversing a judgment upon the facts and granting a new trial, it is found that questions of law are involved upon which the reversal could properly have been based, the appeal will not ordinarily be dismissed, but the order of reversal will be affirmed and judgment absolute awarded against the appellant upon the stipulation: Matter of Mosher, 185 N. Y. 435.

j. **Act of apportionment.**—While the Constitution does not expressly confer jurisdiction upon the court of appeals to review an act of apportionment, that court has such power by virtue of its general jurisdiction to review actual determinations of the appellate division; upon such an appeal the questions reviewable are:

(1) Whether the legislature has violated a mandatory provision of the Constitution.

(2) Whether an act of apportionment, in those matters as to which under the Constitution there is necessarily vested in the legislature some discretion, transcends all reasonable exercise of discretion and palpably violates the plain intent of the Constitution in disregard of its spirit and the purpose for which its express limitations were enacted: Matter of Sherrill v. O'Brien, 188 N. Y. 185, rev'g 114 App. Div. 890.

k. When the court of appeals on granting a new trial has determined that a plaintiff has established a cause of action for negligence and he proves the same facts on the new trial, the decision is binding upon the appellate division unless the evidence introduced by

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the defendant establishes a defense as a matter of law or is of such character as to make the verdict of the jury contrary to the weight of evidence: McCoy v. N. Y. C. & H. R. R. Co., 119 App. Div. 531.

§ 192. Appeals from certain orders, etc., how heard.

a. The purpose of the court of appeals in amending rule 11 relating to motions and orders by including "appeals from interlocutory judgments overruling or sustaining demurrers" among those which should be placed upon the motion calendar was to remove the doubt as to what calendar they should be placed upon occasioned by the repeal of § 192 of the Code of Civil Procedure, relating to such appeals, by chapter 946 of the Laws of 1895; it was not intended to exclude an appeal when duly allowed by the appellate division, from any interlocutory judgment; therefore, an appeal by permission from an interlocutory judgment of any kind is an appeal from an order in an action which should not go on the regular calendar, but either party has the right to notice it for argument and place it upon the motion calendar at his convenience: Slater v. Slater, 174 N. Y. 264; 33 Civ. Pro. R. 355.

§ 193. Court may make rules.

See § 56, ante, Examination and admission of attorneys.

§ 194. Remittitur; when judgment absolute to be rendered, and proceedings thereupon.

See rule 16 (Ct. of App.), Contents of remittitur.

§§ 1324-1339, post, Appeals to the court of appeals.

b. **Erroneous remittitur.**—An order of the supreme court, entered upon a remittitur transmitted to it by the court of appeals, must conform strictly to the remittitur. If the remittitur is erroneous in any respect the remedy is by an application to the court of appeals to amend it: Zapf v. Carter, 90 App. Div. 407; 86 N. Y. Supp. 175.

c. A judgment entered upon a remittitur of the court of appeals must conform to the terms of such remittitur and the court below has no authority to make any change therein: Parish v. Parish, 87 App. Div. 430; 84 N. Y. Supp. 506.

d. **Assessment of damages.**—§ 1232 does not provide for an assessment of damages in the trial court, or for a review thereof, but only an assessment by writ of inquiry out of the court; § 1215 does not provide for an assessment of damages in cases arising under § 194, but only in cases of default in answering or demurring under § 1214; there seems to be no special provision made in the Code of Civil Procedure as to the practice on the assessment of damages in cases arising under § 194, and the court is left to establish its own procedure: Yaw v. Whitmore, 66 App. Div. 317; 72 N. Y. Supp. 765.

e. **Surrogate's court.**—Upon an appeal to the court of appeals from an order of the appellate division, affirming the decree of a surrogate's court admitting an alleged will to probate, the court of appeals reversed the order of the appellate division and the decree of the surrogate's court and remitted the proceedings, directing a trial before a jury in the supreme court to determine whether the alleged will had been revoked: *Held,* that the parties who had succeeded in the court of appeals were entitled, as a matter of right, to the entry of an order on the remittitur and that the judgment of the court of appeals could not be made the judgment of the surrogate's court except in respect to those matters over which the surrogate's court originally had jurisdiction: Matter of Hopkins, 95 App. Div. 57.

f. When the court of appeals has overruled a plaintiff's demurrer to a separate affirmative defense to the entire cause of action contained in the answer and has remitted the case to the court below for judgment in accordance therewith and without granting leave to plaintiff to withdraw the demurrer, the defendant is entitled, as a matter of law, to final judgment dismissing the complaint: National Contracting Co. v. Hudson River W. P. Co., 110 App. Div. 133.

g. Where, upon appeal to the court of appeals from an order of the appellate division reversing a judgment upon the facts and granting a new trial, it is found that questions of law are involved upon which the reversal could properly have been based, the appeal will not ordinarily be dismissed, but the order of reversal will be affirmed and judgment absolute awarded against the appellant upon the stipulation: Matter of Mosher, 185 N. Y. 435.

h. **Costs.**—Costs on a writ of certiorari are granted in the discretion of the appellate division upon the writ itself; although the court of appeals has reversed a dismissal of the writ by the appellate division, and also the determination of a police commissioner

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dismissing a police officer "with costs to abide the event," nevertheless the appellate division may deny costs to the successful relator in its discretion; hence, in the absence of such an award of costs by the appellate division the relator cannot tax costs on a judgment entered on the remittitur of the court of appeals: People ex rel. Shiels v. Greene, 114 App. Div. 168.

§ 217. General jurisdiction of supreme court.

a. The appellate division of the supreme court has jurisdiction of proceedings to remove a justice of the court of special sessions in the city and county of New York after due notice and an opportunity to be heard: Matter of Deuel, 112 App. Div. 99.

b. The supreme court and the appellate division of the supreme court are enumerated separately in the Constitution as courts of record, and as a general rule any reference in the Code is to the special or trial terms thereof: O'Neil v. Mansfield, 47 Misc. 516.

c. **Supreme court.**—The supreme court has express jurisdiction to determine whether or not an act of apportionment is in conflict with the Constitution, and, if such conflict is found to exist, to declare the act void: Matter of Sherrill v. O'Brien, 188 N. Y. 185, rev'g 114 App. Div. 890.

d. The supreme court has jurisdiction of an action brought to set aside an unlawful transfer of property by a bankrupt and to recover the same or the value thereof for the benefit of his creditors: Bouton v. Wheeler, 118 App. Div. 426.

e. The supreme court has no power to order a recanvass of ballots, and a writ commanding a recanvass of the votes and the proclamation of the result is void for want of jurisdiction: People ex rel. March v. Beam, 188 N. Y. 266.

f. **Court of equity.**—A court of equity has no power on declaring an election void, to order the county treasurer to issue liquor tax certificates: Raymond v. Clement, 118 App. Div. 528.

g. A court of equity in the exercise of its discretion may not compel the execution of a deed which will cut off the grantor from access to other lands, but may order a reference to determine an equitable performance of the contract which will be fair to both parties: Wadwick v. Mack, 118 App. Div. 777.

h. **Concurrent jurisdiction.**—The supreme court and the surrogate's court have concurrent jurisdiction to require the personal representatives of deceased executors and trustees to account for property which came into their hands. Ordinarily the supreme court will refuse to exercise its jurisdiction unless the jurisdiction of the surrogate's court be insufficient to determine all the questions involved; the surrogate's court having a limited jurisdiction and being without power to try title to real estate, should refuse to require the representatives of a deceased trustee to account when a question involving the title to real estate must be decided as a prerequisite to the accounting: Matter of Foagary, 117 App. Div. 583.

i. Although the supreme court and the surrogate's court have concurrent jurisdiction to entertain an accounting by an executor, the supreme court will not act when complete relief can be obtained in the surrogate's court; to obtain an accounting in the supreme court the executor must show that complete justice cannot be had before the surrogate; such special fact is not shown by an allegation that by reason of the stringent rules under § 2729, governing the admission of evidence as to payments where no vouchers can be produced, he would be unable to testify to payments and introduce all his evidence thereof, thereby working great hardship and injustice. The provisions of said section are applicable to accountings in the supreme court, as well as to accountings in the surrogate's court: Matter of Smith, 120 App. Div. 199.

j. While the supreme court has jurisdiction to compel an executor to account, it will refuse to exercise such jurisdiction, unless the circumstances require the interposition of a court of equity rather than the usual proceedings before the surrogate: Volhard v. Volhard, 119 App. Div. 266.

k. The supreme court and the surrogate's court have concurrent jurisdiction to compel executors and trustees to account, but the supreme court will only act where the surrogate's court may not have full jurisdiction to decide the questions, as where there are conflicting claims to real estate: Bushe v. Wright, 118 App. Div. 320.

l. **Foreign executor.**—Although the courts of this State have no jurisdiction over a foreign executor, yet when he holds lands in this State as trustee he may be sued as such: Coston v. Coston, 118 App. Div. 1.

m. An action to enforce the liability under the statute of Maryland must be brought in that state, and the complaint will be dismissed for want of jurisdiction if brought in this state: Knickerbocker Trust Co. v. Iselin, 53 Misc. 80.

n. **Injunction.**—When in an action for a permanent injunction a preliminary injunction has been denied in the court below, the appellate division will usually leave the question of the right to an injunction to be determined on

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the trial. But where it is apparent that no facts substantially different will be developed on the trial, and there is little or no dispute as to any material fact, but merely as to the conclusions to be drawn therefrom, the appellate division will determine the right to a preliminary injunction on appeal from the order denying it: Dutton & Co. v. Cupples, 117 App. Div. 172.

§ 218. Supreme court may change place of trial of actions pending in other courts.

See §§ 343-346, post, Removal of action to supreme court, from county court.

See § 319, post, Removal from city court of New York to supreme court.

See §§ 986-989, post, Change of place of trial.

§ 219. Judicial departments.

See Art. VI, § 1, N. Y. Const., Judicial districts.

See Art. VI, § 2, N. Y. Const., Judicial departments.

§ 220. Appellate division.

See Art. VI, § 2, N. Y. Const., Appellate divisions.

See §§ 245-250, post, Supreme Court reporter.

See §§ 1346-1355, post, Appeals to appellate division.

a. Although a justice of the supreme court has announced his decision in an equity case before he is designated to the appellate division, he is thereafter disqualified from acting further in the case by § 2 of article 6 of the Constitution and cannot sign and file his decision; under such circumstances there must be a new trial: Williamson v. Randolph, 111 App. Div. 539; 97 N. Y. Supp. 949; 185 N. Y. 603.

b. A trial justice elevated to the appellate division has thereafter no jurisdiction to hear and decide a motion for a nonsuit which he reserved at trial: Milliman v. N. Y. C. & H. R. R. Co., 109 N. Y. 139.

c. An order of reference made at special term by a justice, who, at the time, had been appointed to the appellate division, is a nullity and in violation of article 6, § 2 of the New York Constitution: Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

§ 221. Clerks, attendants and stenographers.

The justices of the appellate division in each of the third and fourth departments shall have power to appoint and remove a clerk who shall keep his office at a place to be designated by said justices. The clerks of the appellate division in said departments shall be paid an annual salary to be fixed by the justices of said department at not exceeding three thousand dollars. A certificate of the appointment of each of said clerks signed by the presiding justice of the judicial department for which said clerk is appointed shall be filed with the comptroller of the state, and the salaries hereby established shall be paid by the comptroller of state to such appointees quarterly. The justices of the appellate division in each of said departments shall have power to appoint and remove not more than three attendants, one of whom shall act as crier. Each of said attendants shall receive a compensation to be fixed by the justices, which shall not exceed nine hundred dollars per year, payable monthly. He shall also be entitled to receive his traveling expenses to and from his home to the place where said sessions are held, not exceeding once in each term. The compensation of the attendants shall be paid by the comptroller of the state upon the certificate of the presiding justice of the department. Each justice of the appellate division in each

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of said departments shall have power to employ the services of a stenographer. The compensation of each stenographer shall be paid by the comptroller of the state upon the certificate of the justice by whom he is employed. Such compensation shall not exceed twelve hundred dollars a year.

1. The presiding justice of the appellate division of each of the third and fourth departments, shall, with the approval of the other justices of said department, have power to appoint and remove a deputy to the clerk of said appellate division, who shall be paid an annual salary of not to exceed fifteen hundred dollars, and the presiding justice of the appellate division of the fourth department and* shall in like manner have power to appoint and remove a consultation clerk, who shall be an expert stenographer, who shall act under the direction of said justices and shall attend the sittings of said court and render such clerical and stenographic services thereat and during the official consultations as the justices of said department may require, and shall, under the direction of said justices, make up and prepare for filing in the office of the clerk the official lists of decisions to be rendered by said court. The compensation of such consultation clerk shall be fixed by said justices at not to exceed twenty-one hundred dollars per year. A certificate of the appointment of such deputy clerks and such consultation clerk, signed by the justices of the said respective departments, shall be filed with the comptroller of the state, and the salaries hereby established for such deputy clerks and such consultation clerk shall be paid by the said comptroller to such appointees monthly, and annually apportioned by him among the counties constituting the respective judicial departments and refunded by such counties to the state treasury.

2. The clerk of the appellate division of each of the third and fourth department, in addition to the salary herein provided, shall be entitled to receive his necessary disbursements for postage, telephone, telegraph and express charges, to be certified by the presiding justice of said respective departments and to be paid in the same manner as his salary. And the compensation herein provided for said clerk and said deputy clerk shall be in lieu of all fees and charges, and neither said clerk nor deputy clerk shall hereafter be permitted to charge or receive any fee whatever in addition to his salary, for any official service rendered by him.

3. The deputy clerk of the appellate division of the supreme court in the third judicial department or any attendants of said court shall also act under direction of said court as librarian, and have charge of the library in use by said court, and for such additional services shall

*So in original.

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receive the additional sum of five hundred dollars per annum, to be paid in the same manner as his salary as deputy clerk.

Amended by chap. 647 of 1896, chap. 367 of 1897, chaps. 491 and 636 of 1900, chap. 50 of 1904, and chap. 410 of 1907.

§ 230. Number of justices necessary for a decision.

See Art. VI, § 2, N. Y. Const., Number of judges necessary for a decision.

§ 231. Reargument, etc., when cause to be heard in another department.

See § 46, ante, Qualifications of judges.

§ 232. Appointments of terms of the supreme court.

The justices of the appellate division in each department may fix the times and places for holding special and trial terms therein, and assign the justices of the departments to hold such terms, or make rules therefor; and may from time to time make additional appointments and designations, or change or alter those already made. If said justices of the said appellate division in any department shall not have fixed the times and places for holding said special and trial terms, or shall not have assigned the justices to hold such terms, or shall not have made rules therefor, before the first day of December, in the year 1895, and in every second year thereafter, the justices of the supreme court for each judicial district, or a majority of them not designated as justices of the appellate division, must, between the first and fifteenth days of December in each of said years, appoint the times and places for holding the trial and special terms of the supreme court within their judicial district, for two years from the first day of January of the year next following; if for any reason such an appointment is not made before the expiration of the time so specified, it must be made at the earliest convenient time thereafter. At least one special term and two trial terms must be appointed to be held in each year in each county separately organized. Fulton and Hamilton counties shall be deemed one county for the purposes of this section. Two or more trial terms may be appointed to be held and may be held at the same time in any county. A trial term in any county may be held in two or more parts, and a jury panel may be summoned to serve in each part, or jurors may be drawn from one panel; and in such county such part or parts, exceeding one, as may be requisite shall be reserved for the trial of actions on sales of personal property, including agreements incident to such sales, for work, labor and services, and material furnished, upon policies of insurance and upon negotiable paper and other instruments transferable by endorsement or order. The rules made by the justices of an appellate division for fixing the times and places for holding special and trial terms, and for assigning the justices for holding special and trial terms, must be assigned by the

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justices making them, and immediately filed in the office of the secretary of state; and a duplicate thereof must also be filed in the office of the clerk of such appellate division, who must immediately transmit a copy thereof, certified by him, to each of the justices of the supreme court in such department not designated as justices of an appellate division. The justices of the appellate division of each department are hereby authorized to adopt and procure an official seal, with suitable devices and inscription. A description of such seal, with an impression thereof, shall be filed in the office of the secretary of state. The expense of procuring such seal shall be a charge against the state, and shall be paid by the state treasurer upon the audit and warrant of the comptroller.

L. 1870, c. 408, § 7; 2 R. S. 201, § 4; Co. Proc., § 20; L. 1852, c. 374, § 5.

Amended by chap. 303 of 1886, chap. 69 of 1893, chaps. 376 and 946 of 1895, chaps. 140 and 561 of 1896, chap. 73 of 1900 and chap. 500 of 1904.

See Art. VI, §§ 2, 6, N. Y. Const., Appointment of terms.

§ 235. General powers and duties of justices.

See Art. VI, §§ 6, N. Y. Const., May hold term in any county.

a. Where a justice who held a special term, at which a motion was made, grants a reargument of such motion, the fact that such justice's term of office expires on December thirty-first, and that a reargument is ordered for the following January, does not prevent him, when re-elected for a term of office beginning upon the expiration of his former term, from presiding at the special term at which the reargument is had: Jewett v. Schmidt, 108 App. Div. 322; 95 N. Y. Supp. 631; 184 N. Y. Supp. 608.

§ 239. Special terms adjourned to chambers; trials thereat.

See § 37, ante, Causes tried elsewhere than at court-house.

§ 241. What justices may perform duties of justices at chambers.

See § 348, post, Jurisdiction of county court, when coextensive with supreme court.

See § 349, post, Power of county judge in special proceedings.

See §§ 772, 773, post, What judges may make orders one of court without notice.

b. **County judge.**—A county judge has no power to grant an injunction under § 10 of the Agricultural Law to restrain the defendant from further violations of that law, as such injunction is within the exception of § 606 of the Code and must be granted by the supreme court or a justice thereof, and therefore neither § 241, relating to the powers of county judges to grant injunctions, nor § 772, specifying who may grant orders when not specifically designated by law, apply; People v. Windholz, 68 App. Div. 552; 74 N. Y. Supp. 241.

§ 244. Supreme court reporter; appointment of; removal of; term of office.

The justices of the appellate division of the supreme court shall meet in convention at the capitol in the city of Albany, on the third Monday in June, 1905, at twelve o'clock noon, for the purpose of appointing a supreme court reporter as hereinafter provided. The secretary of state shall serve a written or printed notice of such meeting, either personally or by mail, upon each of the justices of the appellate divisions of the supreme court, at least two weeks before such meeting. When so convened, such justices, by a majority of those present, shall appoint a supreme court reporter to

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hold office for a term of five years and until his successor is appointed and qualifies, said term to commence at the expiration of the term of office of the present supreme court reporter. Said justices of the appellate divisions of the supreme court must thereafter meet in convention at the capitol in the city of Albany, at noon of the day when the term of office of the supreme court reporter expires, for the purpose of appointing a supreme court reporter in his place. If that day is a Sunday or a public holiday, the convention must be held at the same time and place on the first day thereafter not being Sunday or a public holiday. If the appointment is not made at such a meeting, it may be made at a special meeting of the convention held as prescribed in the next section. The supreme court reporter may be removed for cause by the justices of the appellate divisions of the supreme court or a majority of such of them as attend at a convention held as prescribed in the next section. An appointment or removal must be in writing. It must be signed by the justices making it, and filed in the office of the secretary of state.

L. 1875, c. 131, §§ 1, 2; L. 1877, c. 416; L. 1895, c. 946.
Former §§ 245 and 246 as amended by chap. 164 of 1905.

§ 245. Special meeting for appointment or removal.

A special meeting of the convention for the appointment or removal of a supreme court reporter must be held at the capitol in the city of Albany, but it may be adjourned to any other place. It may be called by a presiding justice by a written or printed notice stating the object of the meeting and served personally or through the post-office, upon each of the justices of the appellate divisions of the supreme court, at least two weeks before the time specified therefor. If the object of the meeting is to consider the question of the removal of the supreme court reporter, the notice must be accompanied with a copy of the grounds alleged for the removal, and both must be served upon the supreme court reporter, personally or by leaving them at his last place of residence with some person of suitable age and discretion, at least ten days before the time appointed for the meeting. The supreme court reporter may be removed at such special meeting.

L. 1875, c. 131, § 2; L. 1895, c. 946.
Former § 247, as amended by chap. 164 of 1905.

§ 246. Duties of reporter; opinions to be furnished to him by justices.

The supreme court reporter must report every cause determined in the appellate divisions of the supreme court unless otherwise directed by the appellate court, or a judge thereof. To enable him to perform that duty, the justices of said appellate division must immediately deliver to him the written opinions, or certified copies thereof, rendered in each cause so determined. Each decision of the court which is reported must be so

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reported as soon as practicable after it is made. The supreme court reporter must prepare for each volume and cause to be published therewith, the usual digest, head notes, table of contents and index, and on the appointment of his successor, must deliver to him all papers in his hands pertaining to a cause which he has not reported, or which are not necessary to be retained by him to complete the publication of a volume which is then partly printed. Said supreme court reporter after the expiration of his term of office, shall not deliver a paper specified in this section or a copy thereof, to any person other than his successor in office, or the publisher of a partly printed volume, except that a copy of such paper may be furnished by him during a vacancy in the office, to a justice of the supreme court or to the attorney for a party to the cause to which it relates. Such supreme court reporter must deposit with the clerk of each appellate division all opinions delivered to him from such appellate divisions which are not to be reported, immediately after the publication of the reports of the other causes decided at the same time. They must be properly filed and preserved by such clerks.

L. 1875, c. 131, § 3; L. 1869, c. 99, § 1; L. 1875, c. 131, § 3; L. 1893, c. 309; L. 1895, c. 946.

Former §§ 248, 249, as amended by chap. 164 of 1905.

§ 247. Contract for publication of reports; price of volumes; advance sheets.

The supreme court reporter shall not have any pecuniary interest in the reports, but a contract for the publication thereof under his supervision, must from time to time be made in behalf of the people by said supreme court reporter, subject to the approval of the presiding justices of the appellate divisions, with the person or persons who agree to furnish to the secretary of state so many copies of each volume as may be needed to enable him to comply with section 213 of the Code of Civil Procedure, and also to publish and sell the reports on terms the most advantageous to the public, regard being had to the proper execution of the work, and also to the continuation of the publication of an official series of reports, with weekly advance sheets, in substantially the same form as heretofore, and at a price not exceeding two dollars for a volume of not less than one thousand pages. Each contract so entered into must provide for the publication of the reports for five years from the expiration of the time specified for that purpose in the last contract or from the abrogation thereof. If the supreme court reporter determines that a contract has not been faithfully kept by the person or persons agreeing so to publish the reports, such reporter may, by an instrument in writing under his hand, approved by the presiding justices of the appellate divisions, filed in the office of the secretary of state, annul the same from a time specified in the instrument, and thereupon immediately enter into a new contract, likewise to be

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approved by the presiding justices of the appellate divisions, for the publication of the reports for five years from the time so specified. Before entering into a contract the supreme court reporter must advertise for, receive and consider proposals for the publication of the reports. The supreme court reporter may also cause advance sheets of the reports to be published at not to exceed fifty cents a volume; he must cause the reports published as prescribed herein, to be kept constantly for sale to persons within the state at the price provided for in said contract.

L. 1869, c. 99, § 2; L. 1875, c. 131, § 3; L. 1893, c. 309; L. 1894, c. 218; L. 1895, c. 946; L. 1897, c. 474; L. 1899, c. 278.

Amended by chap. 164 of 1905.

§ 248. Papers delivered by attorneys for use of reporter.

In each cause heard by the appellate division of the supreme court, the attorney or counsel for each party must deliver to the clerk of said appellate division, for the use of the supreme court reporter, a duplicate of each paper furnished by him for the use of the court. The clerk must collect such papers from the counsel; and immediately transmit them to the supreme court reporter.

L. 1875, c. 131, § 3.

Amended by chap. 946 of 1895 and chap. 164 of 1905.

§ 249. Copyright of reports.

Neither the supreme court reporter nor any other person shall obtain a copyright of the opinions contained in the reports, and the same may be published by any person, but the copyright of the statement of facts of the head notes and of all other notes or references published by the supreme court reporter must be taken by and shall be vested in the secretary of state for the benefit of the people of the state. The secretary of state shall distribute the reports so furnished him as specified in section 247 as provided in section 213 of the Code of Civil Procedure.

Added by chap. 164 of 1905.

§ 250. Salary of reporter; allowances.

The supreme court reporter shall receive an annual salary of five thousand dollars, payable quarterly, and in addition thereto such allowances for clerk hire and office expenses as the legislature shall from time to time direct.

Added by chap. 164 of 1905.

§ 251. Stenographers.

See §§ 82 et seq., ante, Qualifications of stenographers and provisions relating to notes.

See § 359, post, Compensation in county court.

See §§ 2512, 2513, post, Stenographers in surrogate's court.

See § 3311, post, Fees for transcripts.

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§ 254. Stenographers in Kings county.

The justices of the supreme court, residing in the county of Kings, or a majority of them, may appoint and may at pleasure remove sixteen stenographers who shall severally attend, as directed by the respective justices appointing them, the terms of the appellate division and trial and special terms of the supreme court, in the county of Kings and shall each receive an annual salary of three thousand dollars and the expense thereof shall be raised with the annual tax levy as a county charge.

L. 1866, ch. 422, §§ 1, 2, L. 1870, ch. 606.

Amended by chap. 536 of 1884, chap. 946 of 1895, chap. 970 of 1896, chap. 661 of 1897, chap. 616 of 1905 and chap. 17 of 1907.

§ 256. Stenographers in other counties of second judicial district and also in the ninth judicial district.

Each justice of the supreme court for the second judicial district, who does not reside in the county of Kings, may appoint, and may at pleasure remove, a stenographer, who must attend, as directed by the justice appointing him, the trial and special terms of the supreme court held in the counties of Suffolk, Queens, Nassau and Richmond, or either of them, and, when not thus officially engaged, the stated terms of the county court, in each of those counties. Each justice of the supreme court for the ninth judicial district may appoint, and may at pleasure remove, a stenographer, who must attend, as directed by the justice appointing him, the trial and special terms of the supreme court held in the counties of Westchester, Putnam, Dutchess, Orange and Rockland, or either of them, and, when not thus officially engaged, the stated terms of the county court in each of those counties.

Amended by chap. 416 of 1877, chap. 946 of 1895 and chap. 535 of 1907.

§ 258. Stenographers for certain judicial districts.

In addition to the stenographers appointed under special laws, the justices of the supreme court, or a majority of them, for each judicial district, excepting the first, second, third, fifth, seventh, and eighth, shall appoint, and may at pleasure remove, three stenographers. The justices of the supreme court, or a majority of them, for the fifth and seventh judicial districts, respectively, shall appoint, and may at pleasure remove, five stenographers of the supreme court for each of such districts. The justices of the supreme court, or a majority of them, for the third judicial district, shall appoint, and may at pleasure remove, four stenographers of the supreme court for such district. The justices of the supreme court for the eighth judicial district shall appoint, and may at pleasure remove, eight stenographers of the supreme court for such district. Each of the stenographers shall attend such special and trial terms of the supreme court in his judicial district as he shall be assigned

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to attend by the justices of the supreme court, or a majority of them, for such district. Each of such stenographers shall receive an annual salary of twenty-five hundred dollars, to be paid by the comptroller of the state in equal quarterly payments, upon the certificate of a justice of the supreme court of the judicial district for which he shall have been appointed.

L. 1871, ch. 700, §§ 1, 2.

Amended by chap. 426 of 1890, chap. 36 of 1893, chaps. 112 and 625 of 1894, chap. 946 of 1895, chap. 173 of 1903, chap. 58 of 1904 and chap. 60 of 1907.

§ 263. Court of claims.

The board of claims is continued and shall hereafter be known as the court of claims. The court consists of the commissioners of claims now in office and their successors, who shall hereafter be known and designated as judges of the court of claims. Judges shall be appointed by the governor, by and with the advice and consent of the senate. Whenever the term of office of a judge shall expire, or a vacancy shall occur therein, otherwise than by expiration of term, his successor shall be appointed for a full term of ten years from the expiration of the preceding term or from the occurrence of the vacancy, as the case may be. The present judges of the court of claims shall continue to serve, and their term of office is hereby extended for the full period of ten years after this act shall take effect. Notwithstanding the provisions of section five of the public officers law, a judge of the court of claims shall hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen until his successor shall be chosen and qualified, but after the expiration of such term the office shall be deemed vacant for the purpose of choosing his successor. By an order to be filed in the office of the secretary of state, the governor shall designate one of the judges as a presiding judge, who shall act as such during his term; two of the judges shall constitute a quorum for the transaction of business.

Added by chap. 36 of 1897.

Amended by chap. 16 of 1904 and chap. 692 of 1906.

a. **Practice.**—Under the provisions relative to the court of claims there is no reason why the practice therein should not be measured or judged by the same rules as prevail in the supreme court; where the counsel for the state failed to renew at the close of all the evidence, a motion for a nonsuit which was made and denied at the end of the evidence for the claimant, such failure will be regarded as an admission that there is some question of fact to be passed upon and a waiver of the right to have the claim and case dismissed as a matter of law: Spencer v. State, 187 N. Y. 484, aff'g 110 App. Div. 585; 97 N. Y. Supp. 154.

§ 264. Jurisdiction.

The court of claims possesses all of the powers and jurisdiction of the board of claims. It also has jurisdiction to hear and determine a private claim against the state, which shall have accrued within two years, arising upon or out of a contract with the state, or an appropriation of land by the

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state. It may also hear and determine any claim on the part of the state against the claimant, or against his assignor at the time of the assignment; and must render judgment for such sum as should be paid by or to the state. But the court has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination. Where jurisdiction to hear and determine a claim is conferred upon the court by a special law, the liability of the state is not thereby implied, but such a claim is subject to defense and counterclaim by the state in the same manner and to the same extent as presented under a general law. No claim which shall accrue after the passage of this act other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney-general a written notice of intention to file a claim against the state, stating the time when, and the place where such claim arose and in detail the nature of the same, which notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

Added by chap. 36 of 1897.
Amended by chap. 370 of 1905 and 692 of 1906.

a. By § 264 as amended by chap. 370 of the Laws of 1905 and as said section existed prior to the amendment made by chap. 692 of 1906, the court of claims had jurisdiction to hear and determine a private claim against the state arising within the time stated, without any restriction as to the character of the claim except that it be a private claim. Hence, the court of claims had jurisdiction for a claim for damage and for trespass by the state forest, fish and game commission upon private property. Under the section as then standing the court had jurisdiction whether the claim were legal or equitable: Remington v. State of New York, 116 App. Div. 522.

b. An attorney appointed by a committee of the assembly pursuant to a resolution of the assembly authorizing the appointment of counsel to such committee, may sue in the court of claims without a special enabling act, for the court has jurisdiction over claims of that character accruing within two years, by virtue of § 264: Nussbaum v. State of New York, 119 App. Div. 755.

c. Damages.—When a claimant against the state for damages caused to crops by the overflow of a state canal has proved damage to the extent of $900, the court of claims has no power to reduce the amount to $300: Crowley v. State of New York, 112 App. Div. 872; 98 N. Y. Supp. 1094.*

d. The court of claims has no jurisdiction to determine the damages arising from the trespass of the state engineer in making a state survey; § 264 does not undertake to create claims against the state: Litchfield v. Bond, 186 N. Y. 66, rev'g 105 App. Div. 228.

e. It seems that the state is liable to a landowner for damages which he has sustained because of the entry on his property of the state survey, and that the court of claims has jurisdiction to hear and determine the landowner's claim: Litchfield v. Bond, 105 App. Div. 229; 93 N. Y. Supp. 1016.

§ 265. Rules and procedure.

The court may establish rules for its government, and the regulation of practice therein; prescribe the forms and method of procedure before it, vacate or modify judgments and grant new trials, and except as otherwise provided in said rules and regulations, or the code of civil procedure, the practice shall be the same as in the supreme court.

Added by chap. 36 of 1897.
Amended by chap. 692 of 1906.

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§ 266. Officers.

The court shall appoint and may remove for cause a clerk, a deputy clerk, a stenographer, and a marshal, who shall also act as messenger; and they shall perform such duties as the court may prescribe. Before entering upon the duties of his office, the clerk shall make and file in the office of the comptroller, a bond for the faithful performance of his duties in an amount and with sufficient sureties to be approved by at least two of the judges, which approval shall be indorsed on said bond.

Added by chap. 36 of 1897.
Amended by chap. 692 of 1906.

§ 268. Sessions; duty of sheriff.

The court shall hold at least eight sessions each year, and unless otherwise ordered by the court shall be held as follows: On the fourth Monday of January at the capitol in Albany; on the third Monday of February at the city of Syracuse; on the fourth Monday of March at the city of Utica; on the fourth Monday of April at the capitol at Albany; on the fourth Monday of May at the city of Rochester; on the third Monday of June at the city of Buffalo; on the fourth Monday of September at the capitol in Albany; on the fourth Monday of November at the capitol at Albany; and it may also hold adjourned or special sessions at such other times and places in the state as it may determine. It may also hold a session and take testimony where the claimant resides or where the claim is alleged to have arisen, or in the vicinity, and may view any premises affected by the proceedings, and in case of any appropriation of land by the state, the value of which shall exceed five hundred dollars, it shall be the duty of the court to view the premises affected by the appropriation. The sheriff of any county, except Albany, shall furnish for the use of the court suitable rooms in the court house of his county for any session ordered to be held thereat, and shall if required attend said session. His fees for attendance shall be paid out of the contingent fund of the court, at the same rate as for attending a term of the supreme court in that county.

Added by chap. 36 of 1897.
Amended by chap. 692 of 1906.

§ 269. Judgments.

a. Under § 269 the judgment must contain a description of the land and where damages are awarded for the permanent appropriation of land, a satisfactory abstract of title must be filed with the comptroller: Litchfield v. Bond, 105 App. Div. 229; 93 N. Y. Supp. 1016.

b. **Judgment dismissing claim.**—Where an act confers jurisdiction upon the Court of Claims to hear and determine a proceeding, "no award shall be made or judgment rendered herein against the state unless the fact proved will make out a case against the state which would create a liability were the same established in evidence in a court of law or equity against an individual or corporation," it was held that a judgment of the court of claims dismissing the claim after the passage of said act should be reversed: American Bank Note Co. v. State, 64 App. Div. 223; 71 N. Y. Supp. 1049.

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§ 270. Duty of attorney-general and superintendent of public works.

The attorney-general shall represent the state in all proceedings relating to claims. In all cases of canal claims a copy of each such claim and of notice of claim which is or may hereafter be required to be filed with the court of claims shall be filed with the superintendent of public works who on request from the attorney-general, shall furnish such assistance as he may require in subpoenaing witnesses and preparing the cases for trial. The attorney-general may designate a clerk in his office to assist in the preparation of cases for trial and to attend a term of the court. And no claim brought against the state on account of the canal shall be settled or compromised for any amount without the written consent thereto by the superintendent of public works or his duly authorized representative.

Added by chap. 36 of 1897 and amended by chap. 370 of 1905.

§ 275. Appeals.

See § 191, ante, Limitations, exceptions to appeal to the court of appeals.
See § 1346 et sèq., post, Appeal to the appellate division of the supreme court.

a. The provisions of § 275 gives no greater right of appeal from orders than is given from orders of the supreme court, and an appeal does not lie from an order of the court of claims dismissing or refusing to dismiss a complaint; a judgment on such ruling should be entered and an appeal taken therefrom: Withers v. State of New York, 61 App. Div. 251.

b. The appellate division has only the same power to affirm, reverse or modify a judgment of the court of claims that it has in respect to judgments of the supreme court: Crowley v. State of New York, 112 App. Div. 872; 98 N. Y. Supp. 1094.

§ 279. Salary of judge of court of claims.

Each judge of the court of claims shall receive an annual compensation of eight thousand dollars, payable monthly, which sum shall include all his expenses and disbursements connected with his office. A judge of the court of claims shall not during his term of office, practice the profession of law, or act as referee in any action or proceeding in any of the courts of this state.

Added by chap. 36 of 1897.
Amended by chap. 692 of 1906.

§ 280. Salaries of officers of court of claims.

Each officer of the court of claims shall receive an annual salary, payable monthly, and other compensation as follows:

1. The clerk, four thousand dollars.

2. The deputy clerk, three thousand dollars.

3. The stenographer, two thousand five hundred dollars, and five cents a folio for copies of minutes and testimony furnished at the request of the claimant.

4. The marshal, including also his services as messenger, twelve hundred dollars. The clerk, deputy clerk, stenographer and marshal shall be paid their actual expenses while in the discharge of their

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respective duties, elsewhere than in the city of Albany, to be audited by the court and paid from the contingent fund. No charge shall be made against the state by the clerk or the stenographer for copies of minutes, testimony or papers, furnished to the attorney-general or to the court, or filed in the office of the clerk.

Amended by chap. 579 of 1907.

§ 315. Jurisdiction.

See § 3159 et seq., post, As to procedure.

a. The city court of the city of New York is without jurisdiction of an action to enforce a mechanic's lien amounting to over $2,000, and may not, therefore, direct the cancellation of a lien amounting to $7,300 upon giving an undertaking: Matter of Steiger v. London, 52 Misc. 462.

b. The city court of the city of New York has jurisdiction in an action to recover the purchase price of goods sold to defendant as receiver in bankruptcy of a domestic corporation, for use in carrying on its business as authorized by an order of the bankruptcy court: Orr Co. v. Cushman, 54 Misc. 121.

§ 316. The last section limited.

c. The pendency of an action in the city court of New York is a bar to the maintenance of the same action in the supreme court; § 316 does not deprive the city court of New York of jurisdiction of an action where judgment is demanded for more than $2,000, but simply limits the amount of the judgment which may be recovered to $2,000: Ralli v. Pearsall, 69 App. Div. 254; 74 N. Y. Supp. 620.

§ 319. Removal of action to supreme court from city court.

See § 218, ante, Supreme court may change place of trial of actions pending in other courts.

§ 320. Justices; their general duties.

The court consists of ten justices, one of whom is the chief justice of the court. Each justice must perform his share of the labors and duties appertaining to the office. One of the justices must attend at the chambers of the court, from ten o'clock in the morning until four o'clock in the afternoon of each day, except Sunday, a public holiday, or a day upon which the inhabitants of the city of New York generally refrain from business. Each justice, while in the rooms of the court, and not actually engaged in the performance of other official duties, must act upon any application for his official action, properly made to him. The justice, assigned to a trial term or a special term, must remain in attendance, until the day calendar is disposed of, or for such other time as is reasonable.

Amended by chap. 416 of 1877 and chap. 707 of 1907.

§ 323. Justices may make rules.

d. A statement in an order granting a new trial of the grounds on which the motion for a new trial was made is not a sufficient compliance with Rule 31 of the General Rules of Practice, which requires the order to specify the grounds on which it was granted: Israel v. Ury, 52 Misc. 523.

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§ 324. Court, when open; justices to designate terms; routine of business, etc.

a. Where, upon the day set for the trial of a case in the city court of the city of New York, the trial justice had before him an unfinished case and another case ready for trial, which was tried, and defendants' counsel was actually engaged in the trial of a case in the supreme court, an inquest was improperly ordered; the case should have been marked "ready" and an inquest should not have been ordered until the case was actually reached for trial: Pierce, etc., Mfg. Co. v. Kleinfeld, 53 Misc. 260.

§ 328. Clerk, deputy clerk, assistants, stenographers, interpreters, and attendants.

The court has a clerk who is appointed, and may be removed, by the justices thereof, or a majority of them for cause upon charges and after a hearing after notice, and who shall receive a salary of six thousand dollars per annum. The justices of the court or a majority of them must, appoint, and may at pleasure remove, six deputy clerks and not more than fifteen assistants. The clerk is responsible for the faithful discharge of his duty by each deputy clerk, and each assistant. Each deputy clerk, and each assistant, is entitled to a salary, fixed and to be paid as prescribed by law.

L. 1872, ch. 438, § 1; L. 1857, ch. 295, § 6; L. 1873, ch. 453, § 2; L. 1876, ch. 413, §§ 1, 4.

Amended by chap. 416 of 1877, chap. 154 of 1891, chap. 662 of 1906 and chap. 708 of 1907.

§ 329. General duties of deputy clerk.

The deputy clerk has all the powers, and may perform all the duties of the clerk, when the office of clerk is vacant, or at the clerk's office, when the clerk is absent therefrom, or at a term or sitting of the court which the deputy clerk attends.

Amended by chap. 708 of 1907.

§ 332. Stenographers.

The justices of the court or a majority of them must appoint nine stenographers of the court, and may at pleasure remove either of them. The justices of the court, or a majority of them, must, from time to time, assign each of the stenographers to duty at the trial or special term. Each stenographer is entitled to a salary, fixed and to be paid as prescribed by law and must attend the term to which he is assigned.

Amended by chap. 413, §§ 1, 4, of 1876, chap. 416 of 1877, chap. 61 of 1906 and chap. 708 of 1907.

§ 333. Official oath. Interpreters.

The justices of the court or a majority of them from time to time, must appoint, and may at pleasure remove, two official interpreters of the court, who are entitled to a salary, fixed and to be paid as prescribed by law. Before entering upon their official duties the clerk, deputy clerks, assistant clerks, stenographers, interpreters and attendants must

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subscribe and file in the office of the clerk of the city of New York, the constitutional oath of office. Each interpreter must attend any trial or special term of the court, where his services are required; and the justices therein presiding shall regulate his attendance thereat.

Amended by chap. 416 of 1877 and chap. 708 of 1907.

§ 334. Idem; penalty for misconduct.

If an official interpreter knowingly and wilfully, falsely interprets any evidence, matter or thing, between a witness and the court, or a justice thereof, in the course of an action or special proceeding, he is guilty of perjury.

Amended by chap. 707 of 1907.

§ 335. The justices must appoint attendants, etc.

The justices of the court or a majority of them must appoint, and may at pleasure remove, as many attendants upon the court as they deem necessary, not exceeding twenty-two. The justices of the court, or a majority of them, may regulate their attendance. Each attendant is entitled to a salary fixed, and to be paid as prescribed by law.

Amended by chap. 416 of 1877 and chap. 708 of 1907.

§ 338. What mandates may be executed without the city.

a. An order in supplementary proceedings, requiring the judgment debtor to attend for examination, is an order in an action: Deane v. Sire, 48 Misc. 606.

b. **Irregular execution.**—An objection that the execution on which supplementary proceedings were based, was irregular under § 338, subd. 1, which objection appeared on the face of the affidavit on the application for the judgment debtor's examination, is available to a junior judgment creditor and entitles her to have the order appointing the receiver vacated: Matter of Shannon v. Steger, 75 App. Div. 279; 78 N. Y. Supp. 163.

§ 340. Jurisdiction.

See Art. VI, § 14, N. Y. Const., Jurisdiction limited by the Constitution.
See § 349, post, Power of county judge in special proceedings.

a. **Concurrent jurisdiction.**—The county court has concurrent jurisdiction with the supreme court in proceedings for the care of the person and property of persons who are incompetent to manage their affairs by reason of lunacy, idiocy or habitual drunkenness: Matter of Clark, 57 App. Div. 5; 67 N. Y. Supp. 631, aff'd 169 N. Y. 595.

d. **Incompetent.**—When the county court directs an inquisition by a jury to inquire into the condition of the alleged incompetent, their finding must be so far within the terms of the statute as to leave no doubt that the person has been found either a lunatic or of so unsound mind as to be classified as such: Matter of Clark, 175 N. Y. 139, rev'g 77 App. Div. 633; 79 N. Y. Supp. 1129.

e **Counterclaim.**—While the jurisdiction of the county court is limited by § 340 to actions in which the complaint demands judgment for a sum not exceeding two thousand dollars, yet the court has, under section 348, jurisdiction and power to render judgment on a counterclaim for any amount: Howard Iron Works v. Buffalo El. Co., 176 N. Y. 1, rev'g 81 App. Div. 386; 81 N. Y. Supp. 452.

f. **Power to reduce amount claimed.**—Under art. 6, § 14 of the Constitution, and § 340, subd. 2 of the Code, the court has not jurisdiction of an action in which judgment is claimed for $5,000, and the court has no power to allow the plaintiff to amend the complaint by reducing the amount claimed as damages to $2,000: Heffron v. Jennings, 66 App. Div. 443; 73 N. Y. Supp. 410.

g. **Residence.**—Residence in the county is essential to give a county court jurisdiction in an action to recover a sum of money only, and residence must appear on the face of the pleadings, and neither consent nor waiver will give jurisdiction: Perlman v. Gunn, 41 Misc. 166; 83 N. Y. Supp. 986.

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§ 342. Action, etc., wherein county judge is incapable to act.

See § 46, ante, Judge not to sit where he is a party, etc.

§ 343. Supreme court may remove action, and change place of trial.

See § 218, ante, Supreme court may change place of trial of actions pending in other courts.

§ 348. When jurisdiction, etc., co-extensive with supreme court.

a. **Counterclaim.**—While the jurisdiction of the county court is limited by § 340 to actions in which the complaint demands judgment for a sum not exceeding two thousand dollars, yet the court has, under § 348, jurisdiction and power to render judgment on a counterclaim for any amount: Howard Iron Works v. Buffalo El. Co., 176 N. Y. 1, rev'g 81 App. Div. 386; 81 N. Y. Supp. 452.

§ 349. Power of county judge in special proceedings.

See § 472, post, May appoint guardian ad litem.
See § 556, post, May grant order of arrest.
See § 606, post, May grant injunction order.
See § 638, post, May grant warrant of attachment.
See § 772 et seq., post, May make orders out of court.
See § 780, post, May grant order to show cause.
See § 873, post, May grant order to take deposition within the state.
See § 889, post, May grant order to take deposition without the state.
See § 1442, post, May grant order to prevent waste by judgment debtor.
See § 2009, post, May issue writ of habeas corpus to bring up person to testify.
See § 2434, post, May grant order in supplementary proceedings.
See § 2017, post, May issue writ of habeas corpus.

§ 354. Who may make orders.

b. An *ex parte* order of a county court extending the time to answer is valid under § 354; an order made upon an order to show cause of a supreme court justice under the caption of the county court is invalid if made at the special term of the supreme court if the order to show cause was returnable at a special term of this court, which was the county court, and was further invalid because the special term of the supreme court had no jurisdiction under §§ 354 and 772 to make such an order in a county court action: Edwards v. Shreve, 83 App. Div. 165.

§ 356. Notice of appointment to be published.

See § 45, Criminal Code, Publication of criminal terms.

§ 358. Stenographers for county courts.

The board of supervisors of any county except Kings, Queens, Livingston, Monroe, Cortland, Oswego, Westchester and Onondaga, may, in their discretion, provide for the employment of a stenographer for the county court thereof, and when said board of supervisors shall so provide, the stenographer shall be appointed by the county judge and said board of supervisors must fix his compensation and provide for the payment thereof in the same manner as other county expenses are paid.

Chap. 626, § 1, of 1869.
Amended by chap. 403 of 1883, chap. 946 of 1895 and 629 of 1906.

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§ 359. Stenographers for county courts in Kings and Queens counties.

The county judges of the county of Kings, from time to time, must appoint, and may at pleasure remove, two stenographers to be attached to the county court of the county of Kings, and the county judge of the county of Queens, from time to time, must appoint, and may at pleasure remove, one stenographer to be attached to the county court of the county of Queens, who must attend each term of said courts, and each of whom shall receive a salary of three thousand dollars per annum, to be paid in equal monthly instalments. Each of the stenographers appointed as prescribed in this section may, with the consent of the county judges, appoint an assistant stenographer to aid him in the discharge of his duties, whose compensation shall be paid by the stenographer appointing him and is not a county charge. Each of said county judges shall also appoint a confidential clerk at a salary not to exceed two thousand dollars per annum, to be paid by the comptroller of the city of New York in equal monthly instalments, such clerks to be exempt from competitive examination, and their fitness and qualifications for the office shall be approved by the judge making the appointment.

Chap. 271, §§ 1, 2 and 3, of 1867.

Amended by chap. 416 of 1877, chap. 946 of 1895, chap. 6 of 1896 and chap. 629 of 1906.

§ 361. Stenographers.

The county judge in either of the counties of Livingston, Onondaga, Oswego or Cortland, where issues of fact are triable, may employ a stenographer to take stenographic notes upon trial thereat, who is entitled to a compensation, to be certified by the judge, not exceeding ten dollars for each day's attendance at the request of the judge. The stenographer's compensation is a charge upon the county, and in the county of Livingston may be audited, allowed and paid as other county charges; and in the counties of Onondaga, Oswego and Cortland must be paid by the county treasurer on an order of the court, granted on the affidavit of the stenographer, and the certificate of the judge that the services were rendered. The county judge in each of the counties of Albany, Erie, Monroe, Oneida, Rensselaer and Niagara may appoint and at pleasure remove a stenographer of said court, who must attend each term of the said court where issues of fact in civil and criminal cases are triable, and the said stenographer of the county court of Albany county shall receive a salary of sixteen hundred dollars per annum, together with his necessary expenses for stationery, to be paid by the treasurer of said county of Albany, in equal monthly instalments on the certificate of said judge of Albany county that the services have been actually performed, or the expenses necessarily incurred, and the said stenographer of the county court of Erie county shall receive a salary of twenty-one hundred dollars per annum,

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together with his necessary expenses for stationery, to be paid by the treasurer of said county of Erie, in equal monthly instalments on the certificate of said judge of Erie county that the services have been actually performed, or the expenses necessarily incurred, and the said stenographer of the county court of Monroe county shall receive a salary of twenty-one hundred dollars per annum, together with his necessary expenses for stationery, to be paid by the treasurer of said county of Monroe in equal monthly instalments in the same manner that the salaries of other officials of said county are audited, allowed and paid, and the said stenographer of the county court of Oneida county shall receive a salary of fifteen hundred dollars per annum, together with his necessary expenses for stationery, to be paid by the treasurer of the said county of Oneida in equal monthly instalments on the certificate of the said judge of Oneida county that the services have been actually performed or the expenses necessarily incurred, and the said stenographer of the county court of Rensselaer county shall receive a salary of twelve hundred dollars per annum, to be paid by the treasurer of said county of Rensselaer, quarterly. Said stenographers shall also report and transcribe opinions for the said county judges, as well as special proceedings where a stenographer is required, without additional compensation. The said stenographer of the county court of Niagara county shall receive a compensation of not to exceed ten dollars for each day's attendance, to be paid by the treasurer of said county of Niagara on the affidavit of the stenographer and certificate of the judge that the services have been actually performed, and shall within twenty days after notice by a party that he intends to appeal, make a case and exceptions or bill of exceptions in a civil or criminal action, or that briefs are to be made or arguments prepared in an action tried before the court without a jury, file with the clerk of said county a transcript of the minutes taken by him upon such trial, and shall be entitled to six cents for each one hundred words of such transcript so filed by him, which shall be certified to by the judge holding the court at which such trial took place. Such sum so certified shall be paid by the county treasurer of said county upon presentation of such certificate. In any county in which there is a special county judge and the official stenographer of such county is engaged in the performance of his duties as such, or shall be necessarily absent with the consent of the judge thereof, the county judge, or special county judge, may, in his discretion, employ a stenographer who shall be paid such compensation as the judge shall by his certificate fix, not to exceed ten dollars for each day's attendance. The sum so fixed is a charge upon the county and may be audited, allowed and paid as other county charges.

Chap. 46 of 1864, chap. 437 of 1866, chap. 749 of 1872.

Amended by chap. 63 of 1878, chap. 7 of 1883, chap. 105 of 1886, chap. 499 of 1888, chap. 312 of 1890, chap. 946 of 1895, chap. 176 of 1897, chap. 371 of 1900, chap. 83 of 1903, chap. 188 of 1905 and chap. 522 of 1906.

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§ 362. When the people will not sue.

a. This section is to be construed in connection with § 368: Deering v. Riley, 38 App. Div. 164; 56 N. Y. Supp. 704, aff'd 167 N. Y. 84.

b. **Riparian owners.**—The exclusive right of fishery in the Hudson river opposite the owner's uplands is not such as to constitute an adverse possession within the provisions of this title: Slingerland v. International Contracting Co., 43 App. Div. 215; 60 N. Y. Supp. 12, aff'd 169 N. Y. 60.

c. When the use of waters from the state canal has been leased to the defendant's predecessor in title by the canal commissioners at a yearly rental, with the reservation of a right to revoke such lease, and with a provision for forfeiture if the rent is not paid, and said rent has not been paid for over fifty years and no demand for payment has been made by the state, and the state has not revoked the lease before a tender of back payments by the defendant, such failure to pay is not an abandonment of the lease, and, as the state has slept on its rights, there is no forfeiture; but when such defendant seeks relief from his default in equity, he must pay the rent due and cannot avail himself of the statute of limitations which would bar an action therefor by the people after twenty years: People v. Freeman, 110 App. Div. 605.

§ 364. Action after annulling letters patent.

See § 414, post, "Action " includes " Special Proceedings."

d. When the use of waters from the state canal has been leased to the defendant's predecessor in title by the canal commissioners at a yearly rental, with the reservation of a right to revoke such lease, and with a provision for forfeiture if the rent is not paid, and said rent has not been paid for over fifty years and no demand for payment has been made by the state, and the state has not revoked the lease before a tender of back payments by the defendant, such failure to pay is not an abandonment of the lease, and, as the state has slept on its rights, there is no forfeiture; but when such defendant seeks relief from his default in equity, he must pay the rent due and cannot avail himself of the statute of limitations which would bar an action therefor by the people after twenty years: People v. Freeman, 110 App. Div. 605.

§ 365. Seizin within twenty years, when necessary, etc.

e. **Possession presumed.**—Possession of real title is to be presumed when the title thereto was in plaintiff: Brown v. Doherty, 93 App. Div. 190; 87 N. Y. Supp. 563, aff'd 185 N. Y. 383.

f. **Seizin or possession of highway.**—The seizin or possession of the owner of land in a highway over which a city has acquired an easement only is not lost by the city's occupation, because that is in subordination to the legal title, and on the abandonment of the road no question arises of re-entry or the loss of the right thereto by lapse of time: Deering v. Riley, 167 N. Y. 184, aff'g 38 App. Div. 164; 56 N. Y. Supp. 704.

g. **Title to mortgage of premises.**—A mortgagee has no title to mortgaged premises either before or after default, and if in possession, the mortgagor may maintain ejectment, in which case the Statute of Limitations is found in § 365, not in § 379: Becker v. McCrea, 119 App. Div. 56.

§ 368. Possession, when presumed; occupation presumed to be under legal title.

h. **Adverse possession.**—When the court will be justified in assuming that encroachments existed by leave or favor and did not constitute adverse possession within the meaning of the Code: Van Horn v. Stuyvesant, 50 Misc. 432.

i. An occupation by another than the owner is deemed to be under and subordinate to the legal title unless there is an adverse possession for twenty years: Drake v. Drake, 61 App. Div. 1; 70 N. Y. Supp. 163.

j. **Occupation of lands for highways.**—The seizin or possession of the owner of lands taken by a city for highways is not lost by the city's occupation, for that is in subordination to the legal title; the city's possession for use as a public highway being the possession of the owner and his successors in interest: Deering v. Riley, 167 N. Y. 184, aff'g 38 App. Div. 164; 56 N. Y. Supp. 704.

k. An owner of land abutting on a highway cannot acquire title to any portion of the highway by an adverse possession, not based on a written instrument, unless he incloses the land or customarily cultivates it, which cultivation must be notorious, hostile and exclusive: Halleran v. Bell Telephone Co., 64 App. Div. 41; 71 N. Y. Supp. 685, aff'd 177 N. Y. 533.

l. **Evidence.**—Evidence tending to show that the plaintiffs had for more

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than twenty years been in possession, claiming title founded on a written instrument, and had built wharves, boats and bath houses on the shore and had cut hay from the marshes is sufficient, although they had not attempted to fence or cultivate the premises: O'Donohue v. Cronin, 62 App. Div. 379; 70 N. Y. Supp. 737.

§ 369. Adverse possession under written instrument or judgment.

a. When a person having already a title to an undivided two-thirds interest in real estate, purchases her co-tenant's undivided one-third interest on execution, and for over twenty years claims title to the whole premises, the sheriff's deed on such execution is sufficient to support such adverse possession to the whole property against a grantee and his successors in title claiming under a sale on a prior execution against said co-tenant: Tarplee v. Sonn, 109 App. Div. 241; 95 N. Y. Supp. 844.

b. **Undisturbed possession.**—In order to consititute undisturbed possession, the occupation must be taken and continued under claim of title exclusive of any other right: Fortier v. D., L. & W. R. R. Co., 93 App. Div. 24; 86 N. Y. Supp. 896.

c. Proof of the undisturbed possession of land for more than twenty years under deeds purporting to convey the same does not establish title by adverse possession, in the absence of proof that the entry was under the deeds in question and was exclusive of any other right: Freedman v. Oppenheim, 80 App. Div. 487; 81 N. Y. Supp. 110.

d. **Tax lease.**—A claim under a tax lease for a term of years is not sufficient foundation for an adverse possession: Miller v. Warren, 94 App. Div. 192; 87 N. Y. Supp. 1011.

e. **Evidence.**—Evidence tending to show that the plaintiffs had for more than twenty years been in possession, claiming title founded on a written instrument and had built wharves, boats and bath houses on the shore and had cut hay from the marshes is sufficient, although they had not attempted to fence or cultivate the premises: O'Donohue v. Cronin, 62 App. Div. 379; 70 N. Y. Supp. 737.

f. Where the evidence upon a new trial with respect to the issue of adverse possession was substantially the same as that given on a former trial, the appellate division on a second appeal, having once decided that the issue of adverse possession was properly submitted to the jury, should adhere to that decision and leave the correctness thereof to be considered by the court of appeals: Lewis v. Upton, 90 App. Div. 453; 86 N. Y. Supp. 397.

g. **Marketable title.**—Where an owner of lands and her predecessors in title have been in continuous adverse possession for forty-one years under a sheriff's deed of foreclosure and warranty deeds subsequent thereto, the title is marketable although no record of the judgment in the foreclosure action can be found: Messinger v. Foster, 115 App. Div. 689; 101 N. Y. Supp. 387.

§ 370. Id.; what constitutes it.

h. Evidence that the widow of a testator, to whom a plot had been devised by will, took possession by interring the body of her husband, and that subsequently she removed the body from the plot and conveyed the premises, does not establish a valid title to the plot by adverse possession in her grantee: Meiggs v. Hoagland, 68 App. Div. 182; 74 N. Y. Supp. 234.

i. **Substantial inclosure.**—A lot completely inclosed against every one except the plaintiff's father, who made no claim of title, but which was left open on the side towards the land of plaintiff's father, and which otherwise were completely inclosed, is within the meaning of §§ 369-370 "protected by a substantial inclosure:" Brown v. Doherty, 93 App. Div. 190; 87 N. Y. Supp. 563, aff'd 185 N. Y. 383.

j. **Actual occupancy.**—The definition given in § 134 of the Tax Law is at least as precise and explicit as was the word "possession," which § 370 of the Code defined; it must be the actual occupant upon whom the notice is to be served; what use by the Adirondack League Club does not constitute "actual occupancy" within the above definition: People ex rel. Keyes v. Miller, 90 App. Div. 596; 86 N. Y. Supp. 189.

k. **Adverse possession.**—Open, notorious and exclusive possession of the property by the defendant's ancestor, with accompanying acts and open claims of title, indicating publicly his intention to hold it adversely to his co-tenants, no objection having been made to his occupancy and claims for thirty-two years, including twenty-four years after the inception of the co-tenant's title, establishes title to such property in the defendant's ancestor, as against his co-tenant by adverse possession: Cole v. Lester, 48 Misc. 13.

l. **Partition.**—Facts considered and held that action for partition could not be maintained as defendant had acquired title by adverse possession: Morris v. Morris, 114 App. Div. 346.

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§ 371. Adverse possession under claim of title not written.

a. **Encroachments.**—When the court will be justified in assuming that encroachments existed by leave or favor and did not constitute adverse possession within the meaning of the Code: Van Horn v. Stuyvesant, 50 Misc. 432.

b. **Co-tenants.**—Title by adverse possession as against co-tenants of real property: Zapf v. Carter, 70 App. Div. 395; 75 N. Y. Supp. 197.

c. **Easements.**—An elevated railway, taking easements in light and air, obtains a prescriptive title thereto by the lapse of twenty years before suit brought by a taxpayer: Goldstrom v. Interborough Rap. Transit Co., 115 App. Div. 323.

§ 372. Id.; what constitutes it.

d. **Substantial inclosure.**—Land within piles driven outside of a dock and left uncovered and unused cannot be said to be a substantial inclosure within the provisions of § 372: Fortier v. D., L. & W. R. R. Co., 93 App. Div. 24.

e. Open, notorious and exclusive possession of the property by defendant's ancestor, with accompanying acts and open claims of title, indicating publicly his intention to hold it adversely to his co-tenant, no objection having been made to his occupancy and claims for thirty-two years, including twenty-four years after the inception of the co-tenant's title, establishes title to such property in the defendant's ancestor, as against his co-tenant by adverse possession: Cole v. Lester, 48 Misc. 13.

f. When the court will be justified in assuming that encroachments existed by leave or favor and did not constitute adverse possession within the meaning of the Code: Van Horn v. Stuyvesant, 50 Misc. 432.

§ 373. Relation of landlord and tenant, as affecting adverse possession.

g. **Landlord and tenant.**—While the relation of landlord and tenant exists the possession of the tenant is to be deemed that of the landlord: Cole v. Bickelhaupt, 64 App. Div. 6; 71 N. Y. Supp. 636.

h. **Co-tenants.**—Title by adverse possession as against co-tenants of real property: Zapf v. Carter, 70 App. Div. 395; 75 N. Y. Supp. 197.

§ 374. Right not affected by descent cast.

i. Where a cause of action, or a right of entry which has accrued during the lifetime of an ancestor, passes upon his death to his infant heirs, the running of the statute of limitations, or of the statutory period for the acquisition of a prescriptive title, is not interrupted by his death and the supervening disability of his infant heirs: Scallon v. Manhattan Ry. Co., 185 N. Y. 359.

§ 375. Certain disabilities excluded from time to commence action.

See § 396, post, Exceptions as to persons under disabilities.

j. **Possession.**—Evidence that the widow of a testator, to whom a plot had been devised by will, took possession by interring the body of her husband and that subsequently she removed the body from the plot and conveyed the premises does not establish a valid title to the plot by adverse possession in her grantee: Meiggs v. Hoagland, 68 App. Div. 182; 74 N. Y. Supp. 234.

k. A lot completely inclosed against every one except the plaintiff's father, who made no claim of title, but which was left open on the side towards the land of plaintiff's father, and which otherwise was "protected by a substantial inclosure:" Brown v. Doherty, 93 App. Div. 180; 87 N. Y. Supp. 563, aff'd 185 N. Y. 383.

l. **Encroachments.**—When the court will be justified in assuming that encroachments existed by leave or favor and did not constitute adverse possession within the meaning of the provisions of the Code: Van Horn v. Stuyvesant, 50 Misc. 432.

m. **Infancy.**—The rule that no person can avail himself of a disability arising from his infancy unless it existed when his right of action or right of entry accrued was not changed by this section; where a cause of action, or a right of entry, which has accrued during the lifetime of an ancestor, passes upon his death to his infant heirs, the running of the statute of limitations, or of the statutory period for the acquisition of a prescriptive title, is not interrupted

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by his death and the supervening disability of his infant heirs: Scallon v. Manhattan Ry. Co., 185 N. Y. 359; 186 N. Y. 528.

a. **Statute of limitations.**—In an action to restrain the maintenance and operation of a railroad in front of premises and for fee and rental damages, the remainderman, under § 1665 may maintain such an action and the statute of limitations in such a case is governed by § 375: Muller v. Manhattan Railway Co., 53 Misc. 133.

§ 376. When satisfaction of judgment presumed.

b. The statute does not begin to run against a deficiency judgment until such judgment is perfected and it does not date from the entry of the judgment of foreclosure and sale: Seaman v. Clarke, 60 App. Div. 416; 69 N. Y. Supp. 1002, aff'd 170 N. Y. 594.

Amendment of answer.—Where an answer alleges that a cause of action upon a deficiency judgment did not accrue within twenty years before the commencement of the action, the court has no power, upon the failure of the defendant to establish this defense, to allow the answer to be amended on the trial so as to allege that twenty years had expired before the answer was served: Id.

c. **Certificate of sale.**—Where no application for a sheriff's deed pursuant to the certificate of sale, was made until more than forty years after such certificate of sale was executed, it will be presumed that the judgment debtor had redeemed from the sale and thereby destroyed the validity of the certificate: Dixon v. Dixon, 89 App. Div. 603; 85 N. Y. Supp. 609.

d. **Receiver.**—The right of a receiver, appointed in proceedings supplementary to execution, to an award, made on the condemnation of lands of the judgment debtor is not measured by the ten years, during which the judgment is a lien on the debtor's real estate under § 1251, but for the twenty years during which the judgment is in force under § 376; *semble*, as such receiver could not enforce payment of the award for a period of four months after the confirmation thereof, the time, during which the judgment was a lien on real estate, was extended for said four months by virtue of § 1255: Van Loan v. City of New York, 45 Misc. 482.

e. **Judgment of justice's court.**—Chap. 307 of 1894, which amended §§ 376, 382, subd. 7, and § 3017 of the Code of Civil Procedure, so as to prescribe a twenty-year statute of limitations for an action on a justice's judgment, a transcript of which had been filed in the county clerk's office, instead of the six-year statute existing prior to that date, applied only to future justices' judgments and did not apply to a justice's judgment rendered April 8, 1892, a transcript of which was filed in the county clerk's office April 25, 1892: McMahon v. Arnold, 107 App. Div. 132.

f. **Remedy by action.**—The conclusive presumption arising under the twenty years' statute of limitations relates only to the remedy by action; the presumption that the plaintiff's claim has been paid, which arises after the lapse of twenty years from the time a decision in his favor was rendered, is rebuttable; and a judgment thereafter entered upon such decision will not be vacated, where it appears that the amount awarded has not been paid: Puls v. N. Y., Lackawanna & W. R. R. Co., 54 Misc. 303.

§ 379. Limitation of action to redeem from a mortgage.

g. In an action to foreclose a purchase-money mortgage given by the husband where the wife is not made a party and is not served with process, and the property is sold to the mortgagee or a third person, the wife has, under § 379, twenty years from date of sale in which to redeem: McMichael v. Russell, 68 App. Div. 104; 74 N. Y. Supp. 212.

h. A mortgagee has no title to mortgaged premises either before or after default, and if in possession, the mortgagor may maintain ejectment, in which case the statute of limitations is found in § 365, not in § 379; a mortgagee in possession neither has title nor holds adversely to the title of the mortgagor, but the word "adverse," as used in § 379, limiting an action to redeem from a mortgage in possession, must be construed to mean that a mortgage in rightful possession of the premises for over twenty years after a breach of a condition or covenant of the mortgage obtains title, otherwise said section would be ineffective. When an action of foreclosure is brought to judgment but no sale is had thereunder, and the mortgagee with the knowledge and consent of the mortgagor is on possession for over twenty years, the possession ripens into title by virtue of § 379: Becker v. McCrea, 119 App. Div. 56.

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§ 380. Other periods of limitation.

See § 414, post, "Action" includes "Special Proceedings."

a. The statute of limitations provided by §§ 380, 382 and 414 of the Code is not applicable to the remedies provided by § 225 of the Tax Law as amended by chap. 382 of 1900, in regard to the refunding by an order of the comptroller of taxes erroneously paid: Matter of Hoople, 93 App. Div. 486; 87 N. Y. Supp. 842.

§ 381. Within twenty years.

See § 376, ante, When satisfaction of judgment presumed.

b. **Contract.**—An action on a contract that a municipality requires the payment of street car license fees should be brought within twenty years: City of New York v. Third Ave. R. R. Co., 42 Misc. 599; 87 N. Y. Supp. 588.

c. **Estoppel.**—Failure of grantor of lands, sold with condition subsequent that lands revert unless condition is fulfilled, to assert its right of re-entry until fifteen years after its right to re-enter accrued does not operate as an estoppel: Trustees of Union College v. City of N. Y., 173 N. Y. 38, aff'g 65 App. Div. 553; 73 N. Y. Supp. 512.

d. **Cloud upon title.**—A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain, as a cloud upon title, a sale under a power of sale contained in the mortgage, in the absence of any allegation in the complaint or finding by the court that the bond and mortgage have been paid: House v. Carr, 185 N. Y. 453, rev'g 105 App. Div. 625; 93 N. Y. Supp. 1135.

e. **Part payment.**—When more than twenty years have expired from the time a real estate mortgage became due, a recovery thereon is barred by the statute of limitations; part payment within that time made by some of the mortgagors does not revive the action against a third joint mortgagor who made no payments and who did not authorize such payments: Keese v. Dewey, 111 App. Div. 16.

f. An action upon a sealed instrument may be brought within twenty years; and an answer which pleads the statute of limitations based on a shorter period is demurrable; if the plaintiff does not prove a sealed instrument he may have leave to amend and then it will be time enough to set up a defense based on shorter periods of limitation than twenty years: Burstein v. Levy, 49 Misc. 469.

g. **Mortgage.**—When a mortgage became due more than twenty years before the time title to the property is to be transferred, the presumption is that the mortgage is paid; when the debt is more than twenty years past due, an action on the bond or for the foreclosure of the mortgage could not be maintained unless within that time there had been a payment of principal or interest, and the burden is on one who refuses title to show such payment: Forbes v. Reynard, 113 App. Div. 307.

h. **Surety.**—When a surety on a bond secured by a mortgage given by a literary corporation who is also the secretary and treasurer of the corporation, makes payment of interest due with checks of a partnership of which he is a member, and takes receipts from the mortgagee, acknowledging the payment to have been made by the corporation, any claim against the surety for a deficiency on foreclosure is barred by the lapse of twenty years: Ulster Co. Savings Inst. v. Deyo, 116 App. Div. 1.

§ 382. Within six years.

See § 414, post, "Action" includes "Special Proceedings."

i. **Alaska.**—The statute of limitations of Alaska was not taken from our Code of Civil Procedure, but from the Code of Oregon, which is mainly based on our Code: Tudor v. Ebner, 104 App. Div. 562; 93 N. Y. Supp. 1067, 182 N. Y. 562.

j. **Taxes erroneously paid.**—The statute of limitations provided by §§ 380, 382 and 414 of the Code is not applicable to the remedies provided by § 225 of the Tax Law, as amended by chap. 382 of 1900, in regard to the refunding by an order of the comptroller of taxes, erroneously paid: Matter of Hoople, 93 App. Div. 486; 87 N. Y. Supp. 842.

k. **Transfer tax.**—In a proceeding to enforce the payment of a transfer tax, assuming the transfer tax to be "a liability created by statute," and barred within six years, yet, where the statute of limitations was removed before it had ceased to run, the proceeding to enforce the tax could be commenced at any time and a defense of the statute is untenable: Matter of Moench, 39 Misc. 480.

l. Whether a proceeding to collect a transfer tax is barred by § 382, subd. 2, after the expiration of six years, the collection of such tax is removed from the operation of the statute of limitations by chap. 737 of 1899, providing

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that the provisions of the Code of Civil Procedure shall not apply to the collection of any taxes or penalty: Matter of Strang, 117 App. Div. 796.

a. **Nuisance.**—This section applies to an action by a tenant in possession of premises for a nuisance in operating an electric light plant: Bly v. Edison Electric Ill. Co., 172 N. Y. 1, rev'g 54 App. Div. 427; 66 N. Y. Supp. 737.

b. **Breach of contract.**—An action to recover damages for the failure by an attorney to record a mortgage is governed by the six years' statute of limitations, which begin to run from the date of the breach of the agreement and not from the date of the discovery thereof: Crowley v. Johnston, 96 App. Div. 319; 89 N. Y. Supp. 258.

c. Where a woman accepted a position as companion and nurse under an agreement that her services should be paid for by a provision in the will of the employer, the statute of limitations does not begin to run against the claim until the breach of the agreement which occurred at the death of said employer: Chambers v. Boyd, 116 App. Div. 208.

d. **Cestui que trust.**—The six-year statute of limitations applies to an action by a *cestui que* trust to recover, as for money had and received, a trust fund which the trustee paid to another person; and, where the trustee dies and leaves all his property to his widow and executrix, and she dies without accounting for the fund and her property goes to the hands of executors, an action against them, brought by the *cestui que* trust within seven years and six months of the trustee's unauthorized payment of the fund is not barred by the statute: Hopper v. Brown, 34 Misc. 661.

e. **Judgment of justice's court.**—Chap. 307 of 1894, which amended §§ 376, 382, subd. 7, and 3017 of the Code of Civil Procedure, so as to prescribe a twenty-year statute of limitations for an action on a justice's judgment, a transcript of which had been filed in the county clerk's office, instead of the six-year statute existing prior to that date, applied only to future justices' judgments and did not apply to a justice's judgment rendered April 8, 1892, a transcript of which was filed in the county clerk's office April 25, 1892: McMahon v. Arnold, 107 App. Div. 132.

f. **Infant legatee.**—The fact that more than six years have elapsed since the accrual of the right to compel executors to account, does not bar an infant legatee and heir-at-law of the decedent from having such a proceeding taken in her interest, and this because the time of the disability arising from her infancy is not a part of the six years and the statute has never begun to run against her: Matter of Brintnall, 40 Misc. 67; 81 N. Y. Supp. 249.

g. **Fraud.**—In an action for fraud under § 382, subd. 5, no question of laches in the strict sense of the word is involved: Slayback v. Raymond, 40 Misc. 601; 83 N. Y. Supp. 15.

h. Time within which non-resident alien sisters, who inherited from their sister under the enabling acts of 1874 and 1875, have to bring an action under § 382, subd. 5, for fraud of their sister's administrator: Kelly v. Pratt, 41 Misc. 31; 83 N. Y. Supp. 636.

i. The statute of limitations on a cause of action for damages for fraud and misrepresentation, whereby the plaintiff was induced to exchange lands for worthless stock, begins to run when the plaintiff has knowledge of facts which put him upon inquiry as to the existence of the fraud: Coffin v. Barber, 115 App. Div. 713.

j. Where an action is one to recover judgment on the ground of fraud, it is barred under § 382, subd. 5, where the plaintiff had, more than six years before the commencement of the action, obtained information of the facts constituting the fraud: Talmage v. Russell, 74 App. Div. 7.

k. In an equitable action to rescind a contract on the ground of fraud and recover stock delivered to the defendant under a contract which the defendant failed to carry out, the six-years' statute of limitations applies, and, under § 382, subd. 5, such statute does not begin to run until the plaintiff discovered the fraud or should have discovered, if due diligence had been exercised to discover such fraud: Slayback v. Raymond, 93 App. Div. 326; 87 N. Y. Supp. 931.

l. An action against executors to recover money alleged to belong to an infant is not one to procure a judgment on the ground of fraud and is not governed by subd. 5 of § 382, which provides that a cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud: Libby v. Van Derzee, 80 App. Div. 494; 81 N. Y. Supp. 139.

m. § 382, subd. 5 does not include an action to set aside the purchase at a foreclosure sale by a guardian *ad litem* of the property of an infant: Dugan v. Sharkey, 89 App. Div. 161; 85 N. Y. Supp. 778.

n. § 382, subd. 5 does not apply to an action to cancel and reform a discharge of a mortgage: Perry v. Williams, 40 Misc. 57; 81 N. Y. Supp. 204.

o. **Civil Service.**—The question as to whether subdivision 3 of § 383 or subdivision 2 of § 382 applies to an action for damages under § 20 of the Civil Service Law, discussed but not decided: Hilton v. Cram, 112 App. Div. 35; 97 N. Y. Supp. 1123.

p. **Executor.**—The statute of limitations does not commence to run in favor of an executor in possession of trust

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funds which he has failed to turn over to the trustee named in the will until he openly repudiates the trust and exercises individual ownership over the property, and the question as to whether the statute has run will not be decided until after an accounting: Matter of Ashheim, 111 App. Div. 176; 97 N. Y. Supp. 607; 185 N. Y. 609.

a. **Trustee.**—When a residuary legatee gives to another a power of attorney authorizing him to receive, invest and reinvest his share of an estate the instrument creates the relation of trustee; the statute begins to run on an action against the trustee when the trust terminates, or he repudiates the trust; when the *cestui que* trust has died without knowledge of the fraud her administrator may bring an action for an accounting against the estate of the attorney in fact: Anderson v. Fry, 116 App. Div. 740.

b. **Administrator.**—When an administrator *de bonis non* before the short statute of limitations has run admits the validity of a claim which was rejected by a former administratrix, the claim is not barred by the subsequent expiration of the short statute, for it is presumed that the claimant refrained from suit relying upon the acceptance of the claim and the withdrawal of the prior rejection; a part payment on a joint note by one of the makers at the request of and in the presence of the other from their joint moneys stops the running of the six years' statute of limitations: Matter of Hallenbeck, 119 App. Div. 758.

§ 383. Within three years.

See § 414, post, "Action" includes "Special Proceedings."
See § 1902, post, When action for causing death by negligence must be brought.

c. **Personal injuries.**—An action commenced September 12, 1898, to recover damages for personal injuries sustained September 11, 1895, is barred by the three-years' statute of limitations applicable to actions for personal injuries, notwithstanding that the 11th day of September, 1898, occurred on Sunday: Benoit v. N. Y. Central & H. R. R. R. Co., 94 App. Div. 24; 87 N. Y. Supp. 951.

d. The three-year statute of limitations applies to an action on an indemnity bond given to city contractors against personal injuries caused by them or their workmen: Tolmie v. Fidelity & Casualty Co., 95 App. Div. 352; 88 N. Y. Supp. 717.

e. **Misconduct of directors.**—This statute of limitations applies in an action against directors of a bank for misconduct in office: Hanna v. People's National Bank, 35 Misc. 517; 71 N. Y. Supp. 1076, rev'd 76 App. Div. 224; 78 N. Y. Supp. 516.

f. § 34 of the Stock Corporation Law was not intended to shorten the regular three-year statute of limitations, applicable to a creditor's action to hold a director personally liable for a debt of the corporation because of the failure to file an annual report: Staten Island M. R. R. Co. v. Hinchcliffe, 34 Misc. 624; 70 N. Y. Supp. 601.

g. **Penalty.**—An action under § 29 of the Domestic Commerce Law to recover a penalty for the unlawful possession of a milk can is not barred under § 383, subd. 3, although the defendant had been in possession of said can for over three years, provided the action is commenced within three years from any date in which it was in his possession: Bell v. Gibson, 71 App. Div. 472.

h. **Civil Service Law.**—The question as to whether subdivision 3 of § 383 or subdivision 2 of § 382 applies to an action for damages under § 20 of the Civil Service Law, discussed but not decided: Hilton v. Cram, 112 App. Div. 35; 97 N. Y. Supp. 1123.

§ 384. Within two years.

See § 414, post, When action for causing death by negligence must be brought.
See § 1902, post, When action for causing death by negligence must be brought.

i. § 405 does not apply to an action brought elsewhere than in one of the courts of record of the state of New York, and where an action for libel, which is barred by the two-years' statute of limitations of § 384, was begun in the United States circuit court within two years after the cause of action accrued, and was dismissed, an action for the same libel in a court of this state is barred by the statute under § 384, in two years from the time the cause of action accrued: Solomon v. Bennett, 62 App. Div. 56; 32 Civ. Pro. R. 104; 70 N. Y. Supp. 856.

j. **Alaska.**—The statute of limitations of Alaska was not taken from our Code of Civil Procedure but from the Code of Oregon, which is mainly based on our Code: Tudor v. Ebner, 104 App. Div. 562; 93 N. Y. Supp. 1067, aff'd 182 N. Y. 562.

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§ 385. Within one year.

See § 414, post, "Action" includes "Special Proceedings."

a. Where perishable property, upon which an attachment has been issued, is sold pursuant to § 656, and the deputy sheriff who conducts the sale accepts the purchaser's promissory note secured by a chattel mortgage on the property for part of the purchaser's price and the property is destroyed by fire before the note and mortgage mature, an action by the attachment creditor to secure the amount of the purchaser's note is governed by § 385 and must be brought within one year: Beyer v. Sigel, 75 App. Div. 83; 77 N. Y. Supp. 1018.

§ 386. When cause of action accrues on current account.

See § 414, post, "Action" includes "Special Proceedings."

See § 415, post, "Mode of computing periods of limitation."

b. **Decedent's estate.**—In an action against a decedent's estate for services, no recovery can be had for services rendered more than six years prior to the decedent's death unless there is evidence of payment or a mutual, open and current account; upon the reference of a disputed claim, the entry of the order of reference is deemed the date of the commencement of the action for the purpose of the application of the statute of limitations: Leahy v. Campbell, 70 App. Div. 127; 75 N. Y. Supp. 72.

c. It is not only the right, but the duty of the executor to discharge the debt against the estate, and his acknowledgment thereof, by making payments thereon from time to time, prevents the running of the statute of limitations, and the principle of the rule that prevents an executor from reviving a debt against the estate of his testator which is barred by the statute has no application to a case where he performs his legal duty in keeping it in force: Holly v. Gibbons, 176 N. Y. 520, rev'g 67 App. Div. 628; 74 N. Y. Supp. 1132.

d. **Payment upon balance.**—A payment made upon a running account within six years of action thereon is presumed to have been made upon the balance unpaid, and is sufficient to save the balance from the statute of limitations: Van Name v. Barber, 115 App. Div. 593.

e. When, in an action by a niece, against the estate of her uncle, to recover a balance due for services rendered during his lifetime, the contract to pay is established and it is proved that a continuous series of payments were made during the time of service, the statute of limitations does not run on the balance due: Greenwood v. Judson, 109 App. Div. 398.

§ 388. Actions not before provided for.

See § 1973, post, Limitation of action by people for peculation is ten years.

f. **Sufficiently pleaded.**—The provisions of § 388, that "An action, the limitation of which is not specifically prescribed in this or the last title, must be commenced within ten years after the cause of action accrues," are not sufficiently pleaded, by the defendants' allegation, "that the statutory period in which to begin such an action as is here brought, to wit, ten years, has long since expired, and that this action is consequently outlawed:" Schrieber v. Goldsmith, 39 Misc. 381.

g. It would seem that the limitation applicable to actions was by § 414 made applicable to special proceedings, but in such special proceedings, an objection, that such a proceeding is barred by the statute of limitations, must be taken in the court below and it cannot be interposed for the first time in the appellate tribunal; it must have been raised and passed upon by the court below or it will be deemed to be waived; the ten-year statute provided for in § 388 applies: People ex rel. Ehrlich v. Grant, as late sheriff, 61 App. Div. 238; 32 Civ. Pro. R. 73; 70 N. Y. Supp. 504.

h. **Mandamus.**—A mandamus proceeding to compel commissioners to levy an assessment to pay certain evidence of indebtedness issued to the relator is a special proceeding within the meaning of § 414 which prescribes that the statute of limitations contained in that Code shall apply "to a civil action or special proceeding," and § 388 provides that "an action, the limitation of which is not specifically prescribed, must be commenced within ten years after the cause of action accrues," governs the proceeding: People ex rel. Nelson v. Marsh, 82 App. Div. 571; 81 N. Y. Supp. 579.

i. **Accounting.**—The ten years' statute of limitations applies to a proceeding by an administrator to compel an executor to account for certain shares of stock where it appears that a person seeking to enforce the claim had made the demand more than ten years last past: Matter of Smith, 66 App. Div. 340; 72 N. Y. Supp. 1062.

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a. **Mistake.**—An action by a first mortgagee to be relieved from the satisfaction piece on the ground of mistake, being based entirely upon the plaintiff's own mistake and there being no charge of fraud, is barred by the ten years' statute of limitations contained in § 388: Perry v. Fries, 90 App. Div. 484; 85 N. Y. Supp. 1064.

b. **Infant.**—The purchase of mortgaged property at a mortgage foreclosure sale, by the guardian in socage of the infant owner of the equity of redemption, is voidable by the infant, and the time for the commencement of an action by the infant to avoid the purchase by the guardian is governed by §§ 388 and 396: Cahill v. Seitz, 93 App. Div. 105.

c. **Trust ex malificio.**—An action to set aside a trust *ex malificio* is barred by the ten-years' statute of limitations contained in § 388: Talmage v. Russell, 74 App. Div. 7.

d. **Reformation of deed.**—In an action by a grantee in possession of real estate, to have his deed reformed in relation to the description so as to make it conform to the intention of the parties, § 388 of the Code of Civil Procedure is no defense: Brennan v. Thompson, 46 Misc. 317.

e. **Trustee.**—An action against a trustee for breach of implied legal duties or obligations in refusing to issue bonds and pay out the proceeds thereof must be commenced within ten years from the time of the breach of the trust: Rhinelander v. Farmers' Loan & Trust Co., 172 N. Y. 519, aff'g 58 App. Div. 619; 68 N. Y. Supp. 1144.

f. An action by owners of an equity of redemption to avoid the deed and declare the trust is, except as affected by the infancy of the owners of the equity of redemption, governed by the ten-years' statute of limitations prescribed in § 388: Dugan v. Sharkey, 89 App. Div. 161.

g. **Administrator.**—The right of the successor of a deceased administrator to compel his personal representative to account is not barred until the expiration of ten years from the appointment of the new administrator: Matter of Lesser, 119 App. Div. 507.

h. **Fraudulent transfer.**—When in an action to set aside as fraudulent the transfer by a third party, the proof is insufficient to show that the value paid was less than the true value, and there was no actual fraud, the statute of limitations is that prescribed in § 388 and the action is barred by the lapse of ten years: Chorrmann v. Bachmann, 119 App. Div. 146.

i. **Joint debtor.**—In an action under § 1937 to charge a joint debtor not personally served in a prior action, the defendant is entitled to plead the statute of limitations as a defense, the prior limitation being ten years, as provided by § 388; the ten years begin to run from the date the former judgment was recovered: Hofferberth v. Nash, 117 App. Div. 284.

§ 390. Action against a non-resident, upon a demand, barred by the law of his residence.

See § 402, post, When defendant is without the state or living under an assumed name.

j. **Defense.**—In an action brought upon a judgment recovered in another state the answer states a good defense under §§ 390 and 390a when it alleges the statute of limitations of such other state as a bar, and it is not demurrable because it failed to allege that the defendant continued to reside in the other state until the time limited by the statutes of that state for bringing an action on the judgment had expired: Chesapeake Coal Co. v. Mengis, 102 App. Div. 15.

k. **Residence.**—This section which allows a non-resident when sued in this state by another non-resident upon a cause of action not involving title to real property within the state, to plead the statute of limitations authorized by the laws of his residence, means such residence at the time the cause of action accrued and not the residence at the time the action was brought: Utah Nat. Bank v. Jones, 109 App. Div. 526.

§ 390a. Upon cause of action arising in another state or country and barred by its laws.

l. In a cause of action arising in a foreign state, the time within which it may be commenced is under the provisions of § 390a affected by the statute of limitations of the state in which it arose: Holmes v. Hengen, 41 Misc. 521; 85 N. Y. Supp. 35.

m. In an action brought upon a judgment recovered in another state the answer stated a good defense under §§ 390 and 390a when it alleges the statute of limitations of such other state as a bar, and it is not demurrable because it failed to allege that the defend-

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ant continued to reside in the other state until the time limited by the statutes of that state for bringing an action on the judgment had expired: Chesapeake Coal Co. v. Mengis, 102 App. Div. 15.

§ 392. Cause of action accruing between the death of a testator or intestate, and the grant of letters.

See § 1902, post, When action for causing death by negligence, etc., to be commenced.

a. **Guaranty.**—Where a guaranty is given that a mortgage given to secure the payment of a note will be paid within six years and the time of the payment of the bond and mortgage was extended, the statute of limitations did not begin to run until the expiration of the extension: Alger v. Alger, 83 App. Div. 168.

§ 394. Action against directors, etc., of banks.

b. § 30 of the Stock Corporation Law contains no limitations upon the time in which the liability of directors therein created can be enforced, and the only limitation is found in § 394 of the Code of Civil Procedure, which provides that an action to require a penalty or forfeiture or to enforce a liability created by law against a director or stockholder of a corporation, must be brought within three years after the cause of action accrues: Shepard v. Fulton, 171 N. Y. 184; Staten Island M. R. R. Co. v. Hinchliffe, 170 N. Y. 473.

c. **Receiver.**—An action by the receiver of a national bank of Texas against a domestic stockholder must, under § 394, be brought in three years from the time the comptroller of the currency declared the entire liability to be due: Beckham v. Hague, 38 Misc. 606; 78 N. Y. Supp. 79, aff'd 80 App. Div. 626; 80 N. Y. Supp. 1129.

§ 395. Acknowledgment or new promise must be in writing.

d. **Sufficiency of acknowledgment.**—What acknowledgment is sufficient under this section: Serrell v. Forbes, 106 App. Div. 482; 94 N. Y. Supp. 805, aff'd 185 N. Y. 572.

e. What constitutes an acknowledgment of a debt and a new promise to pay it: Levy v. Popper, 106 App. Div. 394; 94 N. Y. Supp. 905, aff'd 186 N. Y. 88.

f. An acknowledgment of a debt contained in a letter is sufficient to take the case out of the statute of limitations if the writer only recognizes the debt and admits that he is the debtor and although the letter is written after the commencement of the action: Willis v. Wileman, 53 Misc. 465.

g. **Oral proof.**—Wherever the writing does not sufficiently express the character of the debt, it may be shown by oral proof: Hodnett v. Gault, 64 App. Div. 163; 71 N. Y. Supp. 831.

h. **Implied promise.**—A letter from the debtor to his creditor stating that he is willing to make a due bill, is a sufficient acknowledgment of an indebtedness under § 395 to take the case out of the six years' statute of limitations, although such letter did not contain an express promise to pay as such an express promise would be implied because of the acknowledgment of the debt: Benedict v. Slocum, 95 App. Div. 602; 88 N. Y. Supp. 1052.

i. **Part payment.**—When more than twenty years have expired from the time a real estate mortgage became due, a recovery thereon is barred by the statute of limitations; part payments within that time made by some of the mortgagors does not revive the action against the third joint mortgagor who made no payments and who did not authorize such payments: Keese v. Dewey, 111 App. Div. 16.

j. **Burden of proof.**—The burden is upon a creditor relying upon a part payment to take a debt out of the statute of limitations to show that the payment was made upon the particular debt and was so accepted under circumstances indicating an absolute acknowledgment by the debtor that the money was due: Murphy v. Walsh, 113 App. Div. 428.

§ 396. Exceptions, as to persons under disabilities.

See § 375, ante, Certain disabilities excluded from time to commence action.

k. Chap. 572 of 1886, providing in substance that no action for negligence can be commenced against a municipality having 50,000 or over " unless the same shall be commenced within one year after the cause of action therefor shall have accrued," is subject to suspension during the existence of any of

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the disabilities specified in § 396: McKnight v. City of New York, 186 N. Y. 35.

a. **Infancy.**—The fact that more than six years have elapsed since the accrual of the right to compel executors to account does not bar an infant legatee and heir-at-law of the decedent from having such a precedent taken in her interest, and this is because the time of the disability arising from her infancy is not a part of the six years and the statute has never begun to run against her: Matter of Brintnall, 40 Misc. 67; 81 N. Y. Supp. 249.

b. The purchase of mortgaged property at a mortgage foreclosure sale, by the guardian in socage of the infant owner of the equity of redemption, is voidable by the infant, and the time for the commencement of an action by the infant to avoid the purchase by the guardian is governed by §§ 388 and 396: Cahill v. Seitz, 93 App. Div. 105.

§ 398. When action deemed to be commenced.

c. **Little Falls.**—As the Legislature has the power to prohibit an action to set aside or cancel an assessment, it had the power to enact the charter of the city of Little Falls, providing that such an action should be commenced within thirty days after the delivery of the assessment roll, etc.: Loomis v. City of Little Falls, 176 N. Y. 31, aff'g 66 App. Div. 299; 72 N. Y. Supp. 744.

d. **Amendment of answer.**—When an answer alleges that the cause of action "did not accrue within twenty years before the commencement of this action," the court has no power, upon the failure of the defendants to establish this defense, to allow the answer to be amended on the trial so as to allege that twenty years had expired before the answer was served: Seaman v. Clarke, 60 App. Div. 416; 69 N. Y. Supp. 1002.

§ 399. Attempt to commence action in a court of record.

e. **Insurance policy.**—Under § 399 a delivery of the summons to the sheriff within the time limited is a sufficient compliance with the terms of the policy, which provides that an action must be brought within twelve months after a loss by fire: Connolly v. Hyman, 176 N. Y. 403.

f. § 399 applies in determining whether an action on an insurance policy has been commenced within the stipulated time: Wetyen v. Fick, 90 App. Div. 43; 85 N. Y. Supp. 592.

§ 400. Id.; in a court not of record.

See § 438, subd. 6, post, Service of summons by publication.

§ 401. Exception when defendant is without the state.

See § 390, ante, Action against "non-resident," upon a demand barred by the law of his residence.

g. Where one of two debtors remains in the state, such fact does not prevent the suspension of the statute as to the debtor who is out of the state: Hixson v. Rodbourn, 67 App. Div. 424; 73 N. Y. Supp. 779.

h. **Occasional visits.**—The fact that a person, after removal to Canada, made occasional visits to this state, which visits were only of a few days' duration, does not affect the continuous character of his absence from the state of New York: Lawrence v. Hogue, 105 App. Div. 247.

i. Where a person removes from this state to another after a cause of action accrued against him, and has since resided in the latter state, such absence suspends the running of the statute of limitations, although he has made a number of visits to the state; the amendment of 1888 of this section changing the "departs from and removes without the state and remains" to "or remains" did not alter the rule that occasional visits to the state do not destroy the continuity of the absence of non-residents: Connecticut Trust & S. D. Co. v. Wead, 172 N. Y. 497, mod'y 58 App. Div. 493; 69 N. Y. Supp. 518.

j. **Dower.**—Under § 1596 an action for dower must be commenced by a widow within twenty years after the death of her husband, unless there exist such disabilities as are set forth in said § 1596, and where the action is not commenced within said twenty years, the statute is not prevented from running by force of § 401 on the ground that at no time since the husband's death have the defendants resided in the state of New York, since by subd. 1 of § 414, the general provisions of the Code relating to the limitation of actions (§§ 362-415) do not apply where a different limitation, such as is provided by § 1596, is prescribed by law: Wetyen v. Fick, 178 N. Y. 223, aff'g 90 App. Div. 43; 85 N. Y. Supp. 592.

k. **Guaranty.**—When a defendant who is sought to be held liable on the guarantee of the collection of a note, in his guaranty and by other writings de-

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scribed himself as residing in another state, such papers are competent evidence against him when he claims to have resided in this state and to be entitled to the benefit of the statute of he has given no evidence of his residence here: Phillips v. Lindley, 112 App. Div. 283.

§ 403. Id.; when a person liable, dies within the state.

See § 391, ante, When person liable dies without the state.

a. **Cestui que trust.**—The six-year statute of limitations applies to an action by a *cestui que* trust to recover, as for money had and received, a trust fund which the trustee paid to another person; and, where the trustee dies and leaves all his property to his widow and executrix, and she dies without accounting for the fund and her property goes to the hands of executors, an action against them brought by the *cestui que* trust within seven years and six months of the trustee's unauthorized payment of the fund is not barred by the statute: Hopper v. Brown, 34 Misc. 661.

b. When, in an action by a niece, against the estate of her uncle, to recover a balance due for services rendered during his lifetime, the contract to pay is established and it is proved that a continuous series of payments were made during the time of service, the statute of limitations does not run on the balance due: Greenwood v. Judson, 109 App. Div. 398.

§ 405. Provision where judgment has been reversed.

c. The purpose of this section is to prevent the statute of limitations running while an action is pending; if the action is disposed of on the merits, or if the plaintiff of his own motion elects to relinquish his claim, the section does not apply: Bannister v. Michigan Mutual Life Ins. Co., 111 App. Div. 765.

d. The manifest purpose of § 405 is to permit a party to pursue his real right under a more appropriate form of action; § 414 relates only to rules of limitation and does not take away the benefit of the provisions of § 405; neither does the short limitation contained in a policy of insurance take away a plaintiff's right under § 405: Bellinger v. German Insurance Co., 51 Misc. 463; 113 App. Div. 917.

e. **Mechanic's lien.**—When an action to foreclose a mechanic's lien is commenced within one year after the filing of the lien and is dismissed for lack of evidence, a new action may be commenced under the provisions of § 403 within one year after the final determination of the first action: Connolly v. Hyams, 176 N. Y. 403.

f. **Action begun elsewhere.**—§ 405 does not apply to an action brought elsewhere than in one of the courts of record of the state of New York, and where an action for libel, which is barred by the two years' statute of limitations of § 384, was begun in the United States circuit court within two years after the cause of action accrued and was dismissed, an action for the same libel in a court of this state is barred by the statute under § 384 in two years from the time the cause of action accrued: Solomon v. Bennett, 62 App. Div. 56; 32 Civ. Pro. R. 104; 70 N. Y. Supp. 856.

g. **Without prejudice.**—The provision in a final order stating that the affirmance "without prejudice to the right of the relator to sue" is solely for the purpose of showing that the decision was not upon the merits and therefore not a bar to any action: People ex rel. Allen v. York, 84 App. Div. 440; 82 N. Y. Supp. 863.

§ 406. Stay by injunction, etc., to be deducted.

See § 414, post, "Action" includes "Special Proceedings."

See § 1923, post, Limitation of action against unincorporated associations.

h. **Partnership.**—The appointment of a receiver in proceedings supplementary to execution on a judgment for an individual debt and an injunction therein granted restraining the judgment debtor from interfering with his property, does not operate to prevent an action by him as surviving partner to recover on a claim of the partnership. Hence, such injunction is ineffective to stop the running of the statute of limitations on a cause of action belonging to the partnership: Gibbons v. Bush Co., Lim., 115 App. Div. 619.

§ 410. Provision when the action cannot be maintained without a demand.

See § 415, post, Mode of computing periods of limitation.

i. **Demand not necessary.**—A demand is not necessary where the cause of action was the breach of the duty of an attorney to record a mortgage: Crowley v. Johnston, 96 App. Div. 319; 89 N. Y. Supp. 258.

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a. In an action to compel the defendants to surrender certain collateral to a note, in which action the plaintiff claimed that the note was a renewal note and had been paid, if any demand was necessary it was a demand that the renewal note be returned and that accrued at the time when the original note was paid, and therefore such an action does not come within the second subd. of § 410: Brown v. Bronson, 93 App. Div. 312; 87 N. Y. Supp. 872.

b. **Receiver.**—In an action by a receiver to collect a second assessment on the stock of a national bank, the cause of action accrues when the comptroller of the currency declares the entire liability or a particular portion of it to be due: Beckham as Receiver v. Hague, 38 Misc. 606; 78 N. Y. Supp. 79, aff'd 80 App. Div. 626.

c. **Trustee.**—There is a distinction with respect to the statute of limitations between an actual express subsisting trust or a case of actual fraud, and the case of an implied trust, of a trustee *ex malificio* or a constructive fraud, as in the two former cases the statute does not begin to run against the beneficiary or *cestui que* trust until the trustee has openly, to the knowledge of the beneficiary, renounced, repudiated or disclaimed the trust, while in the latter cases the statute begins to run from the time the wrong was committed by one chargeable as trustee by implication: Talmage v. Russell, 74 App. Div. 7; 76 N. Y. Supp. 854.

d. **Trustee.**—The statute does not begin to run against a trustee of an actual, express, subsisting trust until open repudiation of the trust, but in the case of a trustee *ex maleficio* the statute runs from the time the wrong was committed: Putnam v. Lincoln Safe Deposit Co., 49 Misc. 578.

e. **Pledge.**—Upon a pledge of goods, the pledgor's right to tender the amount of the indebtedness and demand the return of the goods accrues when the debt becomes due; and, after the expiration of sixteen years from the time when the debt became due, an action for an accounting of the disposition of the proceeds of the goods, which had been wrongfully sold by the pledgee, cannot be maintained: Wheeler v. Breslin, 47 Misc. 507.

§ 413. How objection taken, under this chapter.

f. An action upon a sealed instrument may be brought within twenty years; and an answer which pleads the statute of limitations based on a shorter period is demurrable; if the plaintiff does not prove a sealed instrument he may have leave to amend and then it will be time enough to set up a defense based on shorter periods of limitation than twenty years: Burstein v. Levy, 49 Misc. 469.

§ 414. Cases to which this chapter applies.

See § 1499, post, Action for encroachment, within one year.

See § 1596, post, Action for dower, within twenty years.

See § 1710, post, Action against sheriff by third party claiming chattel, within three months.

See § 1752, post, Action for annulment on the ground of physical incapacity, within five years after marriage.

See § 1758, post, Action for divorce, within five years after discovery of the offense.

See § 1822, post, Action by creditor on claim rejected by executor, within six months.

See § 1902, post, Action for causing death by negligence, etc., within two years after decedent's death.

See § 1973, post, Action by state for misappropriation of public property, within ten years.

See § 2750, post, Application to sell decedent's real property for debts, within three years.

g. The manifest purpose of § 405 is to permit a party to pursue his real right under a more appropriate form of action; § 414 relates only to rules of limitation and does not take away the benefit of the provisions of § 405; neither does the short limitation contained in a policy of insurance take away a plaintiff's right under § 405: Bellinger v. German Insurance Co., 51 Misc. 463; 113 App. Div. 917.

h. **Dower.**—Under § 1596, an action for dower must be commenced by a widow within twenty years after the death of her husband, unless there exist such disabilities as are set forth in said § 1596, and where the action is not commenced within said twenty years, the statute is not prevented from running by force of § 401 on the ground that at no time since the husband's death have the defendants resided in the state of New York, since by subd. 1 of § 414, the general provisions of the Code relating to the limitation of actions (§§ 362-415) do not apply where a different limita-

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tion, such as is provided by § 1596, is prescribed by law: Wetyen v. Fick, 178 N. Y. 223, aff'g 90 App. Div. 43; 85 N. Y. Supp. 592.

a. **Insurance policy.**—Parties have the right to prescribe a shorter limitation for the enforcement of an action, as in a policy of insurance, as such right is recognized in § 414, where it is provided that the statute of limitations shall not apply to a case "where a shorter limitation is prescribed of a written contract of the parties:" Tolmie v. Fidelity & Casualty Co., 95 App. Div. 352; 88 N. Y. Supp. 717; 183 N. Y. 581.

b. The limitation provided in an insurance policy may be waived by the company: Berger v. Aetna Life Ins. Co., 48 Misc. 385.

c. Where an insurance policy provides that an action thereon must be brought within six months after the disallowance of the beneficiary's claims, the period is to be computed from the rejection of the claim after the filing of proof of death, and not from the date of prior notification that the policy was forfeited, for until the filing of proof of death, the beneficiary had no cause of action: Munn v. Masonic Life Assn., 115 App. Div. 855.

d. The provision in a mutual benefit insurance association certificate, that the insured will comply with all provisions of existing by-laws and those which may thereafter be adopted, will not be construed to shorten the statute of limitations because of a subsequent by-law providing that an action must be brought in a shorter time than that provided by statute: Butler v. Supreme Council, 105 App. Div. 164; 93 N. Y. Supp. 1012, aff'd 186 N. Y. 2.

e. **Mandamus.**—A mandamus proceeding to compel commissioners to levy an assessment to pay certain evidence of indebtedness issued to the relator is a special proceeding within the meaning of § 414 which prescribes that the statute of limitations contained in that Code shall apply "to a civil action or special proceeding," and § 388 provides that "an action, the limitation of which is not specifically prescribed, must be commenced within ten years after the cause of action accrues," governs the proceeding: People ex rel. Nelson v. Marsh, 82 App. Div. 571; 81 N. Y. Supp. 579.

f. **Taxes erroneously paid.**—The statute of limitations provided by §§ 380, 382 and 414 of the Code are not applicable to the remedies provided by § 225 of the Tax Law, as amended by chap. 382 of 1900 in regard to the refunding by an order of the comptroller of taxes erroneously paid: Matter of Hoople, 93 App. Div. 486; 87 N. Y. Supp. 842.

g. **Questions must be raised below.**—It would seem that limitation applicable to actions was by § 414 made applicable to special proceedings, but in such special proceedings an objection that such a proceeding is barred by the statute of limitations must be taken in the court below, and it cannot be interposed for the first time in the appellate tribunal; it must have been raised and passed upon by the court below or it will be deemed to be waived: People ex rel. Ehrlich v. Grant, as late Sheriff, 61 App. Div. 238; 32 Civ. Pro. R. 73; 70 N. Y. Supp. 504.

h. **Infancy.**—The fact that more than six years have elapsed since the accrual of the right to compel executors to account, does not bar an infant legatee and heir-at-law of the decedent from having such a proceeding taken in her interest, and this is because the time of the disability arising from her infancy is not a part of the six years and the statute has never begun to run against her: Matter of Brintnall, 40 Misc. 67; 81 N. Y. Supp. 249.

§ 415. Mode of computing periods of limitation.

i. By chap. 4 the limitation for the institution of supplementary proceedings is fixed at ten years from the accruing of the right: Peck v. Disken, 41 Misc. 473; 84 N. Y. Supp. 1094.

j. Where one of two executors executed a deed, an action to recover possession of the premises commenced running at the time the deed was executed: Brown v. Doherty, 93 App. Div. 190; 87 N. Y. Supp. 563.

k. In an action to compel the defendants to surrender certain collateral to a note, in which action the plaintiff claimed that the note was a renewal note and had been paid, if any demand was necessary it was a demand that the renewal note be returned, and that accrued at the time when the original note was paid and therefore such an action does not come within the second subdivision of § 410: Brown v. Bronson, 93 App. Div. 312; 87 N. Y. Supp. 872.

l. **Penalty.**—The three-year statute of limitations against the right to enforce the penalty imposed by the statute upon a witness to a will who omits to write his address opposite to his signature does not begin to run until the death of the testator: Dodge v. Cornelius, 168 N. Y. 242.

m. A cause of action under § 1902 does not accrue until the appointment of the executor or administrator: Crapo v. City of Syracuse, 183 N. Y. 395; 184 N. Y. Supp. 561.

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§ 416. Action to be commenced by summons; time when court acquires jurisdiction.

See § 638, post, Personal service of summons must be made within thirty days after granting of warrant of attachment.

See § 451, post, When defendant or his name is unknown.

See § 720, post, Defects cured by verdict and judgment.

See § 824, post, Summons and complaint to be filed.

a. Where the summons and complaint in an action as originally brought wrongfully designates the defendant, and thereafter the court permits the summons and complaint to be amended as to the name of such defendant and directs the service upon such defendant of the amended summons and complaint, the action is deemed to have been commenced at the time of the service of the original summons and complaint: Boyd v. United States Mortgage & T. Co., 94 App. Div. 413; 88 N. Y. Supp. 289.

b. **Personal judgment.**—The rule that a valid personal judgment can be obtained against a defendant insurance company in the courts of North Carolina by service of process upon the commissioner of insurance of that state, where the policy was issued by the defendant to a resident of that state prior to the revocation of the designation of such commissioner as the person upon whom process may be served, applies equally to a policy which, although originally issued to a resident of South Carolina, was assigned to a resident of North Carolina before the designation was revoked: Hunter v. Mutual Reserve Life Insurance Co., 118 App. Div. 94; 103 N. Y. Supp. 70.

§ 417. Requisite of summons.

See § 451, post, When defendant or his name is unknown.

See § 419, post, Notice stating sum demanded.

See § 423, post, Notice stating that no personal claim is made against a defendant.

See § 1774, post, In matrimonial actions, when complaint is not served with summons, the summons should state the nature of the action.

See § 1897, post, Indorsement on summons in action to recover penalty.

See § 1929, post, In action against certain public officers, they must be designated in summons.

See § 3404, post, Summons in action to enforce mechanic's lien in courts not of record.

See § 55, ante, Party may appear in person or by attorney.

c. **Venue.**—A stipulation as to the commencement of an action in a certain county does not affect the jurisdiction of the court; it only affects the venue, and if the action is brought in a county contrary to such stipulation, the remedy of the defendant is to move to change the place of trial: Benson v. Eastern Bldg. Loan Assn., 174 N. Y. 83.

d. Where the place of trial named in the summons is different from that named in the complaint, the county named in the complaint determines the venue of the action, and the mere error of an attorney in naming a different place of trial in the complaint from that in the summons will not effect a change in the place of trial, provided such attorney moves promptly to correct the error and does not permit his adversary to act upon the assumption that the change was intentional: Goldstein v. Marx, 73 App. Div. 545; 77 N. Y. Supp. 956.

e. **Amendment.**—An amendment at trial changing one letter of plaintiff's name as written in the summons and complaint, is merely formal to conform the pleadings to the proof and does not change the cause of action: Mitterwallner v. Supreme Lodge, 109 App. Div. 70.

f. A summons signed by different attorneys representing different plaintiffs does not comply with the requirements of §§ 417 and 418: Jones v. Conlon, 48 Misc. 172.

g. **Irregularity.**—The omission of the street number from the address of plaintiff's attorney subscribed to a summons is not a jurisdictional defect, but a mere irregularity; and where defendant, having actual knowledge of such office address, retains the summons, a motion to set aside service thereof and vacate the judgment entered in the action is properly denied: Sullivan v. Harney, 53 Misc. 249.

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§ 418. Form of summons.

a. The court will take judicial notice that an action was not commenced prior to the date of the summons issued in the action: Keene v. Newark Watch Case Material Co., 81 App. Div. 48; 80 N. Y. Supp. 859.

b. A summons signed by different attorneys representing different attorneys does not comply with the requirements of §§ 417 and 418: Jones v. Conlon, 48 Misc. 172.

§ 419. Service of copy complaint or notice with summons; consequence of failure.

See rule 26 (Sup. Ct.), Judgment on failure to answer.

See § 1212, post, Judgment by default, after service of summons, etc.

See § 479, post, When copy of the complaint to be served.

§ 420. Cases where such service must be made.

See § 515, post, Judgment upon failure to reply.

See rule 26 (Sup. Ct.), Judgment on failure to answer.

See § 1212, post, Judgment by default, after service of summons, etc.

§ 421. Appearance of defendant.

See § 424, post, Effect of voluntary appearance.

See § 2886, post, Appearance in justice's court.

c. **Special appearance.**—A party may appear specially in a manner other than that specified for a general appearance by defendant in § 421, and it seems that an offer of judgment made by the defendant's attorney on his behalf, constitutes a valid special appearance: Cutting v. Jessmer, 101 App. Div. 283.

d. **Extension of time.**—An order extending the time of a defendant to answer or demur, for a period of twenty days, also extends the defendant's time to appear in the action for such period: Littauer v. Stern, 177 N. Y. 233, aff'g 88 App. Div. 274.

e. **Appearance upon a motion.**—Where an action is begun by the service of a summons only, if the defendants desire a copy of the complaint, they should serve a written demand for the same upon the plaintiff's attorney within twenty days after the summons was served, and when the party neither serves a notice of appearance, nor answers, nor demurs, he has not appeared in the manner prescribed by § 421, and the mere appearance upon a motion is not a sufficient compliance with that section: Stokes v. Schildknecht, 85 App. Div. 602; 83 N. Y. Supp. 358.

§ 422. When defendant must answer before time to appear expires.

See § 781, post, Time in which to answer may be extended.

See § 1778, post, In an action against a corporation upon a note, etc., no extension can be given without notice to plaintiff's attorney.

See § 419, ante, When judgment may be taken by defendant.

See § 479, post, When copy of the complaint to be served.

f. An order extending the defendant's time to appear is necessary to prevent the plaintiff from proceeding as upon a default, and the order extending the time to answer, may, by implication, be construed to extend also the time to appear: Littauer v. Stern, 88 App. Div. 274; 85 N. Y. Supp. 71, aff'd 177 N. Y. 233.

§ 425. Summons; when and by whom served. Sheriff's duty.

See rule 18 (Sup. Ct.), Service of summons by person other than sheriff.

See § 1895, post, Service of summons in action for a penalty.

g. An order for the examination of a third party in proceedings supplementary to execution may not lawfully be served upon the third party by the judgment creditor: Matter of Dawes, 108 App. Div. 171.

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a. **Appeal.**—When there has been no personal service of the summons or an appearance by the defendant in the action, a judgment of the municipal court for the plaintiff will be reversed with costs and the complaint dismissed; an appeal from the judgment is the proper remedy: Mears v. North Am. Brew. Co., 113 App. Div. 41.

§ 426. How personal service of summons made upon a natural person.

See rule 18 (Sup. Ct.), Service of summons by a person other than the sheriff.

See §§ 427-429, post, Service of summons in cases of infancy, lunacy, etc.

See § 2526, post, Service of citation upon a corporation, infant, etc.

b. Under § 426, in regard to personal service of a summons upon the defendant, it is necessary that the defendant should be apprised in some way that service is intended to be made and be informed of the proceeding against him in order that he may have an opportunity to defend; the service must be effected in an orderly manner, and, if the defendant seeks to avoid service, the paper may be placed upon his person or it may be dropped near him and his attention called to the proceeding and to the fact that service is made; the person, who in assaulting another in order to effect service, and violently thrusts papers upon him, does not effect a good service and the service will be held to be void: Anderson v. Abeel, 96 App. Div. 370.

c. **Sunday.**—A service of a summons and complaint made on Sunday is absolutely void, and the plaintiff's attorney will not be required to accept service of an answer to such complaint, especially where he has previously notified the defendant that he intends to treat the attempted service of the summons and complaint on Sunday as a nullity: Scott Shoe Machinery Co. v. Dancel, 63 App. Div. 172; 71 N. Y. Supp. 263.

d. **Legal holiday.**—A service of a summons and complaint on a legal holiday is valid—so, *Held* as to service on superintendent of insurance of process against a foreign corporation: Flynn v. Union Surety & Guaranty Co., 170 N. Y. 145.

e. **Exemption.**—The exemption from service of process accorded to a nonresident while attending, as a witness, a trial in the state of New York is a personal privilege and may be waived: Weston v. Citizens National Bank, 64 App. Div. 145; 71 N. Y. Supp. 827.

f. **Order to show cause.**—An order to show cause in proceedings to punish a contempt of court may be served on the attorney for the defendant charged with the offense: Lederer v. Lederer, 47 Misc. 471; 95 N. Y. Supp. 934, rev'g 108 App. Div. 228.

g. **Annulment of marriage.**—When the record in an action for annulment of marriage shows that due service was made upon the defendant and the affidavit of the server states that he handed the summons to the defendant, who threw it away, that he left it by her on the sidewalk, and that it contained a notice of the nature of the action, etc., the server having been examined in open court as to these facts, and in addition it being shown that the defendant acknowledged to a third person that she had been served, a finding by a surrogate that the supreme court acquired jurisdiction is warranted, although the defendant in the proceedings before the surrogate three years later presented her affidavit denying due service: Matter of McGarren, 112 App. Div. 503.

h. **Forcible entry.**—Service of the summons and complaint in a civil action, made by a process server who gained access forcibly to the room where defendant was at the time after having obtained an entrance into defendant's residence upon the pretext that she wanted to see one of the servants, naming her, is illegal and will be set aside: Olson v. McConihe, 54 Misc. 48.

§ 427. Id.; in certain cases of infancy, or lunacy, etc., not judicially declared.

See § 2527, post, Service of citation upon infant, etc.

i. Where a defendant, who has a substantial interest in a controversy, is *non compos mentis*, but who has not been judicially declared insane, and the court, under the provisions of § 427, directs that the summons be delivered on her behalf to a third person, the duty of such third person is not confined to the mere receiving of the summons, but the order directing the delivery of the summons to him should be sufficiently broad to enable him to look after the interests of the incompetent defendant at every stage of the action: Am. Mortgage Co. v. Dewey, 106 App. Div. 389; 94 N. Y. Supp. 808.

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a. A person mentally incapable to adequately protect his rights, although not judicially declared to be incompetent to manage his affairs, may be sued, but the court may in its discretion require, by order, that a copy of the summons be also delivered in behalf of such defendant to a person designated in the order: Callahan v. N. Y. Central & H. R. R. Co., 99 App. Div. 56.

b. **Non-resident.**—Where, after the commencement of an action against a non-resident lunatic, and the seizure of her real property under a warrant of attachment, the lunatic is judicially declared incompetent and a committee of her property is appointed, the court may properly deny a motion by the committee to be allowed to appear specially in the action for the purpose of having the action stayed and all proceedings taken therein vacated, on the ground that no permission had ever been granted to sue the committee; in such a case, the committee, if it so elects, is entitled to come in and defend the action, and, if he declines to do so, the plaintiff may apply for leave to make him a party: Carter v. Burrall, 80 App. Div. 395; 81 N. Y. Supp. 30.

c. **Guardian ad litem.**—Although a guardian *ad litem* is not a party to an action and is not entitled to be made a party or interpose an answer, yet, under §§ 427 and 428, he may intervene, and, to the extent that it may be advisable and proper, "conduct the defense for the incompetent defendant:" Behlen v. Behlen, 73 App. Div. 143; 76 N. Y. Supp. 747.

d. **Leave of court.**—An order permitting service of a summons on one confined in a state hospital for the insane does not constitute a leave of the court to bring an action; but such leave of court to sue an incompetent person is not necessary unless he has been judicially declared insane and a committee appointed. In the latter case the court takes possession of the property of the incompetent through its committee, and neither the incompetent nor the committee can then be sued without leave of court: Grant v. Humbert, 114 App. Div. 462.

§ 428. The same.

e. Although a guardian *ad litem* is not a party to an action and is not entitled to be made a party or interpose an answer, yet, under §§ 427 and 428, he may intervene, and, to the extent that it may be advisable and proper, "conduct the defense for the incompetent defendant:" Behlen v. Behlen, 73 App. Div. 143; 76 N. Y. Supp. 747.

§ 430. Designation, by a resident, of a person upon whom to serve a summons during his absence; effect and revocation thereof.

f. Where an affidavit to procure a warrant of attachment under § 636, subd. 2, alleges on information and belief that the defendant had been absent from the state for more than six months and had filed no designation, under § 430, of a person upon whom process could be served, as appeared by the certificate of the county clerk annexed to the affidavit, such certificate, although not in form to be used in evidence, is sufficient as a basis for affiant's information and belief; the failure of the warrant to state the grounds on which it is granted is merely an irregularity and must be specified in the notice of motion to vacate the attachment on that ground: Ennis v. Untermyer, 93 App. Div. 375.

g. Where, after a foreign life insurance company had formally withdrawn doing business in North Carolina, an action is brought against it in that state by the assignee of a policy issued by defendant to a citizen of South Carolina and delivered in the latter state, service of the process upon one whose appointment to receive service of process for defendant in North Carolina had been duly revoked confers no jurisdiction: Hunter v. Mutual Reserve Life Ins. Co., 51 Misc. 26.

§ 431. How personal service of summons made upon a domestic corporation.

See § 2526, post, Service of citation upon corporation.

See § 2879 et seq., post, Service upon corporations in justice's court.

h. **Local agent of insurance company.**—A summons in an action in the city court of Elmira may be served on a local agent of an insurance company pursuant to § 2881 of the Code: Murray v. American Casualty Ins. Co., 88 App. Div. 224; 85 N. Y. Supp. 449.

i. **Proper officer.**—A person, who has no connection with a corporation except to receive the price of papers sold by him for it in one of its departments, is not the cashier thereof within the meaning of § 431; the cashier of a corporation is its financial agent, who

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has charge of its funds and the right to such funds to the exclusion of every other person: Eisenhofer v. New Yorker Zeitung Pub. Co., 91 App. Div. 94.

a. The service of a summons and complaint on the president of a corporation three days after he resigned both as president and director, confers no jurisdiction upon the court to proceed to judgment and is not a valid service: Yorkville Bank v. Zeltner B. Co., 80 App. Div. 578; 80 N. Y. Supp. 839.

b. **Affidavit of service.**—Where the process is served on an officer, the affidavit of service must allege that the person served was such officer at the time service was made: Cameron v. United Traction Co., 67 App. Div. 557; 73 N. Y. Supp. 981.

c. Service of a summons will be upheld, though affidavits are presented upon behalf of defendant which, without denying the allegations of the plaintiff's affidavits, state that the person served was neither an officer nor managing agent of the company, such statements being rather conclusions than statements of fact: Brun v. Northwestern Realty Co., 52 Misc. 528.

§ 432. Id.; upon a foreign corporation.

Personal service of the summons upon a defendant, being a foreign corporation, must be made by delivering a copy thereof, within the state, as follows:

1. To the president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary; or, if the corporation lacks either of those officers, to the officer performing corresponding functions, under another name.

2. To a person designated for the purpose by a writing, under the seal of the corporation, and the signature of its president, vice-president, or other acting head, accompanied with the written consent of the person designated; and filed in the office of the secretary of state. The designation must specify a place, within the state, as the office or residence of the person designated; and, if it is within a city, the street, and street number, if any, or other suitable designation of the particular locality. It remains in force until the filing in the same office of a written revocation thereof, or of the consent, executed in like manner; but the person designated may, from time to time, change the place specified as his office or residence, to some other place within the state, by a writing, executed by him, and filed in like manner. The secretary of state may require the execution of any instrument, specified in this section, to be authenticated as he deems proper, and he may refuse to file it without such an authentication. An exemplified copy of a designation so filed, accompanied with a certificate that it has not been revoked, is presumptive evidence of the execution thereof, and conclusive evidence of the authority of the officer executing it.

3. If such a designation is not in force, or if neither the person designated, nor an officer specified in subdivision first of this section, can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein; to the cashier, a director, or a managing agent of the corporation, within the state.

Co. Proc., § 134, subd. 1; L. 1855, c. 279, §§ 1-3.
Amended by chap. 416 of 1877 and chap. 311 of 1903.
See § 2526, post, Service of citation upon a corporation, etc.
See §§ 2880, 2881, post, Service in justice's court.

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a. **Managing agent.**—Where a foreign corporation engaged in publishing a newspaper in another state employs a person in this state to solicit advertisements and confers on him the power to make contracts for advertising, such person is not the managing agent of the corporation within the meaning of § 432, subd. 3; service under that subdivision may only be made upon the managing agent where "the corporation has property within the state, or the cause of action arose therein:" Fontana v. Post Printing & Pub. Co., 87 App. Div. 233; 84 N. Y. Supp. 308.

b. Service of the summons in a civil action against a foreign corporation may be made upon its manager while in attendance in this state on the business of the corporation: Rudd v. McLean Arms & Ordnance Co., 54 Misc. 49.

c. A person who merely collects dues of a fraternal insurance association is not a managing agent within § 432, which provides that the summons against a foreign corporation may be served upon its managing agent: Moore v. Monumental Mut. Life Ins. Co., 77 App. Div. 209; 78 N. Y. Supp. 1009.

d. **Proof of service.**—The proof of service of a summons upon a cashier or managing agent of a foreign corporation under § 432, subd. 3, is not sufficient unless such proof shows that no officer specified in subd. 1 of § 432 or person designated under § 432, subd. 2, can be found with diligent effort; *Quaere*, whether an advertising agent of a foreign corporation employed strictly upon a commission basis is a cashier or managing agent of the corporation within the meaning of § 432: Doherty v. Evening Journal Association, 98 App. Div. 136.

e. Under this section, it is a condition precedent to the valid service upon a managing agent that the proofs show that the corporation has failed to designate a person upon whom service can be made and that neither of the officers specified in subd. 1 of § 432 can by due diligence be found within the state: Vitolo v. Bee Publishing Co., 66 App. Div. 582; 73 N. Y. Supp. 273.

f. What is sufficient proof that person served was the managing agent of a foreign corporation in the state of New York within § 432: Perrine v. Ransom Gas Machine Co., 60 App. Div. 32; 69 N. Y. Supp. 698.

g. **Insurance Law, § 30.**—Service of a summons upon a foreign insurance company, made pursuant to § 30 of the Insurance Law, need not be made personally upon the state superintendent of insurance; if he admits service thereof and sends the summons and complaint to the home office of the company the service is good: Appelbaum v. Star Fire Ins. Co., 115 App. Div. 117.

h. **President.**—A foreign corporation, not doing business in this state and having no property here, and which has not appointed an agent upon whom service can be made, cannot be brought into court in a stockholder's action to obtain a decree adjudging the corporation to be owner of certain mines by service of summons upon its president who did not come into this state as representative of the company: Grant v. Cananea Consolidated Copper Co., 117 App. Div. 576.

§ 433. Service of process, etc., to commence a special proceeding.

See § 2000, post, Writ of habeas corpus can be served only by an elector.

i. An order for the examination of a third party in proceedings supplementary to execution may not lawfully be served upon the third party by the judgment creditor: Matter of Dawes, 108 App. Div. 174.

§ 434. Proof of service of summons, etc.; how made.

See rule 18 (Sup. Ct.), Provides what affidavit of service to contain.

See § 1774, post, Proof of service in matrimonial actions.

j. **Affidavit.**—The proof by affidavit of the service of a summons required by the Code of Civil Procedure must be the affidavit of one who has some personal knowledge that the person served was the defendant in the action, or at least some proof from which such knowledge can be inferred: O'Connell v. Gallagher, 104 App. Div. 492.

k. The affidavit of service must allege that a copy of the summons was delivered to the person served: Vitolo v. Bee Pub. Co., 66 App. Div. 582; 73 N. Y. Supp. 273.

l. **Annulment of marriage.**—When the record in an action for the annulment of marriage shows that due service was made upon the defendant and the affidavit of the server states that he handed the summons to the defendant, who threw it away, that he left it by her on the sidewalk, and that it contained a notice of the nature of the action, etc., the server having been examined in open court as to these facts, and in addition it being shown that the defendant acknowledged to a third person that she had been served, a finding by a surrogate that the supreme court acquired jurisdiction is warranted, although the defendant in the proceedings before the surrogate three years later presented her affidavit denying due service: Matter of McGarren, 112 App. Div. 503.

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§ 435. Order for service of summons from court of record, when defendant was not found, etc.

a. It is doubtful whether the provisions for substituted service under §§ 435 and 436 were intended to apply to an action for divorce, and their use for that purpose should be employed with the utmost caution. The provisions of § 438 for substituted service by publication apply to such an action by the express provisions of those sections and, unless it appears from the moving papers that service in the manner there provided for cannot be made, the application for an order directing service under §§ 435 and 436 should be denied: Maiello v. Maiello, 42 Misc. 266.

§ 436. How service must be made.

See § 638, post, Attachment, service of summons by publication.

b. **Action for divorce.**—It is doubtful whether the provisions for substituted service under §§ 435 and 436 were intended to apply to an action for divorce, and their use for that purpose should be employed with the utmost caution. The provisions of § 438 for substituted service by publication apply to such an action by the express provisions of those sections, and, unless it appears from the moving papers that service in the manner there provided for cannot be made, the application for an order directing service under §§ 435 and 536 should be denied: Maiello v. Maiello, 42 Misc. 266.

§ 437. Papers to be filed; proof of service.

See § 639, post, Attachment, affidavits to be filed.

§ 438. Cases in which service of summons by publication, etc., may be ordered.

See § 1541, post, Partition, service by publication.

See § 1774, post, Divorce, how summons to be indorsed.

See § 1919, post, Actions by or against associations of seven or more persons.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

c. A receiver *pendente lite* cannot be appointed in foreclosure without notice to the owner of the equity of redemption, when not in default, except where an order has been made under § 438 relative to service of the summons by publication or without the state of New York: Coleman v. Goodman, 37 Misc. 517.

d. **Dower.**—Where in an action for dower, the twenty years, provided by § 1596 in which an action may be brought, have passed, and the real estate has been unoccupied and the defendants have been non-residents of the state of New York, still the action might have been commenced by the service of the summons by publication under § 438: Wetyen v. Fick, 178 N. Y. 223, aff'd 90 App. Div. 43; 85 N. Y. Supp. 592.

e. **Divorce.**—It is doubtful whether the provisions for substituted service under §§ 435 and 436 were intended to apply to an action for divorce, and their use for that purpose should be employed with the utmost caution. The provisions of § 438 for substituted service by publication apply to such an action by the express provisions of those sections, and, unless it appears from the moving papers that service in the manner there provided for, cannot be made, the application for another directing service under §§ 435 and 436 should be denied: Maiello v. Maiello, 42 Misc. 266.

f. An action of divorce is an action *in rem* and service on the defendant without the state may be made by publication; but unless the defendant appear or jurisdiction has been obtained by attachment, a judgment for alimony and costs cannot be entered; an execution on a judgment for costs improperly entered will be vacated, though it would be better practice to move to set aside the judgment: Burch v. Burch, 116 App. Div. 865.

g. A judgment for alimony and costs cannot be awarded a defendant in an action for divorce, if he was served by publication and did not appear in the action: Edwards v. Edson, 119 App. Div. 684.

h. **Separation.**—Where a decree of separation was obtained on service by publication, the husband, the defendant, is the only person interested in that part of the judgment which required him to pay alimony, and if he recognizes its validity the vice in the decree is cured: Tisdale v. Rider, 119 App. Div. 594.

i. **Due diligence.**—It is necessary that due diligence to serve a summons within the state must be exercised in order that the court may make an order au-

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thorizing the service of the summons by publication under § 438, subd. 3: Vitolo v. Bee Pub. Co., 66 App. Div. 582; 73 N. Y. Supp. 273.

a. **The bare fact of non-residence** is not enough to authorize an order for service by publication, for the plaintiff must also show due diligence to make personal service, or state facts tending to show why personal service cannot be made; the present statute differs from the former one (Code of Procedure, § 135) in that the latter authorized service by publication when the person to be served could not "after due diligence be found within the state:" Kennedy v. Lamb et al., 182 N. Y. 228; 34 Civ. Pro. R. 326.

b. **Attorney's lien.**—In an action to enforce an attorney's lien, the client is a necessary party and if without the jurisdiction he may be served by publication: Oishei v. Metropolitan Street Ry. Co., 110 App. Div. 709; 97 N. Y. Supp. 447.

c. When a foreign defendant served in this State has appeared in a suit in the courts of this State, and it is thereafter sought to enforce an attorney's lien against it, it cannot maintain that, being a foreign corporation, the money upon which the lien attaches is not within this State: Oishei v. Pennsylvania Railroad Co., 117 App. Div., 110; 102 N. Y. Supp. 368.

d. **Appeal.**—Upon appeal for an order denying an application of a non-resident testamentary trustee to vacate an order for the service of the summons upon him by publication, the question whether such service of the summons would confer jurisdiction upon the court to compel the non-resident trustee to convey the land in an action for specific performance will not be considered: Meaney v. Way, 108 App. Div. 290.

§ 439. Papers upon which order for publication may be made.

e. A devisee of real estate under a will, directed to be sold for the payment of debts, is a necessary party in an action by a creditor to compel the sale of such real estate, and a judgment will be reversed where it is shown that there was not a compliance with the requirements of § 439: Holly v. Gibbons, 176 N. Y. 520, rev'g 67 App. Div. 628; 74 N. Y. Supp. 1132.

f. **Due diligence.**—The bare fact of non-residence is not enough to authorize an order for service by publication, for the plaintiff must also show due diligence to make personal service, or state facts tending to show why personal service cannot be made; the present statute differs from the former one (Code of Procedure, § 135) in that the latter authorized service by publication when the person to be served could not "after due diligence be found within the state:" Kennedy v. Lamb et al., 182 N. Y. 228; 34 Civ. Pro. R. 326.

g. An affidavit is insufficient in which there is no averment that the summons was ever issued to the sheriff with directions to serve, or that the affiant believed he was a non-resident, or that the plaintiff will be unable in the exercise of due diligence to serve the summons personally: Empire City Savings Bank v. Silleck, 98 App. Div. 139; 90 N. Y. Supp. 561.

h. An affidavit alleging that the plaintiff has been unable, with due diligence, to make personal service upon the defendant is sufficient: Union Trust Co. v. Driggs, 62 App. Div. 213; 70 N. Y. Supp. 947.

i. Non-residence of the defendant alone is not sufficient to show the court in order to obtain an order for the service of the summons by publication: Taylor v. Security Mut. Life Ins. Co., 38 Misc. 575; 77 N. Y. Supp. 1012.

j. **Cause of action.**—The non-residence of a defendant is not, in and of itself, sufficient to justify an order directing service of a summons upon him by publication, or personally without the state. In addition to the non-residence, it must appear from the complaint filed that the plaintiff has a sufficient cause of action against him, or that there is specific property within the state belonging to him or in which he has an interest, from which the judgment in the action, when recovered, may be satisfied: Montgomery v. Boyd, 60 App. Div. 133; 70 N. Y. Supp. 139.

k. **Jurisdictional facts.**—To procure an order to serve a summons by publication, it is necessary that all of the jurisdictional facts necessary to maintain the action be stated in order to confer authority upon the court to exercise its power, and where the residence of the plaintiff does not appear upon such application, the court has no jurisdiction to grant such order: Herbert v. Montana Diamond Co., 81 App. Div. 212; 80 N. Y. Supp. 717.

§ 440. By whom order may be made; contents of order.

l. The special county judge has no power to make the order: Matter of Wright, Peters & Co., 73 App. Div. 75; 76 N. Y. Supp. 775.

m. **Special term caption.**—The order for the service by publication of a summons should not have a special term caption and should not be signed with the initials of the judge, but such defects may be cured by amendment: Volz v. Steiner, 67 App. Div. 504; 73 N. Y. Supp. 1006.

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a. **Publication.**—Under § 440, in regard to service of a summons by publication, the publication must be made once in each seven days, and if on account of a legal holiday, on the day when the publication was to be made, the publication is made twice in one period of seven days and not in the succeeding period of seven days, the service is invalid: Doheny v. Worden, 75 App. Div. 47; 77 N. Y. Supp. 959.

b. **Appeal.**—Upon an appeal from an order denying an application of a non-resident testamentary trustee to vacate an order for the survice of the summons upon him by publication, the question whether such service of the summons would confer jurisdiction upon the court to compel the non-resident trustee to convey the land in an action for specific performance will not be considered: Meaney v. Way, 108 App. Div. 290.

c. The title of a purchaser of real estate on foreclosure is not unmarketable because the order of publication of the summons required "notice of the object of action" to be served instead of the "complaint," as required by § 440, if in fact the complaint was served together with such notice of object of action and the order of publication was thereafter corrected and filed *nunc pro tunc:* Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578; 98 N. Y. Supp. 496.

§ 441. When publication must be commenced.

d. § 441 does not apply to the service of a citation by publication: Matter of Denton, 40 Misc. 326; 81 N. Y. Supp. 1031.

§ 442. Papers to be filed; notice to defendant.

e. When an order for the service of summons on a non-resident by publication with the papers on which it was granted has been delivered for the purpose of filing to a special deputy clerk appointed by the justices of first department of the appellate division under the authority of chap. 533 of 1895, such clerk's failure to file the same in the county clerk's office does not invalidate the service: Fink v. Wallach, 109 App. Div. 718; 96 N. Y. Supp. 543.

f. Section 442, being in derogation of the common law, must be strictly construed: Fink v. Wallach, 47 Misc. 247; 95 N. Y. Supp. 872, rev'g 109 App. Div. 718.

g. A notice described in § 442 must be published with the summons: Doheny v. Worden, 75 App. Div. 47; 77 N. Y. Supp. 959.

§ 445. Defendant when allowed to defend.

h. **Right to defend.**—Under § 455, the right to defend is not subject to the discretion of the court, and a party must be admitted to defend, if he applies within seven years after the filing of the judgment roll, where there has been no personal service upon him of a written notice of the entry of judgment: Matter of Killan, 172 N. Y. 548 at 567.

i. The burden of proof as to the good faith of a purchaser necessary to bring him within the exception of § 445 is on the plaintiff to prove affirmatively: Zarkowski v. Schroeder, 71 App. Div. 526.

j. Although § 455 permits a defendant to be let in to defend, when the proposed answer states no defense, a judgment will not be vacated: Bishop v. Hughes, 117 App. Div. 425.

§ 446. Who may be joined as plaintiffs.

k. **Transfer of interest.**—When a person has transferred his entire interest in a cause of action to another, he cannot be joined with such transferee as a party plaintiff, and demurrer will lie to such complaint: Alexander v. City of Gloversville, 110 App. Div. 791.

l. Where the surviving partner of a firm, individually and as such surviving partner, transfers to a corporation all the assets, property and good will of the business owned by him as surviving partner, taking in payment therefor stock of the corporation and its promise to pay its debts, so that his sole property is represented by the stock of the corporation, and thereafter parties, without probable cause therefor and with the willful and malicious intent of injuring such surviving partner and the corporation of which he is the president, institutes involuntary bankruptcy proceedings against such surviving partner, two distinct causes of action arise, one in favor of the surviving partner for the damages sustained by him personally, and one in favor of the corporation for the damages sustained by it: Lawrence v. McKelvey, 80 App. Div. 514; 81 N. Y. Supp. 129.

m. In an action against the president of a new corporation which took over the stock and assets of an old corporation for stock alleged to be held in trust for the plaintiff, a stockholder in the old corporation, it was held that the new corporation was a necessary party and

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that the other stockholders were also as the plaintiff had sued individually and not on behalf of himself and other stockholders: Knickerbocker v. Conger, 110 App. Div. 125.

a. In order to join one as a party plaintiff, under the provision of § 446, it is not enough that he have an interest in the subject of the action, but he must have the right to enforce the obligation or to recover property: Conley v. Walton, 49 Misc. 1.

b. **Certiorari.**—When parties joining as relators to a writ of certiorari to review an assessment of lands on the ground of the inequality thereof are not "affected in the same manner" as provided in § 250 of the Tax Law, the writ will be quashed for misjoinder of parties: People ex rel. Litchfield v. O'Donnel, 113 App. Div. 713; 99 N. Y. Supp. 436, aff'd 187 N. Y. 536.

c. **Fraud.**—In an action to set aside a contract to sell lands obtained by fraud, the corporation for whose benefit the president holds title may be joined with him as party plaintiff: Cassidy v. Sauer, 114 App. Div. 673; 99 N. Y. Supp. 102, aff'd 187 N. Y. 540.

d. **Annulment of marriage.**—In an action by a daughter to annul the marriage of her mother upon the ground that at the time of the marriage the mother was a lunatic and that the marriage was procured by the fraud and undue influence of the defendant, the incompetent is a necessary party and should be brought in upon her own motion: Coddington v. Larner, 75 App. Div. 532; 78 N. Y. Supp. 276.

e. In an action brought by the mother of an infant under § 1750 of the Code to have the infant's marriage annulled on the ground that his consent was obtained by force, duress or fraud, the infant is a necessary party: Fero v. Fero, 62 App. Div. 470; 70 N. Y. Supp. 742.

f. **Insurance policy.**—In an action by a mortgagor to recover upon a fire insurance policy, the mortgagee to whom the loss is payable to the extent of his interest is a necessary party, and if such mortgagee refuses to join as a plaintiff he may, under §§ 446 and 448, be made a party defendant: Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392.

§ 447. Who may be joined as defendants.

g. **Condemnation.**—Where a railway company seeks to condemn, under the Condemnation Law, real property held in severalty by the defendants, and some of them default in the proceeding, some appear and consent to condemnation, others appear and object to the jurisdiction, and still others answer under § 3365, but not by the same attorneys, the proceeding constitutes, in effect, as many distinct proceedings as there are owners of distinct parcels and justifies a separate judgment as to each and entitles each successful owner to costs: Schenectady Railway Co. v. Lyon, 44 Misc. 275; 89 N. Y. Supp. 908.

h. **Annulment of marriage.**—In an action brought by the mother of an infant under § 1750 of the Code to have the infant's marriage annulled on the ground that his consent was obtained by force, duress or fraud, the infant is a necessary party: Fero v. Fero, 62 App. Div. 470; 70 N. Y. Supp. 742.

i. In an action by a daughter to annul the marriage of her mother upon the ground that at the time of the marriage the mother was a lunatic and that the marriage was procured by the fraud and undue influence of the defendant, the incompetent is a necessary party and should be brought in upon her own motion: Coddington v. Larner, 75 App. Div. 532; 78 N. Y. Supp. 276.

j. **Municipal officers.**—In an action to restrain the illegal act of a municipal officer under chap. 301 of 1892, the proper parties defendant are the comptroller, the lessees and their successors in interest and the city of New York: Wenk v. City of New York, 171 N. Y. 607, rev'g 69 App. Div. 621; 75 N. Y. Supp. 1135.

k. **Insurance company.**—§ 447, providing that any person may be made a defendant who has, or claims an interest in the controversy adverse to the plaintiff, does not authorize making a third person, claiming to be entitled to life insurance money, a party to an action against a life insurance company on a policy: McCabe v. McCabe, 67 App. Div. 589; 73 N. Y. Supp. 852; 32 Civ. Pro. R. 320.

l. § 447 authorizes the joinder, as defendants, of all persons whose separate interests spring from a common cause, in such a way that an adjudication upon their several rights cannot be had without the determination of the question upon which the rights of all depend: Greene v. Knox, 175 N. Y. 432.

m. **Corporation.**—In an action to have a receiver appointed for a corporation, the corporation is a necessary party defendant: Miller v. Barlow, 78 App. Div. 331; 79 N. Y. Supp. 964.

n. **Personal representatives.**—In an action brought by stockholders against a corporation and a brokerage firm, the personal representatives of a deceased partner are not proper parties defendant, unless it be shown that the survivor is insolvent: Hutchinson v. Simpson, 92 App. Div. 382; 87 N. Y. Supp. 369.

o. In an action against the personal representatives of a deceased joint debtor, the insolvency of the survivors or their inability to pay must be alleged: Potts v. Dounce, 173 N. Y. 335.

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a. **Attorney's lien.**—The client is a necessary party in an action to enforce an attorney's lien: Oishei v. Metropolitan Street Ry. Co., 110 App. Div. 709; 97 N. Y. Supp. 447.

b. **Stockholder.**—In an action brought by an individual stockholder against the president of the corporation to compel him to account for moneys of the corporation alleged to have been misapplied, it is improper to join the other stockholders as parties defendant when no relief is asked against them, and they are entitled to no relief or subject to no liability: McCrea v. McClenahan, 114 App. Div. 70; 99 N. Y. Supp. 689.

c. **Taxpayer's action.**—In a taxpayer's action to set aside audits made by a board of supervisors the owners of the claims are necessary parties defendant, and when the defendant board has demurred to the complaint by reason of such defect of parties it is error to refuse an application to amend the complaint to bring in additional parties: Armstrong v. Fitch, 113 App. Div. 317.

d. **Creditor's action.**—In a creditor's action to recover property fraudulently transferred by the debtor, the debtor is a necessary party defendant: Lathrop v. Byrne, 115 App. Div. 846.

e. **National bank.**—The liquidating agent of a national bank may be sued in the Supreme Court of the State of New York, for an accounting in equity, as he does not occupy the position of a receiver, and he may be sued, or sue, without leave of court: Ingold v. Gilmore, 118 App. Div. 727.

f. **Foreign executor.**—Although the courts of this State have no jurisdiction over a foreign executor, yet when he holds lands in this State as trustee he may be sued as such: Coston v. Coston, 118 App. Div. 1.

g. **Surety.**—Where an administrator continues the business of the decedent and dies, in an action by his surety against his executor for an accounting and to determine the extent of the liability of the surety upon the administrator's bond, a creditor of the business carried on by the administrator is entitled to be made a party to the action, since the profits of the business, if any, would be applicable in equity to the payment of the liabilities incurred by the administrator in carrying it on: American Surety Co. v. McGuire, 54 Misc. 79.

§ 448. Parties united in interest, when to be joined; when one or more parties may sue or defend for the whole.

See § 454, post, When person liable for the same demand may be sued together.

See § 1503, post, Who may be joined as defendants in an action of ejectment.

See § 1599, post, Joinder of parties defendants in an action for dower.

h. One of a class, for whose benefit an action has been brought under § 448, but who has not been named in the summons or complaint, and who has not been made a party to the action is not to be regarded as a party for the purpose of influencing the disposition of a motion to change the venue of the action: Brown v. Bache, 66 App. Div. 367; 72 N. Y. Supp. 687.

i. In an action against officers of a corporation for misappropriation by one or more of the directors, the corporation is a necessary party defendant, but creditors and persons entitled to sue under § 1781 are not necessary parties: Miller v. Barlow, 78 App. Div. 331; 79 N. Y. Supp. 964.

j. Where a partnership has been dissolved and an account, stated between the two partners, shows one of them to be the creditor of the other, the creditor partner, on paying an outstanding firm debt, will be entitled in equity to be subrogated to the firm creditor's rights in mortgages which the debtor partner gave him to secure the firm debt; parties, to whom the firm creditor has since conveyed the equity of redemption, need not and should not be made defendants in the action: Schuyler v. Booth, 37 Misc. 35; 74 N. Y. Supp. 733.

k. **Insurance policy.**—In an action by a mortgagor to recover upon a fire insurance policy, the mortgagee to whom the loss is payable, to the extent of his interest, is a necessary party and if such mortgagee refuses to join as a plaintiff, he may, under §§ 446 and 448, be made a party defendant: Lewis v. Guardian Fire & Life Assur. Co., 181 N. Y. 392.

l. **Unincorporated association.**—§ 448 applies to an action brought by one of a number of members of an unincorporated association: Boston B. B. Assn. v. Brooklyn B. B. Club, 37 Misc. 521; 75 N. Y. Supp. 1076.

m. **Stockholder.**—Where an action was brought by a stockholder on behalf of himself and others who came in and contributed to the expenses, to set aside a sale of railroad property, another stockholder who had knowledge of the facts and acquiesced in the litigation for ten years and until the statute of limitations had run against his right to maintain a separate action for the same relief, will not be made a party plaintiff upon his own motion, particu-

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larly where he offers no explanation of the delay: MacArdell v. Olcott, 62 App. Div. 127; 70 N. Y. Supp. 930.

a. In an action against the president of a new corporation which took over the stock and assets of an old corporation for stock alleged to be held in trust for the plaintiff, a stockholder in the old corporation, it was held that the new corporation was a necessary party and that the other stockholders were also necessary parties as the plaintiff had sued individually and not on behalf of himself and other stockholders: Knickerbocker v. Conger, 110 App. Div. 125.

b. **Municipal Court of New York City.**— The provisions of this section permitting one or more parties to defend for the benefit of all, are not applicable to the Municipal Court of the City of New York: Reed v. Wiley, Harker & Camp Co., 51 Misc. 574.

c. **Holders in severalty.**—Persons holding their respective lands in severalty, though having a common or general interest respecting the invasion of their rights by the wrongful act of the defendant which would authorize them all to join as plaintiffs, may sue alone, or one may sue for all where three or more persons or corporations have a common interest: Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152.

d. **Assignees.**—Where plaintiffs sue as assignees of the original obligee it is error to award a judgment in favor of one of the assignees, who, refusing to join in the suit, was made defendant, but demanded no affirmative relief from his co-defendant, and when the respective interests of the assignees were not shown: Blewett v. Hoyt, 118 App. Div. 227.

§ 449. Party in interest to sue. Trustee, etc., may sue alone.

See § 1814, post, Actions by and against executors and administrators to be brought in representative capacity.

See § 1926, post, Actions may be brought by certain public officers for the benefit of municipality.

e. Sections 814 and 2067 should be read and construed in connection with §§ 1909, 1910 and 449 for the purpose of determining their effect in respect to each other for they are deemed to have been enacted simultaneously: Bamberger v. Am. Surety Co., 48 Misc. 221; 96 N. Y. Supp. 671.

f. A person who invest his own money and also the money of others in the purchase of certain stock, may bring an action in relation thereto in his own name: Parker v. Paine, 37 Misc. 768; 76 N. Y. Supp. 942.

g. A person who pledges the money of his partner as security for an obligation may sue for its recovery: Meinhardt v. Excelsior Brewing Co., 98 App. Div. 308; 90 N. Y. Supp. 642.

h. Where an attorney, employed to collect certain judgments, obtains from the judgment debtor promissory notes aggregating the amount of the judgments and the expenses of collection upon his representation to the judgment debtor that the judgment creditors will not accept less than the full amount of the judgments, and subsequently induces the judgment creditors to satisfy the judgments upon the receipt of a portion of such notes, aggregating thirty per cent of the amount of the judgments, upon representing to the judgment creditors that such is the best settlement he can obtain, and the attorney subsequently transfers the notes retained by him to a person who is not a *bona fide* holder for value, such person may maintain an action upon the notes: Crouch v. Wagner, 63 App. Div. 526; 71 N. Y. Supp. 607.

i. **Tripartite agreement.**—In an action on a tripartite agreement between a husband and wife and a third party in regard to a separation of the husband and wife and payment of her debts — by whom action may be maintained: Edic v. Horn, 42 Misc. 26; 85 N. Y. Supp. 535.

j. **Death of plaintiff.**—Where one Betts brings an action on a claim assigned to him by one Trimble, and, during the pendency of the action, Betts reassigns the claim to Trimble, the court is authorized, under § 757 of the Code of Civil Procedure, in the event of the death of Betts while prosecuting the action for Trimble's benefit, to allow the action to be continued in the name of Betts' administrator: Betts v. De Selding, 81 App. Div. 161; 80 N. Y. Supp. 799.

k. **Insurance company.**—In an action brought against a life insurance company to reform an insurance policy and to recover the surrendered value thereof, the insurer acts as trustee of the express trust in relation to the beneficiary: Hunt v. Provident Savings Life Assur. Soc., 77 App. Div. 338; 79 N. Y. Supp. 74.

l. **Action on a bond.**—At common law, an action upon a bond under seal must be brought in the name of the obligee, irrespective of the owner, and this rule still prevails in the state of New York, except where it has been modified by the statute, notwithstanding that § 449 requires that the action shall be brought in the name of the real party in interest: Alexander v. Union Surety & Guar. Co., 89 App. Div. 3.

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a. **Trustee.**—A corporation, to which property has been assigned as a pledge for its protection and the protection of others who became the assignor's sureties on the faith of the pledge, may, as a trustee of an express trust, maintain an action to reclaim the property pledged from the assignor, who had appropriated it to his own use, if any of the obligations, for the benefit of which the pledge was made, remain undischarged: Hoffman House v. Foote, 172 N. Y. 348.

b. **Corporations.**—The power of corporations to sue is limited to actions relating to their corporate interests: Board of Education v. Board of Education, 76 App. Div. 355; 78 N. Y. Supp. 522.

c. **Agent.**—Where a lease of real property, made in the name and under the seal of the owner, is executed by his agent, whose name does not appear in the body of the instrument, the principal may maintain an action to recover the rent: Cochran v. Macrae, 49 Misc. 529.

d. **Assignment.**—A plaintiff, who has assigned his claim against the defendants, who have had notice of the assignment, cannot maintain an action thereon, as there is no claim then existing in his favor; nor will a reassignment of said claim to plaintiff after the commencement of his action create such cause of action, as the reassignment has no retroactive effect: Walsh v. Woarms, 109 App. Div. 166.

e. When a person has transferred his entire interest in a cause of action to another, he cannot be joined with such transferee as a party plaintiff, and demurrer will lie to such complaint: Alexander v. City of Gloversville, 110 App. Div. 791.

f. **Beneficiary.**—This action is permissive merely and does not prevent the joinder of a beneficiary: Cassidy v. Sauer, 114 App. Div. 673; 99 N. Y. Supp. 1026, aff'd 187 N. Y. 540.

g. A written assignment of a note, properly executed by the executors of the will of a deceased person who owned it at the time of his death, vests the onwership of the note in the assignee, who may maintain an action thereon and who, in such an action, is the real party in interest within § 449, although he may hold title as an equitable trustee or may have acquired it without adequate consideration: Huck v. Kraus, 50 Misc. 528.

§ 450. When married woman is a party.

h. Where a married woman sues for the conversion of personal property delivered by her to another, it is not necessary for her to prove that such property was her separate estate: Lumley v. Torsiello, 69 App. Div. 76; 74 N. Y. Supp. 567.

§ 452. When court to decide controversy, or to order other parties to be brought in.

See § 281, ante, New parties may be brought in an action pending in court of claims.

See § 820, post, Interpleader.

See § 1807, post, The court may require creditors of corporation to be brought in, in an action to dissolve or annul a corporation.

i. An application to intervene may be granted by the court although the party has not, as a matter of right, under § 452, the right to so intervene: Mertens v. Mertens, 87 App. Div. 295; 84 N. Y. Supp. 352.

j. The amendment of § 452 by chap. 512 of 1901 does not make it mandatory upon the court to grant an application of the plaintiff to have his grantee made a party to an action brought to restrain the operation of the elevated railroad in front of premises formerly owned by the plaintiff: Pope v. Manhattan Ry. Co., 79 App. Div. 583; 80 N. Y. Supp. 316.

k. The court has power under § 723, after an action is at issue as to two joint tort feasors, to grant the plaintiff's motion to make a third joint tort feasor a party defendant, and to allow the plaintiff to serve a supplemental summons and an amended complaint; relation between §§ 452 and 723 considered: Schun v. Brooklyn Heights R. R. Co., 82 App. Div. 560; 81 N. Y. Supp. 859.

l. An order bringing in a third party as an additional defendant in an action to recover money damages for personal injuries, which is made without notice to such party, is improper. Although § 723 gives to the court the power to amend pleadings by adding the name of a party, it does not authorize the above order, and § 452 relates primarily to equitable actions: Horan v. Bruning, 116 App. Div. 482.

m. In an action to recover damages, for a sale of merchandise alleged to have been induced by fraud, a judgment dismissing the complaint should not be opened and the plaintiff permitted to bring in an additional defendant who appeared upon the trial to have been the most active participator in the al-

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leged fraud, where it appears that the plaintiff knew that fact before the action was commenced: Lederer v. Adler, 51 Misc. 572.

a. One claiming a lien on chattel sought to be replevied will be allowed to be brought in as a party defendant: Friedman v. Schreiber, 50 Misc. 617.

b. This section is to be construed as requiring only such parties to be brought in who would have been, by reason of their interest, either proper or necessary parties at the time the suit was brought: Callanan v. Keeseville, etc., R. R. Co., 48 Misc. 476.

c. When a defect of parties appears upon the face of the complaint the defendant may demur thereto, and if the defect does not appear upon the face of the complaint, the objection may be taken by answer; a failure to take such objection by demurrer or answer is a waiver of the defect; but even though objection be so waived, the court, on its own motion, may direct parties to be brought in if a complete determination of the controversy cannot be had without their presence; an objection to defect of parties must be made by demurrer or answer and cannot be made by motion: Knickerbocker Trust Co. v. O. C. & S. R. Co., 111 App. Div. 812; 97 N. Y. Supp. 673, appeal dis. 186 N. Y. 527.

d. A motion by the owner of two lots who has sued to enjoin the maintenance of a railroad on a street in front thereof to bring in as a party his grantee of one of such lots should be denied: Welde v. N. Y. & Harlem R. R. Co., 108 App. Div. 286.

e. **Stockholders.**—Stockholders of an insolvent savings and loan association will not be allowed to intervene, where the only object of such intervention is in aid of the modification or rejection of a plan of sale which necessarily had to be passed upon by the court: People v. Anglo-Am. S. & L. Assn., 66 App. Div. 9; 72 N. Y. Supp. 1021.

f. Where an action was brought by a stockholder on behalf of himself and others who came in and contributed to the expense, to set aside a sale of railroad property, another stockholder, who had knowledge of the facts and acquiesced in the litigation for ten years and until the statute of limitations had run against his right to maintain a separate action for the same relief, will not be made party plaintiff upon his own motion, particularly where he offers no explanation of the delay: MacArdell v. Olcott, 62 App. Div. 127; 70 N. Y. Supp. 930.

g. **Equitable actions.**—§ 452, authorizing the bringing in of involuntary additional parties defendant, relates only to equitable actions: Ten Eyck v. Keller, 99 App. Div. 106.

h. In an action at law, in which the title to real property or to specific or tangible property is not involved, and in which a money judgment alone is demanded, the court has no power, under § 452, to compel the plaintiff to bring in, as a defendant, a third party who applies to the court to be permitted to intervene; the proper construction of § 452 discussed: Long v. Burke, 105 App. Div. 457.

i. The first sentence of § 452 applies only to equitable actions; under the latter part, the application to be brought in as a party must be made by the party to be brought in; whether the party applies or resists, defines an important difference, for if he chooses to litigate his title in the action then he takes the disadvantage incident to his choice, but if he is brought in against his will, he is deprived of the benefit of § 1709: Goldstein v. Shapiro, 85 App. Div. 83; 82 N. Y. Supp. 1038.

j. **Guardian ad litem.**—Petition for the appointment of a guardian *ad litem* does not bring the application within the provisions of § 452, unless the petition shows the existence of an interest of the infant in property, although it shows the possibility of such interest: Van Williams v. Elias, 106 App. Div. 288.

k. **Partition.**—When a judgment creditor whose judgment was entered after the action of partition was commenced, will be allowed to become a party to the partition action: Flamm v. Perry, 78 App. Div. 603; 80 N. Y. Supp. 125.

l. **Replevin.**—Under § 1709, providing for the claim of a chattel in replevin by third parties, a claim must be made against the defendant and must be made before the chattel is actually delivered to either party; an application under § 452 will not be granted where the controversy between the parties can be completely determined without the intervention of others: Reimers v. Schmitt, 68 App. Div. 299; 74 N. Y. Supp. 122.

m. **Collusion.**—In an action by a teacher against a trustee of a school district, an application was made under § 452 to intervene upon the ground that the parties were acting collusively: *Held*, that the order to intervene should not require the intervening party to employ the attorney retained by the defendant, but the court might require the intervening defendants to stipulate that in the event of their success they would not tax costs against the plaintiff: O'Connor v. Hendrick, 90 App. Div. 432.

n. **Insurance policy.**—In an action on a life insurance policy, the alleged assignee of such policy is a necessary party under § 452: Hasberg v. Moses, 81 App. Div. 199.

o. Where a life insurance policy was erroneously, or fraudulently, made pay-

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able to the insured, or his legal representatives, instead of to a creditor thereof, for whose benefit the policy was obtained and by whom the premiums were paid, the legal representatives of the insured are necessary parties to an action brought by the creditor, after the death of the insured, against the company to have the policy reformed and made payable to such creditor instead of to the legal representatives of the insured and for judgment upon the policy so reformed for the money due thereunder, and although no attempt was made by defendant to raise the objection, by demurrer or answer, that there was a defect of parties defendant, a motion made at the close of the evidence upon the trial, to dismiss the complaint for such defect of parties, should have been granted unless within a reasonable time the personal representatives of the insured were brought in, not necessarily for the protection of the defendant, for it had neglected its rights, but for the protection of the representatives of the insured as well as the seemly and orderly administration of justice, that there might be a complete determination of the controversy; since § 499 must be read in connection with § 452: Steinbach v. Prudential Ins. Co., 172 N. Y. 471; 33 Civ. Pro. R. 218, rev'g 62 App. Div. 133; 70 N. Y. Supp. 809.

a. **After judgment.**—A party may even be brought in after judgment in order to test the validity of the judgment by an appeal: Koehler & Co. v. Brady, 82 App. Div. 279; 81 N. Y. Supp. 695.

b. **Without amendment.**—An order granted upon a motion made at the close of the plaintiffs' case, making a third person a party defendant without any actual amendment of the pleadings or any allegation therein relating to him, or any appearance for him on the record, does not make him a party to the record so as to be bound thereby: Lehrer v. Walcoff, 47 Misc. 112.

c. Where it appears to the trial court that the defendant was not the owner of the property upon which it was alleged a nuisance existed, the court may suspend the trial and direct the plaintiff to bring in the present owner: Ackerman v. True, 120 App. Div. 172.

d. **Lis pendens.**—The right of a person having an interest in the subject of an action at the time of the filing of the *lis pendens* to be admitted as a party under § 452 is absolute, while the right of one who acquired his interest subsequently to the filing of the *lis pendens* depends upon the sound discretion of the court: Bowers et al. v. Denton et al., 41 Misc. 133; 34 Civ. Pro. R. 12.

e. **Decedent's estate.**—Under § 2718, relative to the reference of disputed claims against a decedent's estate, which provides that on the entry of the order of reference "the proceeding shall become an action in the supreme court," the right of a third party to intervene upon such a reference is governed by § 452; where the subject matter of the reference is a mere money demand, a third party will not be allowed to intervene, as the supreme court has no power, under § 452, to compel the plaintiff in an action in which a money judgment only is sought, and in which title to no real, specific or tangible personal property is involved, to bring in as a defendant a third party on the latter's application: Honigbaum v. Jackson, 97 App. Div. 527.

f. **Bondholders.**—In an action by a foreign city to recover of a firm for the value of city bonds which the firm had wrongfully sold, and for which the city offered to restore what it had been paid by the firm, the application of bondholders to whom the bonds had been sold, to intervene under § 452, should be denied: City of Ironwood v. Coffin, 39 Misc. 278.

g. **Interpleader.**—Even though a party may be entitled to an order of interpleader under § 820, yet he may be entitled under § 452 to an order making the person a party defendant: Helene v. Corn Exchange Bank, 96 App. Div. 392.

h. The power of the supreme court to compel a plaintiff to bring into an action a third party upon his own application, must be exercised only in the instances and subject to the requirements of the second sentence of § 452, the general powers conferred upon courts by § 723 being nothing more than a declaration of the inherent powers of the supreme court: Draper v. Pratt, 43 Misc. 406.

i. **Amendment.**—In an action at law for a money judgment where a party elects to sue one only of parties jointly liable on a contract and the defendant demurs to the complaint upon the ground that the other parties liable have not been joined, the court has power to allow an amendment bringing in the other parties if the plaintiff show an adequate excuse for not joining them and the defendants will not be prejudiced, especially when the plaintiff might not be entitled to sue the original defendant alone: Haskell v. Moran, 118 App. Div. 810.

§ 453. Supplemental summons.

j. **Amendment.**—An order allowing an amendment of a summons and complaint to bring in additional defendants, in an action to set aside a conveyance as in fraud of creditors, can only be made on notice to defendants who have already answered; on *ex parte* order is irregular and cannot be confirmed *nunc pro tunc:* Luckey v. Mockridge, 112 App. Div. 199.

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a. **Marketable title.**—The title of a purchaser of real estate on foreclosure is marketable, although at the time the summons in the action of foreclosure was served by publication upon one of the defendants it had been ordered that a supplemental summons issue to bring in certain tenants, which supplemental summons was not served on said defendant, who was served only with the original summons which named her as defendant: Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578; 98 N. Y. Supp. 496.

b. **Executor.**—An executor of a deceased defendant who has been substituted to defend the action has no right to require the service of a supplementary summons and complaint with right to answer unless there are facts other than the succession which should be alleged: Flannery v. Sagaian, 109 App. Div. 321.

c. Where the service of a summons and complaint has been made, additional parties were made defendants and the summons and complaint amended making them parties, and thereafter an order of publication was made directing the service of a copy of the amended and supplemental summons and of the amended complaint on the additional defendants who were required to answer the amended complaint, such order complies with § 453: Meeks v. Meeks, 87 App. Div. 99.

d. **Guardian ad litem.**—The appointment of a guardian *ad litem* for an infant cannot be sustained under § 453, which requires that a supplemental summons in the same form as the original summons be issued to the party brought in, where no summons was at any time served on the infant: Van Williams v. Elias, 106 App. Div. 288.

§ 454. When persons liable for the same demand may be sued together.

See § 3231, post, Costs where several actions are brought on the same instrument.

See § 1204, Judgment against one or more defendants.

e. Non-joinder of defendant's partner, who constituted with him the firm that made the note, is no defense to an action against defendant who indorsed the note if the complaint contains the allegations requisite for the statement of a cause of action against the defendant as an indorser: Singer v. Abrams, 47 Misc. 360.

§ 456. Proceedings in action against defendants severally liable.

f. Where a plaintiff brought an action against a corporation and its president, who was conducting an individual business, jointly for labor and services rendered both, he cannot on appeal invoke the provisions of § 456 in relation to actions severally liable, where he has failed to make an election under said section on the suggestion of the court below: Stein v. Woodward Publishing Co., 45 Misc. 613.

g. Parties to an action by the creditor of an insolvent corporation, whose debt was created in 1900, to enforce in an action at law commenced in 1902, the joint and several liability of the holders of stock not paid in full, conferred by the Stock Corporation Law, chap. 688 of 1892: Lang v. Lutz, 180 N. Y. 254.

h. Form of order of severance under § 456: Weston v. Citizens' Nat. Bank, 88 App. Div. 330; 84 N. Y. Supp. 743.

§ 458. Who may petition for leave to prosecute as a poor person.

See § 3347, subd. 3, post, Courts to which this section applies.

i. **Guardian ad litem.**—The application in the case of an infant must be made by his guardian *ad litem*: Kerrigan v. Langstaff, 64 App. Div. 497; 72 N. Y. Supp. 230.

j. An infant plaintiff, not possessed of any funds of his own, should not be denied leave to prosecute the action as a poor person simply because his guardian *ad litem* is his father, and the father, upon his application for appointment as such guardian, has shown himself to be worth more than $100 and to be of sufficient financial responsibility to answer to the plaintiff for any misconduct in prosecuting the action: Larsen v. Interurban Street Ry. Co., 97 App. Div. 150; 89 N. Y. Supp. 649.

k. Although a person suing in a representative capacity may be admitted to sue as a poor person, and is not to be prevented by liability for costs in a former action against the same defendant, the previous adverse result may properly be considered on the merits of plaintiff's right to sue: Matter of Cannice, 52 Misc. 6.

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§ 459. Contents of petition.

a. **Infant.**—An infant plaintiff, not possessed of any funds of his own, should not be denied leave to prosecute the action as a poor person simply because his guardian *ad litem* is his father, and the father, upon his application for appointment as such guardian, has shown himself to be worth more than $100 and to be of sufficient financial responsibility to answer to the plaintiff for any misconduct in prosecuting the action: Larsen v. Interurban Street Ry. Co., 97 App. Div. 150; 89 N. Y. Supp. 649.

b. The statute is explicit that it is the guardian *ad litem* appointed in the action, and not the person to be appointed such guardian, who must verify the petition by his affidavit in case the infant is under the age of fourteen years: Kerrigan v. Langstaff, 64 App. Div. 497; 72 N. Y. Supp. 230.

§ 460. When and how leave granted.

c. **Attorney's compensation.**—An order allowing the plaintiff in an action to sue in *forma pauperis* is fatally defective, unless it contains a provision that the attorney for the plaintiff shall act without compensation, as required by § 460; the filing by the plaintiff's attorney of a consent to prosecute the action without compensation is not sufficient: Rutkowsky v. Cohen, 74 App. Div. 415; 77 N. Y. Supp. 546.

d. Unless an order allowing plaintiff to sue in *forma pauperis* provides that the attorney for the plaintiff serve without compensation, as required by § 460, it is defective; such an order should not be granted where guardian *ad litem* averred in the petition for his appointment that he is worth over $250: Sunkow v. Sheinker, 84 App. Div. 463.

e. **When leave may be annulled.**—An order requiring a non-resident plaintiff to give security for costs should be vacated on motion where it is shown that an order permitting the plaintiff to sue as a poor person had been granted before the commencement of the action. The order permitting suit as a poor person can only be vacated upon a motion regularly made for that purpose, and is not invalidated by the failure of the plaintiff to serve a copy thereof upon the defendant: Buccolo v. New York Life Insurance Co., 117 App. Div. 423.

§ 467. Costs in favor of petitioner.

f. Where an attorney agrees to act as the attorney for a party petitioning to sue in *forma pauperis* "without compensation except the statutory costs," an order allowing the party to so sue should be granted, as under § 467 costs awarded to a party, suing as a poor person are to be divided between the attorney and counsel in the case: Malkin v. Postal Typewriter Co., 95 App. Div. 205.

§ 468. Right of infant to bring action.

g. **Infant.**—An infant, who was a passenger, and as such refused a transfer under § 104 of the Railroad Law, may sue for the penalty thereof imposed because he is the aggrieved party within the meaning of § 468: Fox v. Interurban Street Ry. Co., 42 Misc. 538.

h. Where the guardian *ad litem* of an infant was appointed and subsequently he was committed to the asylum and a committee of his property appointed, the court may properly order the substitution of such committee as the party plaintiff in place and on behalf of the infant by his guardian *ad litem:* Callahan v. N. Y. C. & H. R. R. Co., 99 App. Div. 56.

§ 469. Guardian for infant plaintiff must be appointed.

See rule 49 (Sup. Ct.), Persons who may be appointed guardians ad litem for an infant party.

See §§ 2887, 2888, post, Appointment of guardian ad litem in justice's court.

See § 3249, post, Costs awarded against an infant may be collected of guardian ad litem.

i. A judgment of separation in favor of a defendant husband will be vacated where it appears that the plaintiff is an infant and no guardain *ad litem* had been appointed; the failure to appoint such guardian is an error for which judgment may be vacated at any time within two years under § 1290: Byrnes v. Byrnes, 109 App. Div. 535.

j. Where the guardian *ad litem* of an infant was appointed and subsequently he was committed to the asylum and a committee of his property appointed, the court may properly order the substitution of such committee as the party plaintiff in place and on behalf of the infant by his guardian *ad litem:* Callahan v. N. Y. C. & H. R. R. Co., 99 App. Div. 56.

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a. While it is the duty of the court to vacate orders appointing guardians *ad litem* for infant defendants, appointed in violation of Rule 49 (Sup. Ct.), yet an error of the court in this respect does not deprive the court of jurisdiction or render an interlocutory judgment directing a sale in partition voidable: Parish v. Parish, 175 N. Y. 181, rev'g 77 App. Div. 267; 78 N. Y. Supp. 1089.

§ 471. Application for appointment of guardian for infant defendant.

See rule 50 (Sup. Ct.), Duties of guardian ad litem.

See § 1534, post, Appointment of guardian ad litem in an action in partition.

See § 3251, post, Costs for procuring the appointment of guardian ad litem.

See § 3363, post, Guardian ad litem to be appointed in condemnation proceedings.

b. Appointment of a guardian *ad litem* cannot be sustained under § 471 unless such appointment be made after service of a summons on the infant: Van Williams v. Elias, 106 App. Div. 288.•

c. An application for the appointment of a guardian *ad litem* for a nonresident infant defendant, made by the plaintiff after the infant has been served by publication, and the time to appear has expired, is governed by § 471 and not by § 473 which requires that the order shall designate a person to be appointed guardian *ad litem* unless the infant or some one in his behalf procures a guardian to be appointed within a specified time after service of the order: Platt v. Finck, 60 App. Div. 312; 70 N. Y. Supp. 74.

d. **Amendment of petition.**—An order may be made amending the petition and affidavit *nunc pro tunc* as of the time when they were made, by reciting in the petition that the infant was under and not over the age of fourteen years and directing that the affidavits showing these facts be annexed to a judgment roll in an action to foreclose a mortgage: Baumeister v. Demuth, 84 App. Div. 394; 82 N. Y. Supp. 831.

§ 472. Guardian, how appointed. Clerk, when to act.

e. A clerk in the office of the attorney cannot be appointed guardian *ad litem* of the infant: Lake v. Kessel, 64 App. Div. 540; 72 N. Y. Supp. 311.

§ 473. Guardian for absent infant defendant.

f. An application for the appointment of a guardian *ad litem* for a nonresident infant defendant, made by the plaintiff after the infant has been served by publication, and the time to appear has expired, is governed by § 471 and not by § 473 which requires that the order shall designate a person to be appointed guardian *ad litem* unless the infant or some one in his behalf procures a guardian to be appointed within a specified time after service of the order: Platt v. Finck, 60 App. Div. 312; 70 N. Y. Supp. 74.

§ 474. Guardian not to receive property until security given.

See rule 51 (Sup. Ct.), Guardian to give security before receiving property.

g. Where the plaintiff in an action brought by her guardian *ad litem* recovers a money judgment, neither the guardian *ad litem* nor her attorney can take a single step towards enforcing the collection of the judgment, either by issuing execution or otherwise, until the guardian *ad litem* has given the security required by § 474 of the Code and rule 51 of the general rules of practice: Wileman v. Metropolitan Street R. Co., 80 App. Div. 53.

§ 478. The first pleading on the part of the plaintiff is the complaint.

h. No such pleading as an "amended and supplemental complaint" is recognized by the Code of Civil Procedure; the power to amend a complaint given by the Code relates to the insertion of allegations of fact existing at the time of the commencement of the action: Harowitz v. Goodman, 112 App. Div. 13; 98 N. Y. Supp. 53.

§ 479. Copy complaint, when to be served.

See § 419, ante, Judgment by default when complaint not served.

See § 824, post, Requesting filing of summons and complaint.

i. Where the complaint in an action is served upon the defendant's attorney on January 15, 1904, and such attorney gives an admission of service dated January 12, 1904, the defendant has twenty days from the date of the actual service

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of the complaint within which to serve his answer and not simply twenty days from the date of the admission: Tolhurst v. Howard, 94 App. Div. 439; 88 N. Y. Supp. 235.

a. Where an action is begun by the service of the summons only, if the defendants desire a copy of the complaint, they should, in accordance with § 479, serve a written demand for the same upon the plaintiff's attorney within twenty days after the service of the summons upon them, and if the defendants neglect to serve such demand within the prescribed time, their remedy is to apply to the court to open the default and to be permitted to serve the demand; they have no standing, while, the default continues, to make a motion to require the plaintiff's attorney to serve a copy of the complaint upon them, and for leave to plead thereto: Stokes v. Schildknecht, 85 App. Div. 602.

§ 480. Consequence of failure.

See § 821, post, Dismissal of complaint for neglect to serve one or more defendants.

See § 822, post, Dismissal of complaint for neglect to proceed.

§ 481. Complaint; what to contain.

The complaint must contain:

1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the supreme court, the name of the county, which the plaintiff designates as the place of trial; and the names of all the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition.

3. A demand of the judgment to which the plaintiff supposes himself entitled.

Co. Proc., § 142.

Amended by chap. 500 of 1905 and chap. 431 of 1905.

See § 519, post, Pleadings are to be liberally construed.

b. **Variance between place of trial in summons and complaint.**—Where the place of trial named in the summons and that named in the complaint are different, the county named in the complaint determines the venue of the action, but the mere inadvertence of an attorney in naming a different place of trial in the complaint from that named in the summons (which was the place he intended to name) will not effect a change in the place of trial, provided he moves promptly to correct the error and does not permit his adversary to act upon the assumption that the change was intentional: Goldstein v. Marx, 73 App. Div. 545; 77 N. Y. Supp. 956.

c. The service of a complaint, subsequent to the service of the summons, stating a different place of trial from that stated in the summons, operates, particularly where the defendant's attorney admits service of such complaint and retains it without objection, to change the place of trial to the county named in the complaint. Thereafter the action will be deemed pending in the county named in the complaint, unless it appears that the insertion of the place of trial in the complaint was inadvertent and the plaintiff promptly take steps to correct the error before the defendant has acted in reliance upon the change in the place of trial: Tolhurst v. Howard, 94 App. Div. 439; 88 N. Y. Supp. 235.

d. **Contract.**—A provision in a contract, made by a building and loan association, which requires that any action brought against the association shall be "commenced" in a certain county is valid. and if an action is commenced against the association in a county other than that agreed upon, the association is entitled to a dismissal of the complaint; the service of a summons upon the association in the county mentioned in the contract is not a compliance with the contract, as the action is "commenced" in the county designated in the summons and complaint: Benson v. Eastern Building & Loan Assn., 67 App. Div. 319; 74 N. Y. Supp. 506, rev'd 174 N. Y. 83.

e. In an action upon a contract, failure to allege consideration of performance makes the complaint demurrable: Fulton v. Harney, 117 App. Div. 572.

f. The plaintiff must allege and prove that the amount that he seeks to recover was due at the commencement of the action, in an action for breach of contract:

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Harrison v. Village of New Brighton, 110 App. Div. 267.

a. Where the complaint sets out a cause of action for breach of an express contract to carry and deliver goods, the plaintiff cannot recover on the common-law liability of a common carrier, and the failure to prove such contract is not a mere variance: Rosenfield v. Central Vermont R. Co., 111 App. Div. 371.

b. Under a complaint alleging performance of a building contract, a recovery by the contractor may be had when substantial performance is shown and found by the court: Rowe v. Gerry, 112 App. Div. 358.

c. A complaint for sums due the plaintiff on a breach of contract of service and for damages caused by the breach sets out two causes of action, which should be separately stated: Carlson v. Albert, 117 App. Div. 836.

d. The complaint in an action to recover damages for a breach of contract of employment held sufficient as alleging breach of contract by the defendants: Abrahams v. Finklestein, 53 Misc. 314.

e. When a plaintiff sues on a breach of contract of employment as assistant superintendent of the defendant, and the latter alleges justification because "for a long time he had persisted in a course of conduct antagonistic to the defendant's superintendent and injurious to and destructive of discipline among the employees," the plaintiff is entitled to a bill of particulars specifying the nature and items of the "course of conduct" referred to in the answer. A verbal statement of the conduct complained of previously made by the defendant does not take the place of a bill of particulars, and is no ground for refusing one: Burhans v. H. R. Wood Pulp Mfg. Co., 116 App. Div. 132.

f. A complaint alleging in substance that simultaneously with the plaintiff's contract to serve as clerk of a corporation at a fixed salary, the defendant, who was president, stockholder and director thereof, promised to give him fifty shares of stock "in consideration of the faithful compliance by the plaintiff with the terms of the aforesaid contract between the said corporation and the plaintiff," which promise he failed to perform, does not state a cause of action, as the defendant's contract was without consideration: Petze v. Leary, 117 App. Div. 829.

g. A complaint which alleges that the defendant, a newspaper, which together with other newspapers had received pictures furnished by plaintiff under an agreement not to publish them before a certain date, made a breach of that promise by prematurely publishing the pictures whereby they were "stale" and the plaintiff lost the benefit of his contracts with other papers, which also asks damages for the injury to the plaintiff's standing with publishers, does not state two causes of action. The allegations as to plaintiff's injured reputation go to damages only: Dunn v. New York Herald Co., 119 App. Div. 477.

h. Where, in an action for breach of contract, the pleadings are oral and the answer is a general denial, a refusal to dismiss the complaint for failure to prove plaintiff's capacity to sue is not error: Independent T. Y. M. B. Assn. v. Somach, 52 Misc. 538.

i. Allegations in a complaint to reform a written instrument, examined and held sufficient: Woolf v. Barnes, 46 Misc. 169.

j. **Foreign corporation.**—Upon an application by a foreign corporation doing business in this state for an order of arrest, the moving papers need not show affirmatively, for the purpose of the order of arrest, that the corporation has complied with the provisions of § 181 of chap. 908 of the Laws of 1896 imposing certain restrictions upon its right to do business in this state. The objection of non-compliance with the statute, if available at all, should be raised by demurrer or by answer as the case demands, and if not raised by either is deemed to have been waived: C. R. Parmele Co. v. Haas, 171 N. Y. 579, rev'g 67 App. Div. 457; 73 N. Y. Supp. 986.

k. The omision, in the complaint in an action brought by a foreign corporation, to allege that it had obtained the certificate required by § 15 of the General Corporation Law, does not render such complaint demurrable, but if it appears affirmatively from the complaint that the foreign corporation has failed to procure the necessary certificate the complaint is demurrable for lack of capacity to sue: Emmerich Co. v. Sloane, 108 App. Div. 330; 95 N. Y. Supp. 39.

l. When it does not appear in the complaint of a foreign corporation suing in this state that it is a stock corporation, the complaint should not be dismissed because it does not set out that the corporation was authorized to do business in this state as required by § 15 of the General Corporation Law: South Bay Co. v. Howey, 113 App. Div. 382; 98 N. Y. Supp. 909.

m. The complaint of a foreign corporation seeking to recover for goods sold in this state, which fails to allege that the plaintiff has complied with § 15 of the General Corporation Law, fails to state a cause of action. The defense need not be taken by demurrer or answer, but is available on a motion for a nonsuit after the evidence is in:

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Wood & Selick v. Ball, 114 App. Div. 743.

a. **Equity.**—A demurrer to a complaint framed in equity will be sustained although the facts alleged in such complaint would sustain an action at law: Black v. Vanderbilt, 70 App. Div. 16; 74 N. Y. Supp. 1095.

b. Where all the allegations of the complaint are made for the purpose of procuring equitable relief, and where equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer has been interposed; the converse of this proposition is also true and where only legal redress is demanded and no answer is interposed, the complaint cannot be sustained for equitable relief: Cody et al. v. First National Bank of Springfield, 63 App. Div. 199; 32 Civ. Pro. R. 148; 71 N. Y. Supp. 277.

c. **Repetition.**—Allegation showing the plaintiff's capacity to sue need not be repeated in the second and subsequent causes of action: Bigelow v. Drummond, 98 App. Div. 499; 96 N. Y. Supp. 913.

d. **Redundant matter.**—Upon a demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, the question is not whether it contains redundant or irrelevant matter but whether it contains averments which go to make up a complete cause of action; every intendment and inference which can be derived from the complaint must be used to sustain it: Budd v. Howard Thomas Co., 40 Misc. 52; 80 N. Y. Supp. 152.

e. **Statutes.**—Extracts from public statutes and from private contracts and various matters which are merely evidence have no proper place in a pleading and such allegations should be stricken out upon motion: Parsons v. McDonald, 88 App. Div. 552; 85 N. Y. Supp. 190.

f. A complaint excusing the joinder of parties whose subscriptions are forfeited need not allege the details essential to the declaration of forfeiture by the directors pursuant to § 43 of the Stock Corporation Law, such facts being merely evidential: Ford v. Chase, 118 App. Div. 605; 103 N. Y. Supp. 30.

g. Allegations of a complaint as to the duties of certain city officials, prescribed by statute, are conclusions of law and a complaint containing such allegations is demurrable: McGuinness v. Allison Realty Co., 46 Misc. 8.

h. **General allegations of fraud.**—General allegations of fraud are of no value in alleging a cause of action, and the facts showing fraud and intent must be alleged in such a manner that the court may see whether they were fraudulent: Knowles v. City of New York, 176 N. Y. 430, aff'g 74 App. Div. 632; 77 N. Y. Supp. 1130.

i. A complaint which sets out that certain transactions were made without consideration, and with a continuing intent to cheat and defraud creditors is not subject to demurrer: Wright v. Simon, 118 App. Div. 774.

j. **Foreign statutes.**—When the statute of limitations of another state is a necessary part of a plaintiff's cause of action, it is incumbent upon him to produce affirmative proof thereof, as the courts of the state of New York do not take judicial notice of the statutes of another state: Moore v. Coler, 106 App. Div. 331.

k. **Threat.**—Allegations in a complaint in an action for an injunction that manufacturers were prevented from making sales to the plaintiff because they wished to protect themselves with those who had adopted the contract or rebate plan and agreed to maintain prices, do not allege a threat: Park & Sons Co. v. Nat. Druggists' Assn., 175 N. Y. 1, aff'g 54 App. Div. 223; 64 N. Y. Supp. 276; 66 N. Y. Supp. 615.

l. **Accident insurance.**—The allegations of a complaint held insufficient in an action on a policy of accident insurance: Todd v. Union Casualty and Surety Ins. Co., 70 App. Div. 52; 74 N. Y. Supp. 1062.

m. **Dissolution.**—Requisites of complaint in action to dissolve corporation subject to Banking Law, considered: People v. Manhattan Real Estate & L. Co., 175 N. Y. 133, rev'g 74 App. Div. 535; 77 N. Y. Supp. 837.

n. A complaint in an action by a stockholder under § 1785 to procure the dissolution of a corporation fails to state a cause of action when it does not allege that notice to the stockholders as required by § 57 of the Stock Corporation Law has not been published or that no notice has been mailed to or served upon the stockholders: Knickerbocker v. Groton Bridge & Mfg. Co., 111 App. Div. 145.

o. **Ejectment.**—A complaint which alleged, that, under a lease in perpetuity, the plaintiffs are owners in fee of certain described real property presently in the possession of the sole defendant, that they are entitled to its possession and rents and profits, that the defendant has occupied and paid rent under the lease, that he has now made default in payment of the rent on demand, that he has forfeited the conditions of the lease and is wrongfully and unlawfully in possession and wrongfully and unlawfully withholds it, does not state a cause of action in ejectment, but one on the lease, for rent and for possession: Ward v. Terry, 36 Misc. 330; 73 N. Y. Supp. 569.

p. **Encroachment.**—An action to recover a strip of land, upon which the adjoining owner has unlawfully encroached with a brick wall, is founded upon a single wrong, and creates but one cause of action. In such an action,

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brought under chap. 14, title I, art. 1 of the Code of Civil Procedure, the plaintiff may have all the relief, both legal and equitable, to which he is entitled, and he cannot maintain an action at law to prove his title and right to possession, and then bring a separate suit in equity to remove the encroachment. Under §§ 481 and 3339, a plaintiff must join and plead in one action all the elements of his cause of action, upon which he seeks either legal or equitable relief, or both: Hahl v. Sugo, 169 N. Y. 109; 32 Civ. Pro. R. 265, rev'g 46 App. Div. 632; 61 N. Y. Supp. 770.

a. **Guaranty.**—Complaint held sufficient pleading consideration of guaranty, as original undertaking: Ward v. Hasbrouck, 169 N. Y. 407, aff'g 52 App. Div. 627; 65 N. Y. Supp. 200.

b. In an action on a guaranty to take a loss in case the customers failed to pay, it is a good defense to allege that the plaintiffs had neglected to collect the claims against the debtors and had not exhausted their remedy against them; the complaint was defective as it did not show that the plaintiffs had been and will be unable to realize the advances made by them: Nachod v. Hindley, 118 App. Div. 658.

c. A complaint setting out that the plaintiff, a bank, made a loan to one S. upon the written guaranty of the defendant, a national bank, of the payment of said loan at maturity, does not state a cause of action, for the contract of guaranty is ultra vires, and no recovery can be had thereon. This is so although the complaint alleges that S. obtained the loan under an agreement with the defendant to turn the sum over to it, and that the guaranty was to be made by the defendant in order that it might obtain the money: Appleton v. Citizens' National Bank, 116 App. Div. 404.

d. **Liquor tax.**—What allegations of a complaint are sufficient to show the breach of a bond of a hotel keeper for a liquor tax certificate: Cullinan v. Fidelity & Casualty Co., 41 Misc. 119; 83 N. Y. Supp. 969.

e. **Replevin.**—A complaint in an action of replevin, brought upon the ground that title to the chattels sold never passed to the defendants because of their fraud, properly and sufficiently describes the chattels where it states them as " 373 2-8 yards of cloth whether manufactured or unmanufactured or in process of manufacture, but capable of identification; " if property can be identified in the hands of a wrongdoer the true owner may replevy it although it no longer remains in its original form: Clemmons v. Brinn, 36 Misc. 157; 72 N. Y. Supp. 1066.

f. **Negligence.**—A complaint in an action brought by a guest of a tenant against the landlords to recover damages for personal injuries sustained by such guest, which alleges that the landlords covenanted in the lease to keep the demised premises in repair and reserved the right to enter such premises for that purpose, and " that as a result of the negligence of the defendants in not keeping the ceiling of the above described apartments in proper repair, plaintiff was struck by such ceiling falling on her head while lying in bed " and " that such accident occurred as a result of the negligence solely of the defendants, and plaintiff is not guilty of any contributory negligence," is demurrable, as it does not charge any personal neglect on the parts of the landlords, but only such neglect as is incident to a breach of contract, which later neglect is insufficient to support the action; the allegations of negligence contained in the complaint are not admitted by the demurrer so far as such allegations involve a mere conclusion of law or of fact on the part of the pleader: Frank v. Mandel, 76 App. Div. 413; 78 N. Y. Supp. 855.

g. Allegations of a complaint held sufficient to describe the place where the accident occurred in an action for negligence: Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181; 84 N. Y. Supp. 669.

h. A complaint alleging the negligence of the owner of the building in failing to guard an elevator shaft and the negligence of a joint defendant, who was tenant "of the second floor of the premises above mentioned," does not state a cause of action when it does not state facts showing that the injury was received on said second floor: Detviller v. Rolled Plate Metal Co., 110 App. Div. 773.

i. Allegations in the complaint as to contributory negligence are unnecessary and may be regarded as surplusage: Hunter v. Metropolitan Ex. Co., 50 Misc. 158.

j. Where the plaintiff has a single cause of action based upon the negligence of the defendant and sets out separate acts of negligence, some constituting negligence at common law and others under the Employers' Liability Act, he should not be compelled to amend his pleading, separately stating the common-law action and the action under the statute; allegations of negligence not proved at trial may be considered as surplusage: Acardo v. New York Contracting & Trucking Co., 116 App. Div. 793.

k. In an action for damages alleged to have been sustained by defendant's negligence, actionable upon common law grounds as well as under the Employers' Liability Act (L. 1902, ch. 600), the complaint states but a single cause of action, though two grounds of liability, either of which the plaintiff may establish by proof on the trial: Hamnstrown v. N. Y. Contracting Co., 52 Misc. 634.

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a. Under a complaint which alleges that when the plaintiff as a passenger upon an electric surface car had mounted the platform and was about to enter the car, the latter "was suddenly moved forward with a violent jerk before the plaintiff had been given a reasonable opportunity to get into said car or take a seat therein," the plaintiff may recover without proof that the car was started with a violent jerk, for the pleading may be construed to be founded on the failure of the defendant to allow a reasonable opportunity to gain a place of safety before starting the car: Morrow v. Brooklyn Heights Railroad Co., 119 App. Div. 22.

b. A complaint which alleges in substance that a municipal corporation negligently piled a large quantity of earth, several feet high, from a public street to and upon the entrance of a building used for religious purposes, and negligently placed upon said pile a large open pipe into which the plaintiff, an infant, going to attend a religious meeting, fell and was injured, without negligence on his part, etc., is not subject to demurrer for failing to state a cause of action: Hunton v. Village of Peekskill, 119 App. Div. 500.

c. **Repetition.**—It is essential to set forth every material fact which forms a part of a cause of action or defense, and a complaint must contain a plain and concise statement of the facts constituting each cause of action without unnecessary repetition: National Citizens' Bank v. Toplitz, 178 N. Y. 464.

d. **Promissory note.**—A complaint in an action on a promissory note which alleges that at the time of the delivery of the note the defendants received the plaintiff's checks aggregating the amount of the note, and also promised to issue to plaintiffs certain stock, which stock was subsequently assigned to plaintiffs, but that it had no value, is sufficient, as it did not appear but that the stock was transferred for some lawful consideration in connection with the note transaction: Cameron v. Fraser, 48 Misc. 8.

e. A complaint which alleges the execution by defendants and the delivery to plaintiff of certain instruments set out in full, and described as promissory notes, and of the demand for payment by plaintiff and of non-payment of any part thereof, states sufficient facts to constitute a cause of action within § 481, and a demurrer to the complaint on the ground that the instruments were not promissory notes and that the complaint fails to comply with § 534 will be overruled: Didato v. Coniglio, 50 Misc. 280.

f. **Insurance policy.**—In an action upon an insurance policy, the plaintiff, if he desires to plead the waiver of any condition by the company with which he failed to comply, must allege the condition and the facts and circumstances constituting the waiver thereof: Glazer v. Home Ins. Co., 48 Misc. 515; 96 N. Y. Supp. 136, aff'g 113 App. Div. 235.

g. If the complaint in an action on a fire insurance policy does not allege, specifically or by intendment, that the insured property was destroyed or injured by fire, a demurrer thereto will be sustained: Frank v. Continental Ins. Co., 50 Misc. 144.

h. A complaint does not allege a waiver of notice of loss by the insurer by stating that the plaintiff fulfilled all the conditions as to notice and that the defendant retained the notice without objection and required no further proof of loss: Glazer v. Home Ins. Co., 113 App. Div. 235.

i. In an equitable action brought by the holder of a life insurance policy, issued by a corporation whose assets the complaint alleges the defendant "took over," where the complaint also alleges that defendant assumed all the contracts of life insurance of such corporation and plaintiff seeks to enforce the provisions of his policy, but no contract of insurance with the defendant is set up and it does not appear whether defendant is a new corporation, or a reorganization of the old one, nor whether the assumption of the previous insurance contracts was by an agreement between two distinct companies or by operation of the provisions of law relating to the reorganization of insurance companies, and the terms of plaintiff's alleged contract of insurance are not set out, the complaint does not state facts sufficient to constitute a cause of action: Ovenshire v. Security Mut. Life Ins. Co., 54 Misc. 435.

j. A complaint in an action against the vice-president and trustee of an insurance corporation which alleges that the defendant was required to preserve the assets of the company, etc., states a cause of action for general damage for wrongful acts or negligence of such officer: Mut. Life Ins. Co. v. Grannis, 118 App. Div. 830.

k. **Broker.**—Where, in a broker's action for commissions against a landowner and his attorney in fact, who was only authorized to take charge of and control the payment of commissions, the complaint asked no personal judgment against such attorney in fact, but merely alleged that the owner made payments of a portion of the commissions to a person with whom the plaintiff had a contract to divide the commissions, and refused to pay the balance to plaintiff without the consent of such person, a personal judgment against such attorney in fact is unauthorized under the complaint, as no such relief was asked: Kervan v. Hellman, 110 App. Div. 655; 97 N. Y. Supp. 55.

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a. **Prayer for relief.**—Where the complaint in an action demands relief against several persons not made parties, and whose presence is not made necessary to a complete determination of the controversy, the prayer for relief may be deemed surplusage, and a failure to join them as defendants is not a ground for demurrer: O'Connor v. Virginia Passenger and Power Co., 184 N. Y. 46, rev'g 107 App. Div. 630; 95 N. Y. Supp. 1149.

b. When facts are stated sufficient to constitute a cause of action, either legal or equitable, the complaint is not demurrable on the ground that it does not state sufficient facts, because both legal and equitable relief are demanded, when the plaintiff is entitled to but one form of relief: Doyle v. Delaney, 112 App. Div. 856.

c. **Warranty.**—Whether a warranty of fitness of an article purchased, to the knowledge of the seller, for a specified use and purpose, was express or implied need not be pleaded: Ducas Co. v. American Silk Dyeing Co., 48 Misc. 411.

d. **Surety.**—When demurrer to complaint in an action by an assignee against sureties of a bond will be sustained: Dunham & Co. v. McCann, 110 App. Div. 157.

e. A complaint against a surety on a bond conditioned for the payment of a promissory note, which does not allege the covenant of the defendant in full or in legal effect, except that "said bond was conditioned for the payment of $5,000," does not state a cause of action, and a demurrer to a partial defense thereto should be overruled, although the defense be bad; a bad defense is good enough for a bad complaint: Gansevoort Bank v. Empire State Surety Co., 112 App. Div. 500.

f. Complaint in an action against guarantors of a promissory note, held not demurrable: Delaware Nat. Bank v. King, 47 Misc. 447; 95 N. Y. Supp. 954, rev'g 108 App. Div. 228.

g. **Employers' Liability Act.**—In an action for personal injuries, the plaintiff may allege both the statutory cause of action under the Employers' Liability Act and the common-law cause of action: Kleps v. Bristol Mfg. Co., 107 App. Div. 488.

h. The complaint in an action under § 1902 may be amended so as to set out the fact that the notice required by the Employers' Liability Act was served on the defendant: Miller v. Erie R. R. Co., 109 App. Div. 612.

i. It is not necessary, in order to plead a cause of action under the Employers' Liability Act (L. 1902, ch. 600) that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirement of the giving of a notice to the defendant has been complied with: Harris v. Baltimore Machine & El. Works, 188 N. Y. 141, aff'g 112 App. Div. 389.

j. A failure to plead and prove facts bringing a cause of action within the Employers' Liability Act bars a recovery thereunder, although it is alleged that the required notice was filed, and the complaint cannot be amended to show such recovery after a motion to dismiss has been granted: Sutherland v. Ammann, 112 App. Div. 332.

k. **Trespass.**—A complaint which alleges that the defendants have wrongfully trespassed on plaintiff's premises by cutting timber thereon and are continuing and threaten to continue to do so to the plaintiff's irreparable damage, followed by a prayer for an injunction with damages for the cutting already done, sets out only an action in equity and defendants have no right to a jury trial, although the defendants are alleged to be liable for treble damages under §§ 1667 and 1668: Page v. Herkimer Lumber Co., 109 App. Div. 391.

l. A complaint in an action for trespass for diversion of water must allege negligence, and unless negligence is proved on the trial the complaint should be dismissed: Gordon v. Ellenville & Kingston R. R. Co., 119 App. Div. 797.

m. **Stockholders.**—In an action against the president of a new corporation which took over the assets and stock of an old corporation for stock alleged to be held in trust for the plaintiff, a stockholder in the old corporation, it was held that the new corporation was a necessary party and that the other stockholders were necessary parties as the plaintiff had sued individually and not on behalf of himself and other stockholders: Knickerbocker v. Conger, 110 App. Div. 125.

n. A complaint in a stockholder's action alleging in substance that the defendants knowing the value of property sold to a corporation conspired to defraud the stockholders, and in pursuance of the conspiracy obtained control of the majority of the stock by false representations, etc., which fails to allege that the defendants were the directors of the corporation, fails to state a cause of action against them, for by the statute directors only have power to manage the corporate affairs; such complaint is also subject to demurrer when it fails to allege that a demand has been made upon the corporation to bring action to recover for the wrongful acts complained of, or fails to state facts which excuse such demand: Brown v. Utopia Land Co., No. 2, 118 App. Div. 364.

o. **Demurrer to answer.**—When a plaintiff demurs to the answer the defendant can challenge the validity of the complaint, as any answer is good to

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a complaint which does not state a cause of action: Parker Co. v. City of New York, 110 App. Div. 360.

a. **Accounting.**—Where a complaint sets forth a cause of action at law for the conversion of stock, the fact that the prayer for relief demands an accounting as a method of ascertaining the damages, does not make it one in equity: Brightson v. Claflin Co., 108 App. Div. 284.

b. An action in equity against the auditor of a corporation for an accounting as to a fund over which he had custody and control, and an action at law for damages claimed to have resulted from his wrongful or negligent acts, in auditing corporate bills, cannot be united in one complaint when it is not alleged that the defendant himself profited by the improper audit; when the two causes are distinctly pleaded the objection to the misjoinder may be taken by demurrer: Mut. Life Ins. Co. v. Gillette, 119 App. Div. 430.

c. An allegation that moneys were received from plaintiff by defendant, an attorney, employed by plaintiff, in connection with such employment, to be used and disbursed by him for and on behalf of the plaintiff in matters relating to the affairs of the plaintiff, is insufficient to show that such moneys were received by the defendant in a fiduciary capacity so that an action in equity could be maintained against him for an accounting; and a demurrer to the compalint will be sustained: N. Y. Life Ins. Co. v. Hamilton, 52 Misc. 189.

d. The liquidating agent of a national bank may be sued in the Supreme Court of the State of New York for an accounting in equity as he does not occupy the position of a receiver and may be sued, or sue, without leave of court: Ingold v. Gilmore, 118 App. Div. 727.

e. Where, although the complaint fails to allege a cause of action for an accounting of profits and losses or for contribution, the same may be inferred from other allegations and the facts may be regarded as sufficient to constitute a cause of action for terminating the joint engagement, but the prayer for relief is for a sum of money only, the complaint does not state facts sufficient to constitute a cause of action for an accounting and contribution: Jones v. McNally, 53 Misc. 59.

f. A complaint in an action for an accounting for assets obtained by false representations may state but a single cause of action although the prayer for relief asks that an agreement, which stands as a bar to an action for accounting, be set aside on the ground of fraud; the demand that such agreement be declared void was simply incidental to the plaintiff's demand for an accounting and did not constitute a separate cause of action: Smith v. Irwin, 108 App. Div. 218; 95 N. Y. Supp. 731.

g. Though in an action in equity for an accounting for moneys obtained by the defendants through a conspiracy of extraordinary character, the rules of pleading governing an action at law should be relaxed and allegations which bear upon the fraudulent scheme of the conspirators are proper, allegations which merely set out evidence of such conspiracy are improper and should be stricken out: Bankers' Surety Co. v. Rothschild, 111 App. Div. 130.

h. A complaint in an action to compel a reorganization committee to account, held sufficient as stating a cause of action for an accounting, and sufficiently alleging bad faith by the committee: Mawhinney v. Bliss, 117 App. Div. 255; 102 N. Y. Supp. 279, aff'g 189 N. Y. ——.

i. **Conversion.**—A complaint which alleges in substance that the defendant, acting as plaintiff's attorney, induced him to turn over moneys on a promise to invest the same in a water company in which the defendant was interested, which representations were false, etc., and that the defendant did not invest said moneys but converted the same to his own use, can be regarded as stating a cause of action for conversion and not for false and fraudulent representations: Sinclair v. Higgins, 111 App. Div. 206.

j. In an action against an attorney for conversion in refusing to turn over to the executors money which he had been given for certain funds, it is necessary to allege facts other than "he converted the same to his own use," the complaint held to be one for moneys had and received, and the defendant was entitled to set up counterclaims for sums due on other contracts: Lange v. Schule, 117 App. Div. 233.

k. A complaint which alleges the title to personal property in the plaintiff under a promise by the defendant to deliver it upon demand, that demand was made and refused, states an action for conversion, and a counterclaim thereto founded upon contract is subject to demurrer: McIntyre v. Smathers, 118 App. Div. 776.

l. **Assignment.**—When a person has transferred his entire interest in a cause of action to another, he cannot be joined with such transferee as a party plaintiff, and demurrer will lie to such complaint: Alexander v. City of Gloversville, 110 App. Div. 791.

m. **Tax.**—An allegation in the complaint in an action brought by a trust company against the city of New York to recover the amount of an illegal tax to the effect that the tax was paid by the bank from moneys applicable for distribution among its stockholders as divi-

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dend payments is sufficient to establish, as against a demurrer to said complaint, that the money so paid by the bank was the property of the trust company: Guaranty T. Co. v. City of New York, 108 App. Div. 192.

a. **Damages.**—Where a complaint alleges a contract and a breach thereof, it is not demurrable as failing to allege damages, as the plaintiff is entitled to at least nominal damages: Gause v. Commonwealth Trust Co., 111 App. Div. 530.

b. Where a complaint for damages for the unauthorized use of the plaintiff's portrait by the defendants, contrary to chap. 132 of 1903, joins as defendants both the photographer who took the portrait and an author who used it in his publications, and alleg' that it was used by the defendants "acting jointly," only one cause of action is alleged which is against the defendants jointly, though the same counts are elsewhere separately set out against each defendant, a demurrer will not be sustained; an action at law for damages and a suit in equity to restrain such use of the plaintiff's portrait may be united in one complaint: Riddle v. MacFadden, 116 App. Div. 353.

c. **Creditor.**—A complaint in an action brought by a creditor of a corporation against a stockholder thereof, under § 54 of the Stock Corporation Law, upon the ground that his stock had not been fully paid up, is demurrable where the allegation as to the defendant's indebtedness upon the stock relates to the time when the indebtedness of the corporation to the plaintiff was contracted, and not to the time when the plaintiff recovered judgment against the corporation upon such indebtedness: Dyer v. Drucker, 108 App. Div. 238.

d. **Penalty.**—A person seeking to maintain an action for a statutory penalty must state every fact required to enable the court to judge whether he has a cause of action under the statute; in such an action the pleadings are strictly construed: Ithaca Fire Dept. v. Rice, 108 App. Div. 100; 95 N. Y. Supp. 464.

e. **Election.**—When plaintiff will not be compelled to elect upon which of three inconsistent counts he will rely: Franke v. Taussig Co., 48 Misc. 169.

f. **Libel and Slander.**—Although a writing charging persons with being crooks and gold-brick men does not refer to the plaintiff by name, if the complaint alleges that the words referred to him in conformity with § 535, the complaint is not demurrable on the ground that the article is not sufficiently descriptive: Townes v. N. Y. Eve. Journ. Pub. Co., 109 App. Div. 852; 96 N. Y. Supp. 822.

g. When one paragraph of a complaint sets out the whole of the article charging the plaintiff with the commission of several acts, and the following paragraph contains an innuendo referring only to some of the charges set forth in the preceding paragraph, such following paragraph is surplusage when the article set out libelous on its face, and an alleged defense in partial justification of the charges not referred to in the innuendo is good and demurrer thereto should be overruled: Nunnally v. Press Pub. Co., 110 App. Div. 10.

h. A complaint in an action for defamation which singles out a meaning of alleged libelous matter capable of both a harmless and a defamatory meaning is limited to the meaning alleged and the defendant has only to answer thereto: Lambertini v. Sun Printing & Pub. Co., 47 Misc. 174; 95 N. Y. Supp. 329, rev'g 111 App. Div. 437.

i. The common-law rule which required the plaintiff in an action for libel to plead facts which connected the publication with him when such publication on its face did not directly or necessarily refer to him, has been abrogated by § 535: Nunnally v. Tribune Assoc., 111 App. Div. 485; 97 N. Y. Supp. 908; 186 N. Y. 533.

j. Where the plaintiff is not named in an article libelous *per se*, but is indicated by circumstances described in the article, and the complaint contains a general allegation pursuant to § 535 that the article was published concerning her, she may at trial show extrinsic facts which would connect her with the article, and the complaint is not subject to demurrer: Nunnally v. New Yorker Staats-Zeitung, 111 App. Div. 483.

k. An article alleging that the popularity of a series of pictures is waning, is not libelous *per se*, and a complaint for libel thereon is demurrable unless the actionable meaning of which the words are capable is pointed out by innuendo: Outcault v. New York Herald Co., 117 App. Div. 534.

l. When a publication, plainly humorous, relating to the plaintiff does not justify an innuendo ascribing to it a libelous meaning, a demurrer to the complaint will be sustained: Lambert v. Sun Printing and Pub. Co., 111 App. Div. 437; 97 N. Y. Supp. 694.

m. The complain in an action for libel must state more than conclusions of fact; facts themselves must be alleged from which the conclusions may be drawn; hence, in an action for libel in writing a letter which charged the plaintiff with writing letters, which, by innuendo, are said to be obscene, the complaint is subject to demurrer, as the characterization of the letters is a mere conclusion. The contents of the letters alleged to be obscene should be set forth: McNamara v. Goldan, 118 App. Div. 221.

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a. A complaint in an action for slander fails to state a cause of action where the words alleged to be spoken are that the plaintiff, in employing men for his employer, charged them a commission or fee on their wages, when no extrinsic facts showing a slanderous meaning are alleged: Finan v. New York C. & H. R. R. R. Co., 111 App. Div. 382.

b. A complaint against an hotel-keeper alleging in substance that the plaintiff having been assigned a room was insulted by a servant who entered and charged her with immoral conduct and ordered her to leave the hotel, does not state a cause of action when there is no allegation of assault, or that the plaintiff was put out of the hotel, and the defamatory words are not set forth; such complaint cannot be sustained as one for slander when the words used are not stated: De Wolf v. Ford, 119 App. Div. 808.

c. A complaint in an action for libel is not demurrable, for the publication of an article charging the plaintiff with drunkenness in a police station, and with "celebrating," which article is stated by innuendo to accuse the plaintiff of drunkenness in a public place, as such article is libelous *per se:* Morse v. Star Co., 118 App. Div. 256.

d. Words which charge an incorporated reporters' association with begging subscriptions, and with being organized for the purpose of benefiting itself and allied concerns, are not libelous *per se* and charge no crime; but when the plaintiff has alleged special damage by stating that because of such publication it has met with serious loss in business by refusal of clients to pay just claims due on contract, the complaint states a cause of action and is not subject to demurrer: Reporters' Assn. v. Sun Printing and Pub. Assn., 112 App. Div. 247.

e. **Trustee in bankruptcy.**—The complaint in an action by a trustee in bankruptcy, to set aside a chattel mortgage made by the bankrupt within the four months' period as a preference in favor of the mortgagee, should allege that the plaintiff has not sufficient assets to pay all creditors who have filed claims against the estate and that the transfer was made in consideration of an antecedent debt: Lesser v. Bradford Realty Co., 47 Misc. 463.

f. A complaint in an action brought by a trustee in bankruptcy to recover moneys collected by a stock exchange association from the debtors of the bankrupt is not demurrable because it did not allege that the moneys were not paid to the bankrupt or to his assignee for the benefit of creditors whom the trustee superseded where the association could not properly pay the funds so collected to the bankrupt: Cohen v. Wagar, 183 N. Y. 33.

g. A complaint in an action by a trustee in bankruptcy to recover property alleged to have been wrongfully transferred by the bankrupt held sufficient as setting forth three causes of action against the transferees of the bankrupt and were not improperly united: Bouton v. Wheeler, 118 App. Div. 426.

h. In an action by a trustee in bankruptcy to set aside a bill of sale and agreement by the bankrupt alleged to have been intended to operate as a mortgage and to give an unlawful preference contrary to the Bankruptcy Law, an allegation that the bill of sale was intended to and did create a preference in favor of the defendant "and thereby gave to it a greater percentage of its debts than that of any other creditor of the same class," is a sufficient allegation that the "enforcement" of the transfer will have that effect. It is not necessary to allege specifically that the transfer complained of is voidable by the plaintiff as trustee when facts are set out showing that the transfer is voidable and judgment is asked declaring it void: Lesser v. Bradford Realty Co., 116 App. Div. 212.

i. Where, in an action brought by a trustee in bankruptcy to set aside as fraudulent certain voluntary conveyances of the bankrupt, his firm and a corporation he controlled, the complaint alleges successive conveyances by the bankrupt to different children and grandchildren with intent to hinder, delay and defraud creditors, in which the grantees participated, made at intervals during a period of eight years as part of one fraudulent scheme, the complaint states but one cause of action; the trustee of two bankrupts who were partners holds a single office and there is no misjoinder of parties: Wright v. Simon, 52 Misc. 360.

j. **Executor.**—An action upon a sealed instrument may be brought within twenty years; and an answer which pleads the statute of limitations based on a shorter period is demurrable; where a defendant is sued both individually and as executor the complaint is good as against a demurrer that the court has no jurisdiction of an action against an executor: Burstein v. Levy, 49 Misc. 469.

k. **No cause of action.**—Where, under a complaint alleging several causes of action, the second and each succeeding alleged cause of action do not repeat or refer to essential facts set out in the first cause of action, the complaint upon its face shows that no separate or independent cause of action has been properly set forth, as required by the second subdivision of this section, and, therefore, as to those causes of action does not state facts sufficient

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to constitute a cause of action: People v. Koster, 50 Misc. 46.

a. A complaint, which in substance alleges that plaintiff furnished goods to a hotel at the request of the defendant, and on his personal promise to pay therefor, and that thereafter defendant represented the hotel company and himself to be insolvent, and induced the plaintiff to compromise his claim and execute an assignment thereof to the defendant at a time when, in fact, the defendant had been given money by the hotel company to pay for the goods, does not state a cause of action: Gordon v. Maas, 115 App. Div. 377.

b. **Discrimination.**—A complaint alleging that a telephone corporation unjustly discriminates against the plaintiff on account of his profession and refuses to supply him with service at reasonable rates, and asking a mandatory injunction, states a cause of action and is not subject to demurrer: Wright v. Glen Telephone Co., 112 App. Div. 745.

c. **Lien.**—A complaint does not state a cause of action when it sets out a levy under attachment in a prior action, the recovery of judgment and the issue of execution against certain property, and that the defendants, holding the property as security for a debt of the defendant in the prior action, claim a superior lien thereon, which lien is alleged to be invalid as against the plaintiff, and that their claim of such lien is null and void: Gavazzi v. Dryfoos, 110 App. Div. 90.

d. In an action to foreclose a mechanic's lien, the absence of any allegation that any sum was due or remained unpaid from the owner to the contractor, or from the contractor to the subcontractor, is fatal to the sufficiency of the complaint, under § 47 of the Lien Law (L. 1897, chap. 418): Gribben v. Hoare, 54 Misc. 245.

e. A complaint in an action to foreclose a mechanic's lien, which alleges in substance that, with the consent of the defendant, plaintiff performed work, labor and services and furnished materials of specified value for the repairing of a chimney, etc., on the defendant's premises, states a cause of action: Kerwin v. Post, 120 App. Div. 179.

f. **Services.**—Although a complaint sets out an action to recover for work, labor and services against joint defendants, a judgment against one of said defendants only is authorized by § 1205: Lawton v. Partridge, 111 App. Div. 8.

g. Where the complaint in an action for services completely performed, though stating the facts according to their legal effect, is vague and indefinite, the defendant should either demand a bill of particulars or move to make the complaint more definite and certain; a demurrer will not lie: Fleck v. Friedman, 49 Misc. 220.

h. In an action for breach of contract of employment, it is proper to set out the amount of plaintiff's salary subsequent to the breach, as it is the measure of damage: Murray v. O'Donohue, 109 App. Div. 696.

i. **Conclusion of law.**—An allegation that the defendant was "indebted" to the plaintiff's assignee for money had and received is a mere conclusion of law, and does not state a cause of action: Tate v. American Woolen Co., 114 App. Div. 106.

j. A complaint which alleges that defendant had no jurisdiction of the plaintiff is a mere conclusion of law, unsupported by facts: McClerg v. Vielee, 116 App. Div. 731.

k. **Performance.**—Although the complaint alleges a right to commissions dependent upon an agreement to erect a hotel upon the "land then owned by" the defendant, it does not fail to allege performance because the proposed hotel was to be built partly "upon land of other parties," when such lands became necessary to meet the requirements of all concerned: Lucas v. Smith, 113 App. Div. 31.

l. Under an allegation of performance of a contract of which time is the essence, there can be no recovery only *secundum allegata;* evidence excusing performance within the stipulated time is not admissible in the absence of an amendment alleging the facts which excuse performance: Hecla Iron Works v. Hall, 115 App. Div. 126.

m. **Specific performance.**—The complaint in an action by the vendee to compel specific performance of a contract to convey real estate, must allege the title to the premises to be in the defendant, and the failure to make such allegation is not cured by the prayer for general relief: Boder v. Gordon, 113 App. Div. 282.

n. A vendor's complaint in an action for specific performance of a contract to convey lands need not allege that the plaintiff was "able" to convey. It is sufficient that he is ready and willing to perform the agreement on his part, and that he did tender to the defendant a deed of the premises pursuant to the terms of the agreement, etc. Inability of the vendor to perform is a matter of defense: Clexton v. Tunnard, 119 App. Div. 709.

o. **Frivolous demurrer.**—Where a complaint, by reason of a clerical error, alleges injury to the plaintiff instead of to the plaintiff's intestate, a demurrer thereto based on such clerical error is frivolous, and the defect is amendable at any time upon mere suggestion to the court: King v. Mail & Ex. Co., 113 App. Div. 90.

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a. **Tort.**—A complaint alleging a special contract by a hospital corporation to watch the plaintiff's insane wife, and that the defendant made a breach of the contract by negligently failing to keep such watch, whereby the wife threw herself out of the window and was killed, states an action in tort and not on contract: Duncan v. St. Luke's Hospital, 113 App. Div. 68.

b. **Stolen bonds.**—A plaintiff suing to recover money paid to the transferee of stolen negotiable bonds must allege that the defendant was not a *bona fide* holder: Lawyers' Title Ins. & T. Co. v. Jones, 113 App. Div. 105.

c. **Infant.**—A complaint to recover the value of goods sold to the infant daughter of the defendant which does not allege that they were necessaries, but merely that the infant bought the goods with authority to pledge the credit of the defendant, does not warrant a recovery on the ground that the goods were necessaries: Cousins v. Boyer, 114 App. Div. 787.

d. **Bankrupt.**—A complaint, in an action brought by the trustee of a bankrupt to recover moneys collected by a stock exchange association from debtors of the bankrupt, is not demurrable because it does not allege that such moneys were not paid to the bankrupt or to his assignee for the benefit of creditors, whom the trustee superseded, where the association could not properly pay the funds so collected to the bankrupt, for the reason that the same were collected after he had made the assignment, and it must be assumed from the complaint that they were not paid to the assignee: Cohen v. Wagar, 183 N. Y. 33, rev'g 93 App. Div. 613; 87 N. Y. Supp. 1130.

e. **Marriage.**—The circumstances stated in the Domestic Relations Law, under which a marriage by a person whose husband or wife is living is not absolutely void need not be specifically negatived in pleading capacity to marry, and a reply to the defendant's allegation that the plaintiff was incompetent to enter into a contract of marriage by reason of the fact that another husband was living, is sufficient when it alleges that at the time of her former marriage the other party was married to another woman now living and that no divorce or annulment of that marriage had been obtained: Stein v. Dunne, 119 App. Div. 2.

f. **Alienation of affections.**—In an action against joint defendants for the alienation of the affection of the plaintiff's wife it is not necessary to allege a conspiracy. It seems that in order to recover against all the defendants, the plaintiff must prove on the trial that the wrong was committed in pursuance of a common plan, but though failing to prove such combination as to all, the plaintiff may nevertheless recover against those who joined to do the act causing the injury. On failure to prove any conspiracy the plaintiff may recover against the defendant who is guilty of the wrong: DeRonde v. Bell, 116 App. Div. 191.

g. **Divorce.**—Where, in an action for absolute divorce, the plaintiff relies upon circumstantial evidence and situations claimed to necessitate the conclusion of adulterous conduct upon the part of defendant, the court must inquire whether opportunity for and inclination toward wrongdoing have been sufficiently proved: Hutchinson v. Hutchinson, 53 Misc. 441.

h. **Judgment creditor's action.**—When, in a judgment creditor's action to reach trust fund, the complaint held to state a good cause of action: Herts Brothers v. Tiffany, 118 App. Div. 215.

i. The complaint in a judgment creditor's action held sufficient to state cause of action; when several defendants demur, only one decision is authorized which should determine their several rights: Pritz v. Jones, 117 App. Div. 643.

j. In a creditor's action on a judgment obtained against joint defendants, where it is sought to set aside an alleged fraudulent transfer by one debtor, the complaint must show that the execution was issued against both judgment debtors and returned unsatisfied, otherwise it does not appear that the creditor has exhausted his remedy at law: Egan v. Hagan, 119 App. Div. 189.

k. **Foreclosure.**—A complaint in foreclosure by the assignee of a mortgage which merely alleges the assignment of the mortgage but is silent as to an assignment of the bond is subject to demurrer as frivolous, as the mortgage is a mere incident to the debt and an assignment thereof does not pass the debt: Smith v. Thompson, 118 App. Div. 6.

l. On the foreclosure of a mortgage made by a testator his representatives may counterclaim for injury done to the lands by the mortgagee by flooding the same with waters from a dam, whereby the value was reduced. Such fact, if true, is available to diminish or defeat the plaintiff's claim and is connected with the subject-matter of the action: Ft. Miller Pulp & Paper Co. v. Bratt, 119 App. Div. 685.

m. **Corporation.**—On demurrer to the complaint in an action by a corporation to recover stock subscriptions made before its incorporation, it will be assumed that the plaintiff was legally incorporated although the contents of the certificate of incorporation are not set out in the complaint: Avon Spr. Sanatarium Co. v. Weed, 119 App. Div. 560.

n. A complaint in an action by a foreign corporation upon a contract

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made by it in this state must allege compliance with § 15 of the General Corporation Law that it has obtained a certificate from the secretary of state that it is authorized to do business in this state: Welsbach Co. v. Norwich G. & E. Co., 96 App. Div. 52, aff'd 180 N. Y. 553.

a. **Real property.**—When, in an action to determine the title to real property, both the plaintiffs and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt, due the grantee, the court is without power to render judgment that the deed was void as champertous and because given while the property was in the adverse possession of another: Bradt v. McClenahan, 118 App. Div. 768.

b. What allegation of a complaint is sufficient to import an actual possession of real property with power of control: Pennacchio v. Greco, 107 App. Div. 225.

c. An allegation that false representations inducing a contract to purchase lands were made by " the defendant or his agent " is not an allegation that they were made by the defendant, for an agent may make a representation not binding on his principal: Kranz v. Lewis, 115 App. Div. 106; 100 N. Y. Supp. 674, appeal dis. 188 N. Y. 579.

d. **Riparian rights.**—Complaint alleging impairment of riparian rights by railroad held sufficient: Naylor v. N. Y. C. & H. R. R. Co., 119 App. Div. 24.

e. **Assault.**—A complaint alleging that the plaintiff was assaulted by the defendant's servants, who spoke falsely concerning plaintiff, is demurrable; and a motion to separately number and state the causes of action should be granted, as they cannot be united in one complaint, not being actions arising out of the same transaction: Paul v. Ford, 117 App. Div. 151.

f. **False imprisonment.**—A complaint charging that the plaintiff was arrested upon process on the instigation of the defendant upon a false charge, and without just and probable cause, does not set out a false imprisonment but only malicious prosecution, for it concedes the validity of the process: Clark v. Palmer, 116 App. Div. 117.

g. **Nuisance.**— Several owners of separate parcels of land cannot unite in an action against a railroad company for damages to their respective lands from the flooding thereof by a stream whose natural flow has been impeded by the abutments of a bridge erected by the defendants, but they may unite in an action to abate the nuisance; and neither the allegations of damage nor the demand of separate money judgments render the complaint demurrable: Burghen v. Erie Railroad Co., 53 Misc. 460.

h. It is better for a pleading to characterize the nature of the action, but this is not imperatively required where the essential facts to support it are pleaded; a complaint alleging that the plaintiff was injured while driving on a city street by the fall of building material from the top of a building upon the defendant's premises, due to the fact that the roof was negligently and dangerously constructed; that the accident was occasioned by the carelessness of the defendant in failing to have the roof properly secured and that the defendant had knowledge and notice of this condition but refused and neglected to repair, authorizes a recovery on the theory of a nuisance, although nuisance is not expressly pleaded: Uggla v. Brokaw, 117 App. Div. 587.

i. In an action to enjoin the violation of an order of a village board of health to abate a nuisance, it is properly brought in the name of the village rather than that of the board of health; and it is not enough to allege that the board of health declared it a nuisance and ordered it abated as the resolution and order are not evidence thereof; the complaint must allege facts showing the nuisance: Village of White Plains v. Tarrytown, W. P. & M. R. Co., 117 App. Div. 841.

j. **Injunction.**—The complaint of a landlord which alleges that his tenant agreed not to sublet to tenants displaying signs, show-cases or articles of merchandise outside of the premises, but that the tenant threatens to let the premises to Negroes and Chinamen or the most undesirable person he can find, does not entitle the plaintiff to an injunction *pendente lite* for the complaint does not show the plaintiff entitled to a final injunction restraining the defendant from subletting: Fleisch v. Schnaier, 119 App. Div. 815.

k. A complaint which seeks to enjoin a common carrier from refusing to transport domesticated deer, does not state a cause of action, as it seeks to compel the carrier to do an illegal act: Dietrich v. Fargo, 119 App. Div. 315.

l. In an action brought by a taxpayer to restrain the municipal authorities from paying a claim for compensation to such person for performing said duties, where the complaint alleges an intention so to do, an injunction *pendente lite* should be granted: Beresford v. Donaldson, 54 Misc. 138.

m. **Money had and received.**—A complaint which alleges in substance that the plaintiffs, as mortgagees, and entitled to be paid the proceeds of fire insurance on the premises, consented

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to the payment of a loss to the mortgagors upon their promise to use the sum in erecting a new building upon the premises equal in value to that destroyed, and the failure of the mortgagors to fulfill that promise, states a cause of action for money had and received: Miller v. Harris, 117 App. Div. 395.

a. **Request to manufacture and promise to pay.**—What is sufficient allegation of request to manufacture goods and promise to pay therefor: Mrs. Osborn Co. v. Shubert, 52 Misc. 95.

b. **Costs.**—In an action upon a bond given as security for costs, claims for costs in the trial court and upon an appeal are not separate causes of action and need not be separately stated and numbered: Dollard v. American Surety Co., 54 Misc. 72.

c. **Trustee.**—A trustee who has participated in an illegal transfer of property may bring action to rescind same; the objection that the complaint did not state a cause of action in favor of the plaintiff is not tenable that he, having discovered the illegality of the transaction, was entitled that the conveyances be declared null and void: Smith v. Stevenson Brewing Co., 117 App. Div. 690.

d. **Receiver.**—A receiver appointed on the insolvency of a railroad is not entitled to recover from contractor the alleged value of the stocks and bonds received as compensation for the construction of the road, when it is not alleged that the cost of constructing the road and the value of the properties acquired from the contractor were of less value than the par value of the stock and bonds delivered in payment: Bostwick v. Young, 118 App. Div. 490.

e. **Elector.**—A complaint in an action by an elector which sets up that the county committee of the party to which he belongs has assumed to delegate to boards in the respective districts and wards of the county discretionary power to enroll and strike from the rolls the names of voters and thereby prevent voters belonging to the party from voting at its primary elections states facts sufficient to constitute a cause of action: Brown v. Cole, 54 Misc. 278.

f. **Alternative relief.**—Neither at common law nor under the Code of Civil Procedure can a plaintiff join two defendants upon the theory that he has a right to relief against one or the other of them. If, however, the complaint alleges facts which show that he is entitled to relief, legal or equitable, against one of the defendants joined, the complaint will be sustained against him; but when a complaint against two defendants asking alternative relief does not state a cause of action against either, the complaint should be dismissed: Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co., 117 App. Div. 215.

g. **Bill of particulars.**—A bill of particulars is not part of the complaint and cannot change the cause of action alleged therein: Dixon v. Bunnell, 52 Misc. 560.

h. **Amended complaint.**—It is not proper in an amended complaint to allege that certain parts of the original complaint are made part of the amended complaint: Holmes v. Slater, 119 App. Div. 924.

i. Although the prayer for relief is not a part of the cause of action it is part of the complaint, and a motion to amend the prayer is a motion to amend the complaint; but upon such amendment not affecting the facts alleged, where it is merely sought to ask equitable relief instead of money damages, a plaintiff is not required to serve a copy of the proposed amended complaint with the motion papers; especially so, when the proposed prayer for relief is set out in the moving papers: McVey v. Security Mut. L. Ins. Co., 118 App. Div. 466.

j. When the plaintiff has served a complaint containing more than one cause of action and an order has been granted requiring the service of an amended complaint separately stating and numbering the alleged causes of action, the order does not mean that the plaintiff ***nolens volens*** must serve a complaint containing two causes of action. The order is complied with if the plaintiff serve an amended complaint setting up but one cause of action, and the defendant will be ordered to accept service thereof: O'Reilly v. Skelly No. 1, 117 App. Div. 559; 102 N. Y. Supp. 884.

k. **Information.**—In civil actions an information and a complaint are synonymous, and a complaint preferred on behalf of the State in a civil complaint is usually termed an information: People v. McClellan, 54 Misc. 130.

l. **Conditions precedent.**—Where a complaint sets forth an agreement containing several stipulations which might or might not be construed as conditions that must be complied with before the plaintiff can put the defendant in default, a further allegation that "all the conditions above mentioned were fulfilled or were waived by the defendants" determines the character of such conditions and requires that the facts constituting performance and waiver should be alleged; and in the absence of such allegations, a demurrer to said complaint should be sustained: Speare's Sons' Co. v. Casein Co., 53 Misc. 58.

m. In alleging the performance of a condition precedent in a contract under 533 while it is not necessary to state the facts constituting the performance, yet the plaintiff must allege that he has duly performed all the conditions precedent on his part to be performed; a mere allegation of general performance is insufficient:

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Gansevoort Bank v. Empire State Surety Co., 117 App. Div. 455.

a. **Separate causes of action.**—Although reference in the statement of a separate cause of action to allegations in the previous statement of another cause of action in the same complaint may suffice to incorporate such allegations in the statement which refers to them, yet where, in the latter, a certain other allegation in a later part of the complaint is necessary for a full statement of a cause of action and no reference to that allegation is made, the statement must be deemed incomplete and a demurrer thereto must be sustained: Marietta v. Cleveland R. R. Co., 52 Misc. 16.

b. A party who has alleged one cause of action cannot recover upon another unless the parties have, by not objecting, or otherwise, consented to try questions outside the issue; when a complaint seeks to recover for material alleged to have been sold to the defendant and the proof shows that it was furnished to an unincorporated association of which the defendant was a member, there is a complete failure to prove the cause of action alleged: Brown v. Wolfe, 119 App. Div. 777.

c. **Defect of parties defendant.**—A complaint, which alleges that certain persons not parties to the action received stock of the defendant corporation in consideration of their personal promissory notes and in violation of § 42 of the Stock Corporation Law; that said persons are a majority of the directors of the corporation and in control thereof, and, by means of the stock which they have thus illegally received, can control the pending election of the corporation, and which concludes by praying that the defendant be enjoined from permitting votes to be cast on said stock, is demurrable upon the ground of a defect of parties defendant: Jones v. Nassau Suburban Home Co., 53 Misc. 63.

d. When the plaintiff sues for a breach of a tripartite contract whereby he was to be paid certain sums of money in consideration of a transfer of patent rights, a defendant sued alone can only assert a defect of parties defendant by demurrer or by allegation in the answer, if the face of the complaint does not show the defect: Willis v. Pennell, 116 App. Div. 493.

e. **Tax Law.**—An objection that a complaint fails to allege compliance with § 181 of the Tax Law refers solely to plaintiff's capacity to sue and, if not taken by either demurrer or answer, it is deemed to be waived: Wright & Co. v. Faulkner, 52 Misc. 100.

f. **Taxpayer's action.**—A taxpayer's action, brought under chap. 531 of 1881 as amended in 1892, to restrain official acts by public officers is only authorized where the acts are without power and where corruption, fraud and bad faith amounting to fraud is charged; where the complaint in such an action does not allege fraud and acts of bad faith, the complaint will be dismissed at the trial, but without costs: Craft v. Lent, 53 Misc. 484.

g. **Labor law.**—A complaint by a servant against his master for personal injuries, which alleges that a scaffold was of unsafe material and construction, permits a recovery, although it does not plead section 18 of the Labor Law and allege its violation; the fact that the liability of the master is created or enlarged by statute does not make the action a statutory one: Riley v. McNulty, 115 App. Div. 650.

h. **Discrimination.**—A complaint which alleges in substance that an electric lighting company furnishing electricity to the plaintiff, unlawfully and unjustly discriminated against the plaintiff by charging other persons a less rate for the same service under similar conditions, and that the payments made by the plaintiff were made without notice or knowledge that others were receiving more favorable rates, states a cause of action to recover the excess paid: Armour Packing Co. v. Edison Il. Co., 115 App. Div. 51; 99 N. Y. Supp. 62.

i. **Funeral expenses.**—A nephew, who, in the preparation for and in the performance of the burial of his uncle, at the request of his widow expends money for certain articles, for immediate consumption at his wake, all of which were suitable to decedent's condition in life and necessitated by the racial custom and sentiment of himself, relations and friends, is entitled to recover from the estate the reasonable value of the materials furnished; and a demurrer to the complaint setting forth the facts, on the ground that it does not state a cause of action, will be overruled: McCullough v. McCready, 52 Misc. 542.

j. **Wills.**—A collateral heir or next of kin who seeks to invalidate a will as making an excessive bequest to charitable corporations in violation of chap. 360 of 1860, must set out his pedigree showing that there are no persons having prior right to take the estate under the statutes of descent and distribution: Moser v. Talman, 114 App. Div. 850.

§ 482. When interlocutory and final judgment may be demanded.

See § 1200, post, Definition of judgment.
See § 1202, post, When judgment may be entered.

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§ 483. Causes of action to be separately stated.

a. Defendants cannot require the plaintiff to state separately and number causes of action of the complaint where there is doubt whether it sets up a single cause of action or several; the plaintiff should be permitted to determine the question and not be required to break up into different causes of action, facts, which she claims constitute only one: Woods v. McClure, 42 Misc. 8; 85 N. Y. Supp. 549.

b. **Separate contracts.**—Under § 483 a complaint should separately number and state the facts as to three causes of action where the breach of the contract alleged consisted of three separate contracts for the sale of merchandise to the plaintiff by the defendants although such contracts related to goods of the same kind and quality: Egan & Co. v. Butterworth, 66 App. Div. 480.

c. **Different forms of relief.**—A complaint may set forth and allege but a single cause of action although it may demand different forms of relief: Lewis v. Howe, 64 App. Div. 44; 71 N. Y. Supp. 704.

d. A complaint is not to be deemed to unite several causes of action simply because it sets forth several grounds upon which the defendant might be liable in respect to the same transaction: Union Transit Co. v. Erie R. R. Co., 52 Misc. 293.

e. **Breach of contract.**—A complaint for sums due the plaintiff on a breach of contract of service and for damages caused by the breach sets out two causes of action, which should be separately stated: Carlson v. Albert, 117 App. Div. 836.

f. **Waiver of defect.**—What constitutes waiver of the defect of not interposing a demurrer to the complaint which improperly alleges false imprisonment and malicious prosecution in a single count: Tyson v. Bauland Co., 68 App. Div. 310; 74 N. Y. Supp. 59.

g. **Conversion.**—Where a complaint sets forth three causes of action for conversion, no one of which affects all the defendants, and a fourth cause of action for an accounting which does not affect all the defendants, the defendants are not entitled under § 483 to have the several causes separately stated to the end that they may raise the question of misjoinder, etc., by demurrer: Whitney v. Wenman, 96 App. Div. 290.

h. When a complaint alleges two causes of action, one for conversion and the other for goods sold and delivered, the defendant is entitled to have the causes separately stated and numbered; although the defendant may require the plaintiff to elect between such causes of trial, he may at his option require the causes to be separated and numbered before answering: Christenson v. Pincus, 117 App. Div. 810.

i. **Amended complaint.**—When the plaintiff has served a complaint containing more than one cause of action and an order has been granted requiring the service of an amended complaint, separately stating and numbering the alleged causes of action, the order does not mean that the plaintiff *nolens volens* must serve a complaint containing two causes. The order is complied with if the plaintiff serve an amended complaint setting up but one cause of action, and the defendant will be ordered to accept service thereof: O'Reilly v. Skelly, No. 1, 117 App. Div. 559; 102 N. Y. Supp. 884.

j. **Incomplete statement.**—Although reference in the statement of a separate cause of action to allegations in the previous statement of another cause of action in the same complaint may suffice to incorporate such allegations in the statement which refers to them, yet where, in the latter, a certain other allegation in a later part of the complaint is necessary for a full statement of a cause of action and no reference to that allegation is made, the statement must be deemed incomplete and a demurrer thereto must be sustained: Marietta v. Cleveland R. R. Co., 52 Misc. 16.

k. In an action at law against the president of an insurance company to recover corporate moneys expended for political purposes and upon improvident contracts, each payment does not give rise to a separate cause of action and allegations will not be struck out as irrelevant: Mut. life Ins. Co., 118 App. Div. 815; 103 N. Y. Supp. 829.

l. **Ejectment.**—Causes of actions for ejectment and for damages for breach of covenant constitute two separate and distinct causes of action which should be separately numbered and stated: Rockey v. Haslett, 91 App. Div. 181; 86 N. Y. Supp. 320.

m. **Alienation.**—A cause of action to recover damages for the alienation by the defendant of the affections of the plaintiff's wife cannot be joined with a cause of action to recover damages for the conversion by the defendant and the plaintiff's wife of personal property belonging to the plaintiff, where, although the wife's physical abandonment of the plaintiff was simultaneous with the taking of the property, the alienation of her affections occurred prior to such conversion: Crowell v. Truesdell, 67 App. Div. 502; 73 N. Y. Supp. 1013.

n. **Negligence.**—An injury to a person and an injury to personal property resulting from the same negligent act give rise to two independent causes of action, and it seems that they should not be joined in a single count, but should be

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separately pleaded as otherwise the defendant may demur for misjoinder without first requiring that the causes of action be separately stated and numbered: Powers v. Sherin, 89 App. Div. 37; 85 N. Y. Supp. 89.

a. A complaint in an action brought to recover damages resulting from the alleged negligence of the defendant, a dentist, in treating the plaintiff's teeth, charging the defendant with negligence in several particulars which resulted in different injuries, states but a single cause of action: Brown v. Cady, 91 App. Div. 415; 86 N. Y. Supp. 959.

b. **Agricultural Law.**—A complaint in an action under the Agricultural Law for violation of several sections held to allege but a single cause of action for a single violation of the statute: People v. Buell, 85 App. Div. 141; 83 N. Y. Supp. 143.

c. **Libel.**—Each publication of defamatory matter is a new publication and rise to a distinct cause of action, and a plaintiff whose book has been criticised as obscene and lascivious in two publications appearing in the same newspaper, but upon different dates, should be required specifically to state and number his causes of action thereon: Fisher v. New Yorker Staats-Zeitung, 114 App. Div. 824.

§ 484. What causes of action may be joined in the same complaint.

The plaintiff may unite in the same complaint, two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as follows:

1. Upon contract, express or implied.

2. For personal injuries, except libel, slander, criminal conversation or seduction.

3. For libel or slander.

4. For injuries to real property.

5. Real property, in ejectment, with or without damages for the withholding thereof.

6. For injuries to personal property.

7. Chattels, with or without damages for the taking or detention thereof.

8. Upon claims against a trustee, by virtue of a contract, or by operation of law.

9. Upon claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivision of this section.

10. For penalties incurred under the fisheries, game and forest law.

11. For penalties incurred under the agricultural law.

12. For penalties incurred under the public health law.

But it must appear, on the face of the complaint, that all the causes of action, so united, belong to one of the foregoing subdivisions of this section; that they are consistent with each other; and, except as otherwise prescribed by law, that they affect all the parties to the action; and it must appear upon the face of the complaint, that they do not require different places of trial.

Co. Proc., § 167.

Amended by chap. 416 of 1877, chap. 590 of 1900, chap. 29 of 1906, and chap. 26 of 1907.

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a. As § 484 provides that causes of action cannot be joined only when, except as otherwise prescribed by law, they affect all the parties to the action, and as § 488 provides that a defendant may demur when causes of action have been improperly united, the objection that the causes of action stated do not affect all the defendants is as good a ground for demurrer as is the objection that the causes of action are improperly joined: Tew v. Wolfsohn, 174 N. Y. 272; 33 Civ. Pro. R. 382, aff'g 77 App. Div. 454; 33 Civ. Pro. R. 278; 79 N. Y. Supp. 286.

b. **Improper joinder.**—Demurrer upon ground of improper joinder of causes of action: Miller v. Edison El. Illuminating Co., 184 N. Y. 17, rev'g 97 App. Div. 638; 89 N. Y. Supp. 1059.

c. Causes of action for slander and malicious prosecution or for malicious abuse of legal process cannot be united in the same complaint: Green v. Davies, 182 N. Y. 499, rev'g 100 App. Div. 359; 91 N. Y. Supp. 470.

d. An action for the conversion of an old automobile and an action based on a promise to pay the value thereof are inconsistent and cannot be joined: Drexel v. Hollander, 112 App. Div. 25.

e. A cause of action for damages for the breach of a contract and a cause of action for damages for fraud in inducing the plaintiff to make it are inconsistent with each other and cannot be united in the same complaint under sub. 9 of § 484; an election between such inconsistent causes is required: Edison Elec. Ill. Co. v. Kalbfleisch Co., 117 App. Div. 842.

f. A cause of action for malicious prosecution and one for libel cannot be joined in the same complaint: Haughie v. New York & New Jersey Tel. Co., 34 Misc. 634; 70 N. Y. Supp. 584.

g. It seems that causes of action for injuries to real property for injuries to personal property and for ejectment cannot be joined under § 484 in the same complaint, and no two of these causes of action can be joined in the same action: Wait v. Hudson Valley Railway Co., 43 Misc. 304.

h. An action to foreclose a lien and one to recover for services cannot, under § 484, be joined in the same complaint: Conde v. Rogers, 74 App. Div. 147; 77 N. Y. Supp. 518.

i. An action for the rescission of a contract to sell lands cannot be united with an action for a breach thereof, as the two causes are inconsistent: Kranz v. Lewis, 115 App. Div. 106; 100 N. Y. Supp. 674. Appeal dis. 188 N. Y. 579.

j. When plaintiffs allege that they rendered services as attorneys in the formation of a corporation to take over the business of several firms, and allege that they were retained by members of various separate firms who desired to become parties to the corporation, the actions upon the several and separate contracts of employment cannot be joined in one complaint; in order that several causes of action may be united it must appear upon the face of the complaint that the causes so united affect all the parties to the action, except as otherwise prescribed by law: Myers v. Lederer, 117 App. Div. 27; 101 N. Y. Supp. 1088.

k. A complaint, alleging that the plaintiff was assaulted by the defendant's servants, who spoke falsely concerning plaintiff, is demurrable; and a motion to separately state and number the causes of action should be granted, as they cannot be united in one complaint, not being actions arising out of the same transaction: Paul v. Ford, 117 App. Div. 151.

l. **Agricultural Law.**—A complaint which alleges several independent causes of action for violations of the Agricultural Law is demurrable on the ground of misjoinder of causes of action: People v. Koster, 50 Misc. 46.

m. **Insurance company.**—When complaint properly unites several actions against individual directors of life insurance company to compel such directors to account for money squandered: Young v. Equitable Life Assur. Soc., 112 App. Div. 760; 98 N. Y. Supp. 1052.

n. When complaint in an action against the directors of a mutual insurance company for negligence and misapplication of funds states more than a single cause of action: Young v. Equitable Life Assur. Soc., 49 Misc. 347; 99 N. Y. Supp. 446, aff'g 112 App. Div. 760.

o. A complaint which alleges that the plaintiff purchased a ticket for the purpose of being carried on defendant's cars and paid the fare required, and that in consideration thereof the defendant agreed to carry and to treat him properly, but, in violation of said "contract" made him buy another ticket and assaulted and arrested him, etc., states an action arising on the breach of a contract to carry and not an action for assault and battery with false imprisonment: Busch v. Interborough Rapid Tran. Co., 110 App. Div. 705; 96 N. Y. Supp. 747, aff'g 187 N. Y. 388.

p. **Mechanic's lien.**—In an action to foreclose a mechanic's lien one who is liable for the debt upon which the lien is founded may be joined as a defendant though his liability arises upon a separate instrument guaranteeing the performance of the contract: Whisten v. Kellogg, 50 Misc. 409.

q. **Accounting.**—A complaint in an action for an accounting for assets obtained by false representations may state but a single cause of action although the prayer for relief asks that an agreement, which stands as a bar to an action for an accounting, be set aside on the ground

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of fraud; the demand that such agreement be declared void was simply incidental to the plaintiff's demand for an accounting and did not constitute a separate cause of action: Smith v. Irvin, 108 App. Div. 218; 97 N. Y. Supp. 731.

a. In an action against directors for accounting, the plaintiff cannot in one complaint unite an action by him as a stockholder to compel an accounting by the directors for their official acts and a restitution to the corporation of moneys wrongfully received, with a personal action to recover damages sustained by the wrongful acts of the defendants: Brown v. Utopia land Co., No. 2, 118 App. Div. 364.

b. An action in equity against the auditor of a corporation for an accounting as to a fund over which he had custody and control, and an action at law, for damages claimed to have resulted from his wrongful or negligent acts, in auditing corporate bills, cannot be united in one complaint when it is not alleged that the defendant himself profited by the improper audit; when the two causes are distinctly pleaded the objection to the misjoinder may be taken by demurrer: Mut. Life Ins. Co., v. Gillette, 119 App. Div. 430.

c. **Creditors.**—A complaint alleging that conveyances were in fraud of creditors and that by a collateral agreement, the grantee agreed to pay the plaintiff's claim against the grantor, states but a single cause of action to set aside the conveyance as fraudulent: Zeiser v. Cohn, 113 App. Div. 9.

d. **Taxpayer's action.**—A taxpayer's action asking a separate judgment against each of several supervisors, defendants, should state, in each paragraph setting out a separate cause of action, the official position of the defendant against whom judgment was demanded, the capacity in which he acted and all the facts necessary to make that cause of action complete in itself: Wallace v. Jones, 68 App. Div. 191; 74 N. Y. Supp. 116.

e. **Directors.**—It is not proper under § 484 to unite in the same complaint, a cause of action against certain directors who made false representations inducing the making of the deposits, with a cause of action against other directors not in office at the time such original representations were made, as each of such causes of action did not affect all the parties to the action: Warner v. James, 88 App. Div. 567.

f. **Injunction.**—In an action against several mill owners for an injunction and damages for discharging refuse into a stream, as each defendant is connected with the subject of the action and the claim of the plaintiff affects all the parties to the action, the action is well within § 484, and the complaint is not demurrable: Warren v. Parkhurst, 45 Misc. 466.

g. **Same transaction.**—Even assuming that the conversion alleged in a first cause of action was a "transaction" within meaning of § 484, subd. 9, the second cause of action for assault having been committed after the conversion, it could not be said that the two causes of action arose out of the same transaction and the complaint was demurrable: Campbell v. Hallihan, 45 Misc. 325.

h. Even where a complaint states more than one cause of action, yet where they arose out of transactions connected with the same subject of action they might properly be united under subd. 9 of § 484: Rogers v. Wheeler, 89 App. Div. 435.

i. **Single cause.**—A complaint alleging that defendant uttered slanderous words of the plaintiff and caused an illegal arrest amounting to malicious prosecution and that damages flowed from such conspiracy to do such acts, states but a single cause of action: Green v. Davies et al., 100 App. Div. 359; 34 Civ. Pro. R. 1; rev'd 182 N. Y. 499.

j. **Conspiracy.**—Where the gravamen of the complaint in an action is that the defendants unlawfully conspired to ruin the plaintiffs' business, the fact, that it alleges that, in the accomplishment of their purpose, the defendants circulated libels and uttered slanders concerning the plaintiffs, does not render the complaint demurrable as stating more than one cause of action: Rourke v. Elk Drug Co., 75 App. Div. 145; 77 N. Y. Supp. 373.

k. **What may be joined.**—Under § 484, it is proper to join in the same complaint a cause of action for trespass and one for assault: Doyle v. American Wringer Co., 60 App. Div. 525.

l. A complaint which alleges that the defendant, a newspaper, which together with other newspapers had received pictures furnished by plaintiff under an agreement not to publish them before a certain date, made a breach of that promise by prematurely publishing the pictures whereby they were "stale" and the plaintiff lost the benefit of his contracts with the other papers, which also asks for damages for the injury to the plaintiff's standing with publishers, does not state two causes of action. The allegations as to plaintiff's injured reputation go to damages only: Dunn v. New York Herald Co., 119 App. Div. 477.

m. A complaint is not to be deemed to unite several causes of action simply because it sets forth several grounds upon which the defendant might be liable in respect to the same transaction: Union Transit Co. v. Erie R. R. Co., 52 Misc. 293.

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a. Where a complaint for damages for the unauthorized use of the plaintiff's portrait by the defendants, contrary to chap. 132 of 1903, joins as defendants both the photographer who took the portrait, and an author who used it in his publications, and alleges that it was used by the defendants "acting jointly" only one cause of action is alleged which is against the defendants jointly, though the same counts are elsewhere separately set out against each defendant, a demurrer will not be sustained; an action at law for damages and a suit in equity to restrain such use of the plaintiff's portrait may be united in one complaint: Riddle v. MacFadden, 116 App. Div. 353.

b. Where the complaint in an action to recover a loan alleges facts leading up to the assumption by the defendant of a balance due the lender for goods sold and delivered to a third person as part consideration of a loan, and a recovery is sought for said balance in addition to the loan, but one cause of action is stated: Wood v. Duncan, 54 Misc. 628.

c. In an action upon a bond given as security for costs, claims for costs in the trial court and upon an appeal are not separate causes of action and need not be separately stated and numbered: Dollard v. American Surety Co., 54 Misc. 72.

d. **Unsafe gun.**—A demurrer lies to a complaint which alleges a cause of action for selling an unsafe gun and one for breach of warranty of said gun, even though they are not separately stated and numbered: Reed v. Livermore, 101 App. Div. 254.

e. **Trustees.**—A cause of action to set aside a contract and a cause of action to compel an accounting for injuries sustained under such contract may be joined by force of subd. 8: Bosworth v. Allen, 168 N. Y. 157, rev'g 57 App. Div. 633; 68 N. Y. Supp. 1133.

f. **Membership corporation.**—It is a misjoinder of causes of action for the vendor to sue for the whole amount due from a membership corporation, more of its directors than are liable therefor; the only effect is that the complaint must be dismissed as to those not shown liable: Pascekwitz v. Richards, 37 Misc. 250; 75 N. Y. Supp. 291.

g. **False report.**—A cause of action for damages because of a false report made by the treasurer of a corporation under § 31 of the Stock Corporation Law and a cause of action for such damages at common law may be joined in the same complaint under § 484 of the Code: Hutchinson v. Young, 93 App. Div. 407.

h. **Stockholders.**—Cause of actions by stockholders against two corporations and all the directors of both corporations to enforce the obligation of one corporation to the other and the liability of an officer of one corporation for the conversion of corporate property cannot be joined in the same complaint: Case v. N. Y. Mut. Sav. & Loan Assn., 88 App. Div. 538; 85 N. Y. Supp. 104.

i. When stockholder's action to recover dividends and an action in equity for the improper increase of capital stock cannot be united: Searles v. Gebbie, 115 App. Div. 778.

j. Where an action is brought to rescind a stock subscription and to recover the payments made on account thereof, against a corporation, its directors and officers, the complaint is not demurrable if it contains a statement of a cause of action against the corporation, although it contained certain allegations which might be construed as intending to allege a cause of action against the individual defendants: Mack v. Latta, 83 App. Div. 242; 82 N. Y. Supp. 130, rev'd on other grounds 178 N. Y. 525.

k. **Negligence.**—An injury to the person, and an injury to property, although resulting from the same tortious act, constitute different causes of action, and a judgment for damages to property recovered in one court, and the satisfaction thereof is not a bar to the maintenance of an action for an injury to the person in another court, arising from the same act: Reilly v. Sicilian Asphalt Paving Co., 170 N. Y. 40, rev'g 31 App. Div. 302; 52 N. Y. Supp. 817.

l. Although an injury to the person and one to personal property, both caused by the same tortious act, constitute two causes of action, both may be united in one complaint under § 484: Eagan v. New York Transportation Co., 39 Misc. 111; 78 N. Y. Supp. 209.

m. Injuries to the person and to the property of the plaintiff resulting from a single negligent act on the part of the defendant, while constituting separate causes of action, may be joined in the same complaint; it seems that in such a case the two causes of action should be stated in separate counts: McInerney v. Main, 82 App. Div. 543; 81 N. Y. Supp. 539.

n. In an action for damages alleged to have been sustained by defendant's negligence actionable upon common-law grounds as well as under the Employer's Liability Act (L. 1902, chap. 600) the complaint states but a single cause of action, though two grounds of liability, either of which the plaintiff may establish by proof at the trial: Hamnstrown v. N. Y. Contracting Co., 52 Misc. 634.

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§ 487. Defendant must demur or answer.

a. Under the rule that a pleading should be liberally construed in favor of the pleader, a demurrer not only admits the direct allegations of the complaint but also whatever may be fairly inferred therefrom: Wright v. Glen Telephone Co., 48 Misc. 192; 95 N. Y. Supp. 101, aff'g 112 App. Div. 745.

b. When a plaintiff sues a former copartner to restrain him from using the firm name, and bases his complaint on a breach by defendant of a contract made on dissolution, it is a good defense to allege that the contract was executed by the defendant's attorney in fact contrary to express instructions which were known to the plaintiff. When the plaintiff sues on a contract the defendant may plead that the contract was never executed and is not binding upon him: Bastable v. Carroll, 116 App. Div. 205.

§ 488. When he may demur.

See § 1629, post, Complaint in an action to foreclose a mortgage must allege whether or not a previous action has been brought to recover any portion of the mortgage debt.

See § 1775, post, Complaint in an action in which a corporation is a party must allege whether such corporation is domestic or foreign.

c. **Vague and uncertain.**—A defendant may not demur to a complaint in an action for services performed because it is vague and indefinite; the defendant should either demand a bill of particulars or move to make the complaint more definite and certain: Fleck v. Friedman, 49 Misc. 220.

d. **Party.**—The client is a necessary party in an action to enforce an attorney's lien: Olshei v. Metropolitan Street Ry. Co., 110 App. Div. 709; 97 N. Y. Supp. 447.

e. When a person has transferred his entire interest in a cause of action to another, he cannot be joined with such transferee as a party plaintiff, and demurrer will lie to such complaint: Alexander v. City of Gloversville, 110 App. Div. 791.

f. Where the complaint in an action demands relief against several persons not made parties, and whose presence is not made necessary to a complete determination of the controversy, the prayer for relief may be deemed surplusage and a failure to join them as defendants is not a ground for demurrer: O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, rev'g 107 App. Div. 630; 95 N. Y. Supp. 1151.

g. When a defect of parties appears upon the face of the complaint the defendant may demur thereto, and if the defect does not appear upon the face of the complaint, the objection may be taken by answer; a failure to take such objection by demurrer or answer is a waiver of the defect; but even though the objection be so waived, the court on its own motion may direct parties to be brought in if a complete determination of the controversy cannot be had without their presence; an objection to defect of parties must be made by demurrer or answer and cannot be made by motion: Knickerbocker Trust Co. v. Oneonta, C. & R. S. R. Co., 111 App. Div. 812; 97 N. Y. Supp. 673, appeal dis., 186 N. Y. 527.

h. **Interested party.**—A defendant may demur on the ground of non-joinder only when he is himself interested in having another person made a defendant: Thompson v. Richardson, 74 App. Div. 62; 77 N. Y. Supp. 202.

i. **Defect of parties.**—A complaint in an action is demurrable on the ground that there is a defect of parties defendant where it appears that in the summons and in the title of the complaint, the defendant is designated in his individual capacity and that in the complaint no cause of action is alleged against him except in his representative capacity as trustee under a certain will: Leonard v. Pierce, 182 N. Y. 431, aff'd 94 App. Div. 266; 87 N. Y. Supp. 978; 179 N. Y. 560.

j. When a motion to amend a complaint by adding a party defendant has been denied without leave to renew the motion, a second motion brought without leave will be denied; however, when it appears that the defendant, as administrator of a deceased partner, did not demur to the first complaint because of a failure to join the surviving partner as party defendant, but does demur to an amended complaint on the ground of defect of parties, the court should grant a further amendment bringing in the surviving partner as a defendant: Haskell v. Moran, 117 App. Div. 251; 102 N. Y. Supp. 388.

k. A complaint which alleges that certain persons not parties to the action received stock of the defendant corporation in consideration of their personal promissory notes and in violation of § 42 of the Stock Corporation Law; that said persons are a majority of the directors of the corporation and in control thereof, and, by means of the stock which they have thus illegally received, can control the pending election of the corporation, and which concludes by praying that the defendant be enjoined from permitting votes to be cast on said stock, is demurrable upon the ground

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of defect of parties defendant: Jones v. Nassau Suburban Home Co., 53 Misc. 63.

a. Erroneous dismissal of complaint for defect of parties defendant: Anderson v. Walsh, 189 N. Y., 159, rev'g 114 App. Div. 902.

b. When the plaintiff sues for a breach of a tripartite contract whereby he was to be paid certain sums of money in consideration of a transfer of patent rights, a defendant sued alone can only assert a defect of parties defendant by demurrer or by allegation in the answer, if the face of the complaint does not show the defect: Wills v. Pennell, 116 App. Div. 493.

c. Where an action is brought under § 1750 to have the infant's marriage annulled on the ground that his consent was obtained by force, duress or fraud, the infant is a necessary party and a demurrer to a complaint in which he is not either a party plaintiff or defendant is properly sustained: Fero v. Fero, 62 App. Div. 470; 70 N. Y. Supp. 742.

d. The provisions of § 488, subd. 6, permitting a demurrer for a defect of parties, plaintiff or defendant, means a deficiency of, and not too many, parties, and a demurrer for misjoinder of parties defendant is unauthorized: Tew v. Wolfsohn, 38 Misc. 54; 76 N. Y. Supp. 919.

e. The objection to a defect of parties defendant, which appears upon the face of the complaint, may only be taken by demurrer; it is improper for the court, upon the trial of issues of law raised by a demurrer, to separate defenses contained in the defendant's answer, to grant the defendant's leave to demur to the complaint on the ground of such defect of parties; the objection that causes of action have been improperly united in the complaint, must, where such objection appears upon the face of the complaint, be taken by demurrer or it will be deemed to have been waived: Ward v. Smith, 95 App. Div. 432; 88 N. Y. Supp. 700.

f. Where there is a defect of parties plaintiff which appears upon the face of the complaint, the objection should be taken by demurrer; it is only where the objection does not appear upon the face of the complaint that it can be taken by answer, and where it is not taken by demurrer, it is deemed waived: Hyde & Sons v. Lesser, 93 App. Div. 320; 87 N. Y. Supp. 878.

g. **Waiver of defect.**—The objection that an action cannot be maintained by the guardian *ad litem* of an infant is deemed to have been waived by the defendant's failure to demur to the complaint: Van Zandt v. Grant, 67 App. Div. 70; 73 N. Y. Supp. 600; affirmed 175 N. Y. 150.

h. The objection of non-compliance with a statute, if available at all should be raised by demurrer or by answer as the case demands, and if raised by neither, is deemed to have been waived: C. R. Parmele Co. v. Haas, 171 N. Y. 579; rev'g 67 App. Div. 457; 73 N. Y. Supp. 986.

i. Though the defendants in an action by their omission to raise the question of a defect of parties by answer or demurrer, must be deemed to have waived such defect under §§ 488, 499, the court will not direct final judgment, if, because of its inconclusiveness upon persons interested in the subject of the action, who have not been made parties thereto, the parties to the action or any of them will be exposed to risk in respect to the rights of such omitted persons: Jewett v. Schmidt, 45 Misc. 34; 90 N. Y. Supp. 848, aff'g 108 App. Div. 322.

j. It seems that where a necessary party was not made a defendant, notwithstanding the fact that § 499 declares that a failure to raise the question of the defect of parties defendant either by answer or demurrer shall constitute a waiver of the defect, the defendant may raise that question for the first time upon trial: Kent v. Aetna Ins. Co., 84 App. Div. 428; 82 N. Y. Supp. 817.

k. What constitutes waiver of the defect of not interposing a demurrer to the complaint which improperly alleges false imprisonment and malicious prosecution in a single count: Tyson v. Bauland Co., 68 App. Div. 310; 74 N. Y. Supp. 59.

l. **Precise defect.**—A plea of nonjoinder of proper parties defendant, without pointing out the precise defect or bringing the matter to the attention of the trial court, or showing that a complete determination of the controversy cannot be had without the presence of an additional party, is ineffectual: Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, aff'g 82 App. Div. 72; 81 N. Y. Supp. 794.

m. No other ground of demurrer except the one specified will be considered: Kellogg v. Stoddard, 40 Misc. 92; 80 N. Y. Supp. 271.

n. Where the ground of objection specified in the demurrer to a complaint is not good, the demurrer cannot be sustained on any ground not particularly specified in such demurrer: Leggett v. Stevens, 77 App. Div. 612; 72 N. Y. Supp. 289.

o. A demurrer upon the ground that there is a misjoinder of parties plaintiff and that the plaintiffs have not a legal capacity to sue, should be overruled as § 490 provides that a demurrer upon either of these grounds "must point out specifically the particular defect relied upon," but if the demurrer be considered as stating but one ground, namely, the misjoinder of parties plaintiff, the demurrer should be held a sufficient compliance with § 490: Town of Palatine v. Canajoharie W. S. Co., 90 App. Div. 548; 86 N. Y. Supp. 412; aff'd 184 N. Y. 582.

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a. A plaintiff should demur to objections to the sufficiency of an amended complaint taken under § 498 by answer and those objections are to be deemed defenses and must specify, not only the supporting facts, but also the particular grounds of each objection as provided by § 490: Neilis v. Rowles, 41 Misc. 313.

b. If the ground of objection specified in a demurrer to a complaint is not good, the demurrer cannot be sustained because of another defect in the complaint not specified in the demurrer: Leggett v. Stevens, 77 App. Div. 612; 72 N. Y. Supp. 289.

c. **Demurrer to answer.**—When the plaintiff demurs to the answer the defendant can challenge the validity of the complaint, as any answer is good to a complaint which does not state a cause of action: Parker Co. v. City of New York, 110 App. Div. 360.

d. On demurrer to an answer as not stating a defense the defendant may assert that the complaint does not state a cause of action and the court will examine the complaint to determine that question: Armour Packing Co. v. Edison El. Il. Co., 115 App. Div. 51; 99 N. Y. Supp. 62.

e. **Admission by demurrer.**—A demurrer to a complaint admits the truth of all the facts stated in the complaint and of all necessary inferences resulting therefrom, but it does not admit the truth of any conclusions either of law or of fact contained therein; a complaint in an action brought by a guest of a tenant against the landlords to recover damages for personal injuries sustained by such guest, which alleges that the landlords covenanted in the lease to keep the demised premises in repair and reserved the right to enter such premises for that purpose, and " that as a result of the negligence of the defendants in not keeping the ceiling of the above-described apartments in proper repair, plaintiff was struck by such ceiling falling on her head while lying in bed " and " that such accident occurred as a result of the negligence solely of the defendants, and plaintiff was not guilty of any contributory negligence," is demurrable, as it does not charge any personal neglect on the part of the landlords, but only such neglect as is incident to a breach of contract, which latter neglect is insufficient to support the action: Frank v. Mandel, 76 App. Div. 413; 78 N. Y. Supp. 855.

f. **Libel.**—When a publication, plainly humorous, relating to the plaintiff does not justify an innuendo ascribing to it a libelous meaning, a demurrer to the complaint will be sustained: Lambert v. Sun Printing and Pub. Co., 111 App. Div. 437; 97 N. Y. Supp. 694.

g. A complaint in an action for libel is not demurrable for the publication of an article charging the plaintiff with drunkenness in a police station, and with " celebrating," which article is stated by *innuendo* to accuse the plaintiff of drunkenness in a public place, as such article is libelous *per se:* Morse v. Star Co., 118 App. Div. 256.

h. The complaint in an action for libel must state more than conclusions of fact; facts themselves must be alleged from which the conclusions may be drawn; hence, in an action for libel in writing a letter which charged the plaintiff with writing letters, which by *innuendo*, are said to be obscene, the complaint is subject to demurrer, as the characterization of the letters is a mere conclusion. The contents of the letters alleged to be obscene should be set forth: McNamara v. Goldan, 118 App. Div. 221.

i. An article alleging that the popularity of a series of pictures is waning, is not libelous *per se*, and a complaint for libel thereon is demurrable unless the actionable meaning of which words are capable is pointed out by *innuendo:* Outcault v. New York Herald Co., 117 App. Div. 534.

j. Where a complaint in an action for libel shows that the article stated that a young man supposed to be poisoned was " keeping company with a young woman, whose name and address he gave in his delirium, and that the plaintiff was discharged by her employers by reason of their identifying her with said article, it is not subject to demurrer where it contains the general allegation allowed by § 535: Nunnally v. Tribune Assoc., 111 App. Div. 485; 97 N. Y. Supp. 908, aff'd 186 N. Y. 533.

k. Where the plaintiff is not named in an article libelous *per se*, but is indicated by circumstances described in the article, and the complaint contains a general allegation, pursuant to § 535, that the article was published concerning her, she may at trial show extrinsic facts which would connect her with the article, and the complaint is not subject to demurrer: Nunnally v. New Yorker Staats-Zeitung, 111 App. Div. 483.

l. Although a writing charging persons with being " crooks " and " gold brick men " does not refer to the plaintiff by name, if the complaint alleges that the words referred to him in conformity with § 535, the complaint is not demurrable on the ground that the article is not sufficiently descriptive: Townes v. N. Y. Evening Journal Pub. Co., 109 App. Div. 852; 96 N. Y. Supp. 822.

m. **Corporation.**—A complaint in an action by a stockholder under § 1785 to procure the dissolution of a corporation fails to state a cause of action when it does not allege that notice to the stockholders as required by § 57 of the Stock Corporation Law has not been published or that no notice has been mailed to or served upon the stockholders: Knicker-

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bocker v. Groton Bridge & Mfg. Co., 111 App. Div. 145.

a. A complaint in an action brought by a creditor of a corporation against a stockholder thereof, under § 54 of the Stock Corporation Law, upon the ground that his stock had not been fully paid up, is demurrable where the allegation as to the defendant's indebtedness upon the stock relates to the time when the indebtedness of the corporation to the plaintiff was contracted, and not to the time when the plaintiff recovered judgment against the corporation upon such indebtedness: Dyer v. Drucker, 108 App. Div. 238.

b. A complaint excusing the joinder of parties whose subscriptions are forfeited need not allege the details essential to the declaration of forfeiture by the directors pursuant to § 43 of the Stock Corporation Law, such facts being merely evidential: Ford v. Chase, 118 App. Div. 605; 103 N. Y. Supp. 30.

c. A complaint in a stockholder's action alleging in substance that the defendants, knowing the value of property sold to a corporation, conspired to defraud the stockholders and in pursuance of the conspiracy obtained control of the majority of the stock by false representations, etc., which fails to allege that the defendants were the directors of the corporation, fails to state a cause of action against them, for by the statute directors only have power to manage the corporate affairs; such complaint is also subject to demurrer when it fails to allege that a demand has been made upon the corporation to bring action to recover for the wrongful acts complained of, or fails to state facts which excuse such demand: Brown v. Utopia Land Co., No. 2, 118 App. Div. 364.

d. On demurrer to the complaint in an action by a corporation to recover stock subscriptions made before its incorporation, it will be assumed that the plaintiff was legally incorporated although the contents of the certificate of incorporation are not set out in the complaint: Avon Spr. Sanatarium Co. v. Weed, 119 App. Div. 560.

e. A complaint, in an action to establish a claim as a creditor against a trust company and to enforce the statutory liability of its stockholders for the debts of the corporation, which fails to allege the recovery of a judgment against the trust company and the return of an execution unsatisfied thereon, is demurrable upon the ground that it does not state a cause of action: Gause v. Boldt, 49 Misc. 340, aff'g 115 App. Div. 897; 99 N. Y. Supp. 442.

f. **Foreign corporation.**—A complaint in an action by a foreign corporation upon a contract made by it in this state must allege compliance with § 15 of the General Corporation Law that it has obtained a certificate from the Secretary of State that it is authorized to do business in this state: Welsbach Co. v Norwich G. & E. Co., 96 App. Div. 52, aff'd 180 N. Y. 553.

g. In an action against the president of a new corporation which took over the assets and stock of an old corporation for stock alleged to be held in trust for the plaintiff, a stockholder in the old corporation, it was held that the new corporation was a necessary party and that the other stockholders were necessary parties as the plaintiff had sued individually and not on behalf of himself and other stockholders: Knickerbocker v. Conger, 110 App. Div. 125.

h. **Damages.**—Where a complaint alleges a contract and a breach thereof, it is not demurrable as failing to allege damages as the plaintiff is entitled to nominal damages at least: Gause v. Commonwealth, 111 App. Div. 530.

i. The complaint in an action for breach of an agreement to give a railroad pass, held demurrable on the ground that plaintiff failed to allege any damages as the result of the defendant's failure to provide the pass in accordance with the terms of agreement: Hasbrouck v. New Paltz H. & P. Traction Co., 98 App. Div. 563; 90 N. Y. Supp. 977.

j. When a question arises as to whether a pleading states a cause of action or defense, the issue must be presented by demurrer, or upon trial at the opening thereof, or when the evidence is offered, or at the close of the case by motion. Especially is this true as to the measure or items of damage; thus, when the complaint in an action to recover damages for death by wrongful act alleges that the widow of the deceased spent large sums of money for hospital room and board and for care and medical attendance, the right to recover such items cannot be decided upon a motion to strike the allegations from the complaint: Fox v. Chapman, 117 App. Div. 127.

k. **Lien.**—A complaint does not state a cause of action when it sets out a levy under attachment in a prior action, the recovery of a judgment and the issue of execution against certain property, and that the defendants, holding the property as security for a debt of the defendant in the prior action, claim a superior lien thereon, which lien is alleged to be invalid as against the plaintiff, and that their claim of such lien is null and void: Gavazzi v. Dryfoos, 110 App. Div. 90.

l. In an action to foreclose a mechanic's lien, the absence of any allegation that any sum was due or remained unpaid from the owner to the contractor, or from the contractor to the subcontractor, is fatal to the

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sufficiency of the complaint, under § 47 of the lien law, (L. 1897. chap. 418.) Gribben v. Hoare, 54 Misc. 245.

a. A complaint in an action to foreclose a mechanic's lien, which alleges in substance that, with the consent of the defendant, plaintiff performed work, labor and services and furnished materials of specified value for the repairing of a chimney, etc., on the defendant's premises, states a cause of action: Kerwin v. Post, 120 App. Div. 179.

b. **Executor.**—An action upon a sealed instrument may be brought within twenty years; and an answer which pleads a shorter period of limitation is demurrable; where a defendant is sued both individually and as executor the complaint is good as against a demurrer that the court has no jurisdiction of an action against an executor: Burstein v. Levy, 49 Misc. 469.

c. **Accounting.**—A complaint in an action for an accounting for assets obtained by false representations may state but a single cause of action although the prayer for relief asks that an agreement, which stands as a bar to an action for accounting, be set aside on the ground of fraud; the demand that such agreement be declared void was simply incidental to the plaintiff's demand for an accounting and did not constitute a separate cause of action: Smith v. Irvin, 108 App. Div. 218; 95 N. Y. Supp. 731.

d. An allegation that moneys were received from plaintiff by defendant, an attorney employed by plaintiff, in connection with such employment, to be used and disbursed by him for and on behalf of the plaintiff in matters relating to the affairs of the plaintiff, is insufficient to show that such moneys were received by the defendant in a fiduciary capacity so that an action in equity could be maintained against him for an accounting; and a demurrer to, the complaint will be sustained: N. Y. Life Ins. Co. v. Hamilton, 52 Misc. 189.

e. The liquidating agent of a national bank may be sued in the supreme court of the State of New York for an accounting in equity, as he does not occupy the position of a receiver, and he may be sued, or sue, without leave of Court: Ingold v. Gilmore, 118 App. Div. 727.

f. In an action against directors for accounting, the plaintiff cannot in one complaint unite an action by him as a stockholder to compel an accounting by the directors for their official acts and a restitution to the corporation of moneys wrongfully received, with a personal action to recover damages sustained by the wrongful acts of the defendants: Brown v. Utopia Land Co., No. 2, 118 App. Div. 364.

g. A complaint in an action to compel a reorganization committee to account, held sufficient as stating a cause of action for an accounting, and sufficiently alleging bad faith by the committee: Mawhinney v. Bliss, 117 App. Div. 255; 102 N. Y. Supp. 279, aff'd 189 N. Y.

h. Where, although the complaint fails to allege a cause of action for an accounting of profits and losses or for contribution, the same may be inferred from other allegations and the facts may be regarded as sufficient to constitute a cause of action for terminating the joint engagement, but the prayer for relief is for a sum of money only, the complaint does not state facts sufficient to constitute a cause of action for an accounting and contribution: Jones v. McNally, 53 Misc. 59.

i. **Surety.**—When demurrer to complaint in an action by the assignee of a bond against the sureties will be sustained: Dunham & Co. v. McCann, 110 App. Div. 157.

j. **Promissory note.**—Complaint in an action against the guarantors of a promissory note, held not demurrable: Delaware Co. Nat. B. v. King, 47 Misc. 447; 95 N. Y. Supp. 954, rev'g 109 App. Div. 553.

k. **Bankruptcy.**—A complaint in an action brought by a trustee in bankruptcy to recover moneys collected by a stock exchange association from the debtors of the bankrupt is not demurrable because it did not allege that the moneys were not paid to the bankrupt or to his assignee for the benefit of creditors whom the trustee superseded where the association could not properly pay the funds so collected to the bankrupt: Cohen v. Wagar, 183 N. Y. 33, rev'g 93 App. Div. 613; 87 N. Y. Supp. 1130.

l. A complaint in an action by a trustee in bankruptcy to recover property alleged to have been wrongfully transferred by the bankrupt held sufficient as setting forth three causes of action against the transferees of the bankrupt and were not improperly united: Bouton v. Wheeler, 118 App. Div. 426.

m. Where, in an action brought by a trustee in bankruptcy to set aside as fraudulent certain voluntary conveyances of the bankrupt, his firm and a corporation which he controlled, the complaint alleges successive conveyances by the bankrupt to different children and grandchildren with intent to hinder, delay and defraud creditors, in which the grantees participated, made at intervals during a period of eight years as part of one fraudulent scheme, the complaint states but one cause of action; the trustee of two bankrupts who were partners holds a single office and there is no misjoinder of parties: Wright v. Simon, 52 Misc. 360.

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a. **Negligence.**—A complaint alleging the negligence of the owner of the building in failing to guard an elevator shaft and the negligence of a joint defendant, who was tenant "of the second floor of the premises above mentioned," does not state a cause of action when it does not state facts showing that the injury was received on said second floor: Detviller v. Rolled Plate Metal Co., 110 App. Div. 773.

b. A complaint which alleged in substance that a municipal corporation negligently piled a large quantity of earth several feet high from a public street to and upon the entrance of a building used for religious purposes and negligently placed upon said pile a large open pipe into which the plaintiff, an infant, going to attend a religious meeting, fell and was injured, without negligence on his part, etc., is not subject to demurrer for failing to state a cause of action: Hunton v. Village of Peekskill, 119 App. Div. 500.

c. Where the plaintiff has a single cause of action based upon the negligence of the defendant and sets out separate acts of negligence, some constituting negligence at common law and others under the Employer's Liability Act, he should not be compelled to amend his pleading, separately stating the common-law action and the action under the statute; allegations of negligence not proved at trial may be considered as surplusage: Acardo v. New York Contracting & Trucking Co., 116 App. Div. 793.

d. **Tax.**—An allegation in the complaint in an action brought by a trust company against the City of New York to recover the amount of an illegal tax to the effect that the tax was paid by the company from moneys applicable for distribution among its stockholders as dividend payments is sufficient to establish, as against a demurrer to said complaint, that the money so paid by the company was the property of the trust company: Guaranty T. Co. v. City of New York, 108 App. Div. 192.

e. An objection that the complaint fails to allege compliance with § 181 of the Tax Law refers solely to plaintiff's capacity to sue and, if not taken by either demurrer or answer, it is deemed to be waived: Wright & Co. v. Faulkner, 52 Misc. 101.

f. **Second demurrer.**—On demurrer for defect of parties, all defects of parties must be pointed out; when a demurrer to a complaint upon the ground of defect of parties has been sustained, and the plaintiff has been allowed to serve a supplemental summons and amended complaint on terms, the amended complaint should not thereafter be dismissed on the ground that the party was not sued individually as well as executor, which defect of parties appeared upon the face of the first complaint, but was not pointed out on the first demurrer, as required by § 488: Smith v. Irvin, 113 App. Div. 55.

g. **Foreclosure.**—Complaint in action of fraud in foreclosing mortgage in foreign state held demurrable in not alleging that heirs were not made parties in the foreclosure action: Nunnally v. Robinson, 113 App. Div. 848.

h. **Ante-nuptial contract.**—The complaint in an action to enforce an ante-nuptial contract is not demurrable, as failing to state a good cause of action, because the contract would not support an action at law, since there are many contracts upon which an action at law cannot be maintained that are enforceable in equity; equity upholds and enforces such ante-nuptial contracts: Phalen v. United States Trust Co., 186 N. Y. 178, rev'g 108 App. Div. 365; 95 N. Y. Supp. 710.

i. **Causes improperly united.**—A complaint alleging a good cause of action on behalf of plaintiff in his individual capacity and another as administrator, both arising out of the breach of covenants running with the land, specific performance of covenants being demanded and also damages for their breach, is not demurrable on the ground that causes of action have been improperly united; it is not a ground of demurrer that alleged causes of action are not numbered and stated in special counts: Greene v. New York, O. & W. R. R. Co., 46 Misc. 478.

j. An action in equity against the auditor of a corporation for an accounting as to a fund over which he had custody and control, and an action at law for damages claimed to have resulted from his wrongful or negligent acts in auditing corporate bills, cannot be united in one complaint when it is not alleged that the defendant himself profited by the improper audit; when the two causes are distinctly pleaded the objection to the misjoinder may be taken by demurrer: Mut. Life Ins. Co. v. Gillette, 119 App. Div. 430.

k. When plaintiffs allege that they rendered services as attorneys in the formation of a corporation to take over the business of several firms, and allege that they were retained by members of various separate firms who desired to become parties to the corporation, the actions upon the separate and several contracts of employment cannot be joined in one complaint; in order that several causes of action may be united it must appear upon the face of the complaint that the causes so united affect all the parties to the action, except as otherwise prescribed by law: Myers v. Lederer, 117 App. Div. 27; 101 N. Y. Supp. 1088.

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a. A complaint alleging that the plaintiff was assaulted by the defendant's servants, who spoke falsely concerning plaintiff, is demurrable; and a motion to separately state and number the causes of action should be granted, as they cannot be united in one complaint, not being actions arising out of the same transaction: Paul v. Ford, 117 App. Div. 151.

b. Where a complaint for damages for the unauthorized use of the plaintiff's portrait by the defendants, contrary to chap. 132 of 1903, joins as defendants both the photographer who took the portrait, and an author who used it in his publications, and alleges that it was used by the defendants "acting jointly" only one cause of action is alleged, which is against the defendants jointly, though the same counts are elsewhere separately set out against each defendant, a demurrer will not be sustained; an action at law for damages and a suit in equity to restrain such use of the plaintiff's portrait may be united in one complaint: Riddle v. MacFadden, 116 App. Div. 353.

c. Where a complaint is demurred to because two causes of action are improperly united, the particular defect must be specifically pointed out so that the defendant may correct the defect if he possibly can; it is not sufficient to simply state the objection in the precise words of § 448, subd. 7: Davis v. City of New York, 75 App. Div. 518; 78 N. Y. Supp. 336.

d. The complaint in an action against two or more persons guilty of negligent acts injurious to a third person is not demurrable on the ground that two separate causes of action were improperly united therein: Lynch v. Elektron Mfg. Co., 94 App. Div. 408; 88 N. Y. Supp. 70.

e. The mere statement of two separate causes of action in a separate count and the omission to separately state and number them is not conclusive upon whether, or not, there are two causes of action and makes the complaint no less demurrable: Crowell v. Truesdell, 67 App. Div. 502; 73 N. Y. Supp. 1013.

f. A complaint in an action in tort is not demurrable because some of the joint tort feasors have not been made parties defendant, nor does the fact that persons have improperly been made defendants render it demurrable as to a person who has been properly made a defendant; where the gravamen of the complaint in an action is that the defendants unlawfully conspired to ruin the plaintiff's business, the fact that it alleges that, in the accomplishment of their purpose, the defendants circulated libels and uttered slanders concerning the plaintiffs, does not render the complaint demurrable as stating more than one cause of action: Rourk v. Elk Drug Co., 75 App. Div. 145; 77 N. Y. Supp. 373.

g. An injury to a person and an injury to personal property, resulting from the same negligent act, give rise to two independent causes of action and it seems that they should not be joined in a single count but should be separately pleaded as otherwise the defendant may demur for misjoinder without first requiring that the causes of action be separately stated and numbered: Powers v. Sherin, 89 App. Div. 37; 85 N. Y. Supp. 89.

h. Upon a demurrer to a complaint upon the ground that it does not state facts sufficient to constitute a cause of action, the question is not whether it contains redundant or irrelevant matter but whether it contains averments which go to make up a complete cause of action; a demurrer admits the truth of all the facts stated in the complaint; every intendment and inference which can be derived from the complaint must be used to sustain it: Budd v. Howard Thomas Co., 40 Misc. 52; 81 N. Y. Supp. 152.

i. Where all the allegations of the complaint are made for the purpose of procuring equitable relief, and where equitable relief alone is asked for, the complaint cannot be sustained for legal redress where no answer has been interposed; the converse of this proposition is also true, and where only legal redress is demanded and no answer is interposed, the complaint cannot be sustained for equitable relief: Cody et al. v. First National Bank of Springfield, 63 App. Div. 199; 32 Civ. Pro. R. 148; 71 N. Y. Supp. 277.

j. Where an action is brought to rescind a stock subscription and to recover the payments made on account thereof, against a corporation, its directors and officers, the complaint is not demurrable if it contains a statement of a cause of action against the corporation although it contained certain allegations which might be construed as intending to allege a cause of action against the individual defendants: Mack v. Latta, 83 App. Div. 242; 82 N. Y. Supp. 130, rev'd on other grounds, 178 N. Y. 525.

k. Where, in a complaint for breach of contract to deliver certain labels, the only allegation of damage is, that owing to their non-delivery plaintiff "was not able to keep the contracts for the delivery of goods on which said label was to have been contained and has lost trade and custom by reason thereof," the complaint is demurrable for failure to state facts sufficient to constitute a cause of action: Vuccino & Co. v. Brown, 46 Misc. 407.

l. Judgment is never ordered on account of the frivolity of a pleading, unless its insufficiency is so clear that it appears from a mere statement without argument, and wherever it is necessary to make an examination of the pleading to determine whether the motion should be granted or not, it becomes improper to strike out the pleading for such reason;

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it is doubtful whether there is any power in the court to strike out as frivolous a demurrer to a complaint framed in the form prescribed by § 488, subd. 8: Vlasto v. Varelopoulos, 73 App. Div. 145; 76 N. Y. Supp. 771.

a. A complaint which alleges that the defendant, a newspaper, which together with other newspapers had received pictures furnished by plaintiff under an agreement not to publish them before a certain date, made a breach of that promise by prematurely publishing the pictures whereby they were "stale" and the plaintiff lost the benefit of his contracts with the other papers, which also ask for damages for the injury to the plaintiff's standing with publishers, does not state two causes of action. The allegations as to plaintiff's injured reputation go to damages only: Dunn v. New York Herald Co., 119 App. Div. 477.

b. **Concession.**—The sufficiency of a pleading to which a demurrer is interposed should not be determined on a concession which forms no part of the record, and is not incorporated in the pleading by an appropriate amendment; the court should take judicial notice that the action was not commenced prior to the date of the summons issued in the action: Keene v. Newark Watch Case Material Co., 81 App. Div. 48; 80 N. Y. Supp. 859.

c. A demurrer to a complaint framed in equity will not be sustained although the facts alleged in such complaint would sustain an action at law: Black v. Vanderbilt, 70 App. Div. 16; 74 N. Y. Supp. 1095.

d. A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action will not be sustained where the facts directly alleged and those which, by fair intendment may be implied, show a cause of action: Wenk v. City of New York, 171 N. Y. 607, rev'g 69 App. Div. 621; 75 N. Y. Supp. 1135.

e. **Causes of action do not affect all the defendants.**—As § 484 of the Code of Civil Procedure provides that causes of action cannot be joined only when, except as otherwise prescribed by law, they affect all the parties to the action and as § 488 provides that a defendant may demur when causes of action have been improperly united, the objection that the causes of action stated do not affect all the defendants is as good a ground for demurrer as the objection that the causes of action are improperly joined: Tew v. Wolfsohn, 174 N. Y. 272; 33 Civ. Pro. R. 282, aff'g 77 App. Div. 454; 33 Civ. Pro. R. 278; 79 N. Y. Supp. 286.

f. **Misjoinder of parties defendant.**—A demurrer for misjoinder of parties plaintiff is authorized by subd. 5, but not of parties defendant; a demurrer will lie for defect of parties plaintiff or defendant under subd. 6, but a "defect" of parties as used in this subdivision means an omission and not a misjoinder: Tew v. Wolfsohn, 77 App. Div. 454; 33 Civ. Pro. R. 278; 79 N. Y. Supp. 286, aff'd 174 N. Y. 272; 33 Civ. Pro. R. 382.

g. Where the substance of the objection is that there is a misjoinder of parties defendant, such is not a defense which may be raised by demurrer: Adams v. Slingerland, 87 App. Div. 312; 84 N. Y. Supp. 323.

h. Neither at common law nor under the Code of Civil Procedure can a plaintiff join two defendants upon the theory that he has a right to relief against one or the other of them. If, however, the complaint alleges facts which show that he is entitled to relief, legal or equitable, against one of the defendants joined, the complaint will be sustained as against him; but when a complaint against two defendants asking alternative relief does not state a cause of action against either, the complaint should be dismissed: Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co., 117 App. Div. 215.

i. **Res adjudicata.**—Where a demurrer to the complaint in an action brought to recover fees under a contract is sustained upon the theory that the contract is invalid and a judgment, from which no appeal is taken, is entered dismissing the complaint upon the merits, such judgment is *res adjudicata* against the right of the plaintiff to maintain a subsequent action to recover other fees alleged to be due under the same contract, notwithstanding that it appears from a decision of the court of appeals rendered in an action between third parties that the contract in question was not invalid: Hirshbach v. Ketchum, 84 App. Div. 258; 82 N. Y. Supp. 739, aff'd 177 N. Y. 582.

j. **Conclusions of law.**—Allegations of a complaint as to the duties of certain city officials, prescribed by statute, are conclusions of law, and a complaint containing such allegations is demurrable: McGuinness v. Allison Realty Co., 46 Misc. 8.

k. Allegations as to membership or copartnership and the succession in interest to the business of a former firm and as to their ownership of judgments in action under § 1946, *Held* to be allegations of fact and not conclusions of law and not demurrable: McKee v. Jessup, 62 App. Div. 143.

l. **Implied warranty.**—Complaint in an action for breach of implied warranty of the genuineness of certain instruments held not demurrable; Gabay v. Doane, 66 App. Div. 507; 73 N. Y. Supp. 381.

m. **Demand for judgment.**—When facts are stated sufficient to constitute a cause of action but the demand for judgment does not ask the relief to which the facts thus stated entitled the plaintiff: Schenectady Co. v. Schenectady Ry. Co., 106 App. Div. 336.

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a. **Conclusions.**—Allegations that the defendants are contriving and conspiring to obtain exclusive control of the wholesale trade in patent medicines, etc., are conclusions of law and are not admitted by demurrer: Park & Sons Co. v. Nat. Druggists' Assn., 175 N. Y. 1, aff'g 54 App. Div. 223; 64 N. Y. Supp. 276; 66 N. Y. Supp. 615.

b. A complaint which alleges that defendant had no jurisdiction of the plaintiff is a mere conclusion of law unsupported by facts: McClerg v. Vielee, 116 App. Div. 731.

c. **Statute of frauds.**—Where it appears on the face of the complaint that the contract sued upon is void under the statute of frauds, the question need not be raised by demurrer but may be raised by an answer pleading the statute, and, at the opening of the trial, a motion for judgment on the pleadings should be made: Seamans v. Barentsen, 180 N. Y. 333; 34 Civ. Pro. R. 178, rev'g 78 App. Div. 36; 79 N. Y. Supp. 212.

d. **Legal capacity.**—Where, from the complaint in an action brought by the assignee of a corporation of New Jersey to recover for an alleged breach of an agreement for the purchase of certain merchandise to be manufactured, it appears that, at the time of making the contract, plaintiff's assignor had not procured any certificate of authority to do business in this state, as required by the General Corporation Law, § 15, the complaint is demurrable on the ground of lack of legal capacity of the plaintiff to maintain the action: Emmerich Co. v. Sloane, 46 Misc. 513; 95 N. Y. Supp. 39, aff'g 108 App. Div. 330.

e. Where, in an action for breach of contract, the pleadings are oral and the answer is a general denial, a refusal to dismiss the complaint for failure to prove plaintiff's capacity to sue is not error: Independent T. Y. M. B. Assn. v. Somach, 52 Misc. 538.

f. A demurrer to a complaint on the ground that the plaintiff has not the legal capacity to sue must point out specifically the particular defect relied on and such objection is not raised by a demurrer on the ground that the complaint does not state a cause of action; hence, a contention that an action should have been brought by the town instead of by the supervisor cannot be raised on a demurrer for failure to state a cause of action: Palmer v. Roods, 116 App. Div. 66.

g. **Action pending.**—The pendency of an action in replevin to recover possession of certain chattels is not a bar to the commencement of a subsequent action between the same parties to recover the price of such chattels, and the complaint in the latter action is not demurrable under § 488, subd. 4: Cobb v. Cullen Bros. Co., 68 App. Div. 179; 74 N. Y. Supp. 56.

h. A complaint for a money judgment for a bonded lien, and to establish it against the surety is not demurrable merely because it alleges, that prior to the commencement of the action, the plaintiff had commenced another, still undetermined, against the same defendant to recover the indebtedness set forth in the complaint, remaining uncollected, in view of the fact that a mechanic's lienor may assert his lien and, at the same time, sue for the debt it represents: Power v. Onward Const. Co., 39 Misc. 707; 80 N. Y. Supp. 950.

i. **Life Insurance.**—In an equitable action brought by the holder of a life insurance policy, issued by a corporation whose assets the complaint alleges the defendant "took over," where the complaint also alleges that defendant assumed all the contracts of life insurance of such corporation and plaintiff seeks to enforce the provisions of his policy, but no contract of insurance with the defendant is set up, and it does not appear whether defendant is a new corporation, or a reorganization of the old one, nor whether the assumption of the previous insurance contracts was by an agreement between two distinct companies or by operation of the provisions of law relating to the reorganization of insurance companies, and the terms of the plaintiff's alleged contract of insurance are not set out, the complaint does not state facts sufficient to constitute a cause of action: Ovenshire v. Security Mut. Life Ins. Co., 54 Misc. 435.

j. **No cause of action.**—A complaint against a hotelkeeper alleging in substance that the plaintiff having been assigned a room was insulted by a servant, who entered and charged her with immoral conduct and ordered her to leave the hotel, does not state a cause of action when there is no allegation of assault, or that the plaintiff was put out of the hotel, and the defamatory words were not set forth; such complaint cannot be sustained as one for slander when the words used are not stated: De Wolf v. Ford, 119 App. Div. 808.

k. A complaint alleging in substance that simultaneously with the plaintiff's contract to serve as clerk of a corporation at a fixed salary, the defendant, who was president, stockholder and director thereof, promised to give him fifty shares of stock "in consideration of the faithful compliance by the plaintiff with the terms of the aforesaid contract between the said corporation and the plaintiff" which promise he failed to perform, does not state a cause of action as the defendant's contract was without consideration: Petze v. Leary, 117 App. Div. 829.

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a. When a pleading is challenged as not stating facts sufficient to constitute a cause of action, all the facts stated will be held to be true, and it will be held to state all facts which can be implied from the allegations by reasonable and fair intendment: Lesser v. Bradford Realty Co., 116 App. Div. 212.

b. **Conditions precedent.**—Where a complaint sets forth an agreement containing several stipulations which might or might not be construed as conditions that must be complied with before the plaintiff can put the defendant in default, a further allegation that "all the conditions above mentioned were fulfilled or were waived by the defendants" determines the character of such conditions and requires that the facts constituting performance and waiver should be alleged; and in the absence of such allegations, a demurrer to said complaint should be sustained: Speare's Sons' Co. v. Casein Co., 53 Misc. 58.

c. In alleging the performance of a condition precedent in a contract under § 533, while it is not necessary to state the facts constituting the performance, yet the plaintiff must allege that he has duly performed all the conditions precedent on his part to be performed; a mere allegation of general performance is insufficient: Gansevoort Bank v. Empire State Surety Co., 117 App. Div. 455.

d. **Jurisdiction.**—An action to enforce the liability under the statute of Maryland must be brought in that state, and the complaint will be dismissed for want of jurisdiction if brought in this state: Knickerbocker Trust Co. v. Iselin, 53 Misc. 80.

e. **Statute of limitations.**—The plaintiff is not required to plead in his complaint facts to take the case out of the statute of limitations either as a part of his cause of action or in anticipation of the setting up of that statute as a defense. Such defense must be set up by answer and cannot be raised by demurrer: Willis v. Wileman, 53 Misc. 465.

f. **Riparian rights.**—Complaint alleging impairment of riparian rights by railroad held sufficient: Naylor v. N. Y. C. & H. R. R. Co., 119 App. Div. 24.

g. **Funeral expenses.**—A nephew who, in the preparation for and in the performance of the burial of his uncle, at the request of his widow, expends money for certain articles for immediate consumption at his wake, all of which were suitable to decedent's condition in life and necessitated by the racial custom and sentiment of himself, relations and friends, is entitled to recover from the estate the reasonable value of the materials furnished; and a demurrer to the complaint setting forth the facts, on the ground that it does not state a cause of action, will be overruled: McCullough v. McCready, 52 Misc. 542.

h. **Employer's Liability Act.**—It is not necessary, in order to plead a cause of action under the Employer's Liability Act (L. 1902, ch. 600) that its precise language should be made use of, provided that it appear plainly from what is alleged that the cause of action was within the provisions of the act and that its requirement of the giving of a notice to the defendant has been complied with: Harris v. Baltimore Machine & El. Works, 188 N. Y. 141, aff'g 112 App. Div. 389.

i. **Trustees.**—A trustee who has participated in an illegal transfer of property may bring action to rescind same; the objection that the complaint did not state a cause of action in favor of the plaintiff is not tenable that he, having discovered the illegality of the transaction, was entitled that the conveyances be declared null and void: Smith v. Stevenson Brewing Co., 117 App. Div. 690.

j. **Receiver.**—A receiver appointed on the insolvency of a railroad is not entitled to recover from contractor the alleged value of the stocks and bonds received as conpensation for the construction of the road, when it is not alleged that the cost of constructing the road and the value of the properties acquired from the contractor were of less value than the par value of the stock and bonds delivered in payment: Bostwick v. Young, 118 App. Div. 490.

k. **Judgment creditor's action.**—When, in a judgment creditor's action to reach trust fund, the complaint held to state a good cause of action: Herts Brothers v. Tiffany, 118 App. Div. 215.

l. The complaint in a judgment creditor's action held sufficient to state cause of action; when several defendants demur only one decision is authorized which should determine their several rights: Pritz v. Jones, 117 App. Div. 643.

m. A complaint which sets out that such transactions were made without consideration, and with a continuing intent to cheat and defraud creditors, is not subject to demurrer: Wright v. Simon, 118 App. Div. 774.

n. **Elector.**—A complaint in an action by an elector which sets up that the county committee of the party to which he belongs has assumed to delegate to boards in the respective districts and wards of the county discretionary power to enroll and strike from the rolls the names of voters, and thereby prevent voters belonging to the party from voting at its primary elections, states facts sufficient to constitute a cause of action: Brown v. Cole, 54 Misc. 278.

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a. **Contract.**—The complaint in an action to recover damages for a breach of contract of employment held sufficient as alleging breach of contract by the defendants: Abrahams v. Finklestein, 53 Misc. 314.

b. In an action upon a contract failure to allege consideration of performance makes the complaint demurrable: Fulton v. Harney, 117 App. Div. 572.

c. While it is inartificial to set out the breach of an undertaking by negativing the language of its condition and such pleading is not commended, yet it is sufficient as an allegation of breach upon demurrer. In any event the remedy for the defect is by motion to make the complaint more definite and certain: Town of Hadley v. Garner, 116 App. Div. 68; 101 N. Y. Supp. 777.

d. **Frivolous.**—When a party gives notice of motion for judgment on a demurrer as frivolous a decision overruling the demurrer as upon a trial of the issue of law may be made by consent: Peabody v. West, 119 App. Div. 103.

e. A complaint in foreclosure by the assignee of a mortgage which merely alleges the assignment of the mortgage, but is silent as to an assignment of the bond, is subject to demurrer as frivólous, as the mortgage is a mere incident to the debt, and an assignment thereof does not pass the debt: Smith v. Thompson, 118 App. Div. 6.

f. A motion for a judgment upon a demurrer to a complaint upon the ground that the demurrer is frivolous cannot be granted where the demurrer raises a question that is doubtful: People v. McClellan, 53 Misc. 472.

g. **A demurrer to the whole complaint** will not be available as to a separate cause of action stated therein and not specifically pointed out in the demurrer, unless it is good as to the whole complaint: Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152.

h. **Guaranty.**—A complaint setting out that the plaintiff, a bank, made a loan to one S. upon the written guaranty of the defendant, a national bank, of the payment of said loan at maturity, does not state a cause of action, for the contract of guaranty is *ultra vires*, and no recovery can be had thereon. This is so although the complaint alleges that S. obtained the loan under an agreement with the defendant to turn the sum over to it, and that the guaranty was to be made by the defendant in order that it might obtain the money: Appleton v. Citizens' National Bank, 116 App. Div. 404.

i. In an action on a guaranty to take a loss in case the customers fail to pay, it is a good defense to allege that the plaintiff had neglected to collect the claims against the debtors and had not exhausted their remedy against them; the complaint was defective as it did not show that the plaintiffs had been and will be unable to realize the advances made by them: Nachod v. Hindley, 118 App. Div. 658.

j. **Injunction.**—A complaint asking for an injunction and for damages for the use of a union label may be maintained by the union which adopted said label under the provisions of the Labor Law and also by its licensee: Lynch v. John Single Paper Co., 115 App. Div. 911; 101 N. Y. Supp. 1145.

k. A complaint which seeks to enjoin a common carrier from refusing to transport domesticated deer, does not state a cause of action, as it seeks to compel the carrier to do an illegal act: Dietrich v. Fargo, 119 App. Div. 315.

l. **Nuisance.**—Several owners of separate parcels of land cannot unite in an action against a railroad company for damages to their respective lands from the flooding thereof by a stream whose natural flow has been impeded by the abutments of a bridge erected by the defendants, but they may unite in an action to abate the nuisance; and neither the allegations of damage nor the demand of separate money judgments render the complaint demurrable: Burghen v. Erie Railroad Co., 53 Misc. 460.

m. In an action to enjoin the violation of an order of a village board of health to abate a nuisance, it is properly brought in the name of the village rather than that of the board of health; and it is not enough to allege that the board of health declared it a nuisance and ordered it abated as the resolution and order are not evidence thereof; the complaint must allege facts showing the nuisance: Village of White Plains v. Tarrytown, W. P. & M. R. Co., 117 App. Div. 841.

n. **Quo warranto.**—The section of the Code of Civil Procedure relating to the action of *quo warranto* require that rival claimants to an office should be made parties to the action; if a defect of parties appear upon the face of the complaint, it may be brought to the attention of the court by demurrer: People v. McClellan, 119 App. Div. 416.

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§ 492. Demurrer to all or part of the complaint; demurrer to part, and answer to part.

a. A demurrer to the whole complaint will not be available as to a separate cause of action stated therein and not specifically pointed out in the demurrer, unless it is good as to the whole complaint: Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152.

§ 493. Defendant may demur to reply.

b. When in an action for the breach of a contract, the answer as a counterclaim, alleges a breach of contract by the plaintiff's assignor after the contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract, "and fully assented to the carrying out the same" in that manner, does not state a defense to the counterclaim and a demurrer thereto should be sustained: Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341; 97 N. Y. Supp. 73.

c. A reply which alleges the modification of the contract on which a counterclaim is founded is not denial thereof, but at most a partial defense, and if pleaded as a complete defense a demurrer thereto will be sustained: Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341; 97 N. Y. Supp. 73.

§ 494. When plaintiff may demur to answer.

d. In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a demurrer will be sustained to a separate defense alleging that the plaintiff's wife was brought to the hospital suffering from a tumor and was operated upon by her own request, as such defense does not meet the cause of action set forth in the complaint: Jackson v. Salvage, 109 App. Div. 556.

In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a demurrer will be sustained to a separate defense alleging that the complaint does not state a cause of action, as such alleged defense is neither a general nor specific denial of the allegations of the complaint, nor a statement of any new matter constituting a defense or counterclaim, nor is it a demurrer authorized to be taken by answer under § 498, because the allegations attacked appear upon the face of the complaint. Id.

e. **Irrelevancy.**—The sufficiency of a defense set up in an answer should be determined upon a demurrer or upon the trial; it cannot be determined upon a motion to strike out portions of such defense as irrelevant: Rankin v. Bush-Brown, 108 App. Div. 294.

f. The proper way to present the question as to the sufficiency of a defense is by demurrer or upon the trial and not by motion to strike out as irrelevant or redundant the allegations constituting the same: Rankin v. Bush, 108 App. Div. 295; 95 N. Y. Supp. 718.

g. **Bad complaint.**—When a plaintiff demurs to the answer the defendant can challenge the validity of the complaint, as any answer is good to a complaint which does not state a cause of action: Parker Co. v. City of New York, 110 App. Div. 360.

h. Although a demurrer to an answer searches the record and raises an issue as to the sufficiency of the complaint, when the complaint has been held not to state a cause of action, the decision will be reviewed as if made upon a demurrer to the complaint, and the truth of the allegations will not be assumed: Nichols v. Riley, 118 App. Div. 404.

i. On demurrer to an answer as not stating a defense the defendant may assert that the complaint does not state a cause of action and the court will examine the complaint to determine that question: Armour Packing Co. v. Edison El. Il. Co., 115 App. Div. 51; 99 N. Y. Supp 62.

j. **Judgment creditor's action.**—When, in a judgment creditor's action to reach trust fund, the complaint held to state a cause of action: Herts Brothers v. Tiffany, 118 App. Div. 215.

k. **Promissory note.**—A complaint against a surety on a bond conditioned for the payment of a promissory note, which does not allege the covenant of the defendant in full or in legal effect, except that "said bond was conditioned for the payment of $5,000," does not state a cause of action, and a demurrer to a partial defense thereto should be overruled although the defense be bad; a bad defense is good enough for a bad complaint: Gansevoort Bank v. Empire State Surety Company, 112 App. Div. 500.

l. **Libel.**—When one paragraph of a complaint sets out the whole of the article charging the plaintiff with the commission of several acts, and the following paragraph contains an innuendo referring only to some of the charges set forth in the preceding paragraph, such following paragraph is surplusage when the article set out is libelous on its face, and an alleged defense in partial justi-

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fication of the charges not referred to in the innuendo is good and demurrer thereto should be overruled: Nunnally v. Press Pub. Co., 110 App. Div. 10.

a. Where an answer in an action of slander, in addition to a general denial, alleged as a separate defense certain new matter, pleaded by way of justification and in mitigation, a demurrer to the entire defense consisting of new matter should not be sustained on the ground that it was insufficient in law as the plaintiff did not contend that the defense was insufficient in law by way of mitigation: Doyle v. Fritz, 86 App. Div. 515; 83 N. Y. Supp. 762.

b. When a publication not naming the plaintiff, but alleged to have been printed of and concerning her, contains accusations of murder, robbery and illicit relations with the person murdered, defenses not set out as partial defenses nor in mitigation, which do not in any way justify the charges of murder or robbery, are bad on demurrer, although they may justify the accusation of illicit relations: Nunnally v. New Yorker Zeitung Publishing Co., 117 App. Div. 1.

c. Mere investigations of a defective character conducted by members of the coroner's office and the municipal police are not judicial and official proceedings within the meaning of § 1907, and a demurrer to an answer which claims a privilege for the report thereof should be sustained: Nunnally v. Press Pub. Co., 110 App. Div. 10.

d. **Statute of limitations.**—An action upon a sealed instrument may be brought within twenty years; and an answer which pleads a shorter period of limitation is demurrable; where a defendant is sued both individually and as executor the complaint is not demurrable on the ground that the court had no jurisdiction of an action against an executor: Burstein v. Levy, 49 Misc. 469.

e. **Fraudulent grantee.**—When plaintiff claiming title against a fraudulent grantee cannot demur to answer of third person claiming rights as against such fraudulent grantee: Darragh v. Rowe, 109 App. Div. 560.

f. **Final judgment.**—When the court of appeals has overruled a plaintiff's demurrer to a separate affirmative defense to the entire cause of action contained in the answer and has remitted the case to the court below for judgment in accordance therewith and without granting leave to plaintiff to withdraw the demurrer, the defendant is entitled, as a matter of law, to final judgment dismissing the complaint: National Contracting Co. v. Hudson River W. P. Co., 110 App. Div. 133.

g. **Special defense.**—Where a counterclaim is in the nature of a complaint several special grounds of demurrer are provided; where the counterclaim set up is for the purpose of defeating the plaintiff's recovery, with no demand for affirmative judgment, it partakes of the nature of a special defense, and can be demurred to only on the ground that it is insufficient in law: Isbell-Porter Co. v. Heineman, 113 App. Div. 79.

h. **Partial defense.**—Matter pleaded as a complete defense which constitutes only a partial defense is demurrable: Ivy Courts Realty Co. v. Morton, 73 App. Div. 335; 76 N. Y. Supp. 687.

i. Allegations not designated as a partial defense must be tested as though pleaded for the purposes of a complete defense and when it is not a complete defense a demurrer will lie: Loos v. McCormack, 46 Misc. 144; 93 N. Y. Supp. 1088, aff'g 107 App. Div. 8.

j. New matter contained in an answer which is not pleaded as a partial defense or in mitigation of damages, but simply as a separate defense, must for the purposes of a demurrer be treated as having set up a complete defense and unless sufficient as such is demurrable: Mott v. DeNisco, 106 App. Div. 155.

k. **Denial and new matter.**—Where a denial of a material allegation of a complaint is joined with new matter and both are pleaded as one separate defense, such defense is not demurrable; a denial is not new matter and a demurrer will only lie to a defense consisting wholly of new matter: Onderdonk v. Peale, Peacock & Kerr, Inc., 104 App. Div. 195.

l. A defense must be complete in itself, must consist of new matter, outside of the issues raised or which can be raised by a denial and a defense cannot be struck out for insufficiency as the remedy is by demurrer: Burkert v. Bennett, 35 Misc. 318; 71 N. Y. Supp. 144.

m. A denial can have no place in a "defense;" the sufficiency of a "defense" is tested by whether the "new matter" pleaded in it constitutes a defense to the action, taking all the allegations of the complaint to be true, and, if it does not stand this test, it is demurrable for insufficiency: Staten Island M. R. R. Co. v. Hinchcliffe, 34 Misc. 49; 68 N. Y. Supp. 556.

n. Where a defense set out in an answer contains new matter and denials of material allegations of the complaint, such denials may be stricken out upon motion if the plaintiff is aggrieved thereby and so long as they remain, a demurrer will not lie to the defense even though the other matter pleaded therein does not constitute a defense: Uggla v. Brokaw, 77 App. Div. 310; 79 N. Y. Supp. 244.

o. **General denial.**—Where the only issue raised by an answer is raised by a general denial, a demurrer must be sustained as it cannot lawfully be overruled, and the plaintiff be remitted to a motion for judgment on the defense, as frivolous or to strike it out as irrelevant or re-

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dundant: Jaeger v. City of New York, 39 Misc. 543; 80 N. Y. Supp. 356.

a. A plaintiff has a right to test a counterclaim by demurrer and, therefore, a general denial, defeating the right to demur, must be stricken out unless a necessary part of the counterclaim: Blaut v. Blaut, 41 Misc. 572; 85 N. Y. Supp. 146.

b. **Denial not defense.**—No demurrer can be interposed as a denial, however defective, as that remedy is confined to defenses and counterclaims. A "denial" is not a "defense" in the nomenclature of pleading; they are separate pleas; if the denial raises no issue, it is frivolous and judgment may be had upon it upon motion: Galbraith v. Daily, 37 Misc. 156; 74 N. Y. Supp. 837.

c. Where a demurrer to a pleaded defense is good, but where the complaint states no cause of action for failing to so allege, the demurrer must be overruled as a bad answer is good enough for a bad complaint; a defense in pleading can only consist of "new matter," that is, matter which cannot be proved under a denial, and if the pleaded defense does not contain such new matter, it is "insufficient in law on the face thereof:" George v. City of New York, 42 Misc. 270; 86 N. Y. Supp. 610.

d. Where, upon the demurrer to a defense set up in an answer, the court finds the complaint does not state a cause of action, it may overrule the demurrer but cannot direct a final judgment dismissing the complaint: Gabay v. Doane, 66 App. Div. 507; 73 N. Y. Supp. 381.

e. **Equity.**—Where it is certain from the facts alleged in a complaint and from the prayer for relief contained therein, that the plaintiff seeks, and can obtain, if anything, equitable relief, a defense that the plaintiff has an adequate remedy at law is demurrable; where, from the facts alleged in the complaint, it is uncertain whether the plaintiff is entitled to legal or equitable relief, and the prayer for judgment asks for equitable relief, the defense that the plaintiff has an adequate remedy at law may be interposed: Edmonds v. Stern, 89 App. Div. 539; 85 N. Y. Supp. 665.

f. A defense, which consists of facts which the defendant will prove upon the trial to effect the extent of the discretionary relief that a court of equity will grant in an action to obtain an injunction restraining the defendants from enforcing an agreement, claimed to be in violation of public policy and the statutes of the state making illegal certain combinations, is not insufficient upon the face thereof, even though it would appear upon an inspection of the pleadings that such facts would not in themselves be sufficient to justify the court in refusing the plaintiff the relief, and such defense is not demurrable: Straus v. American Publishers' Assn., 103 App. Div. 277.

g. **Bad demurrer.**—A demurrer to a defense of new matter on the ground that it does not state facts sufficient to constitute a defense must state that the defense is insufficient in law, upon the face thereof, and the demurrer is bad where it merely states that the defense is insufficient: McCann v. Hazard, 36 Misc. 7.

h. **Condition precedent.**—Answer pleading that plaintiff had failed to request or demand of engineers as to value and amount of extra work in accordance with the terms of the contract, held to plead plaintiff's non-compliance with an essential condition precedent and a demurrer to such a defense upon the ground that it is "insufficient in law upon the face thereof" is not well taken: Nat. Contracting Co. v. Hudson R. W. P. Co., 170 N. Y. 439, rev'g 67 App. Div. 620; 73 N. Y. Supp. 1142, aff'g 34 Misc. 652; 70 N. Y. Supp. 585.

i. Where facts are alleged as new matter by way of a defense, their sufficiency, as a defense, may be tested by demurrer whether or not the facts are admissible in proof under a general denial: Blumenfeld v. Stine, 42 Misc. 411; 87 N. Y. Supp. 81.

j. **Foreign judgment.**—In an action brought upon a judgment recovered in another state the answer states a good defense under §§ 390 and 390a when it alleges the statute of limitations of such other state as a bar, and it is not demurrable because it failed to allege that the defendant continued to reside in the other state until the time limited by the statutes of that state for bringing an action on the judgment had expired: Chesapeake Coal Co. v. Mengis, 102 App. Div. 15.

k. An answer interposing defense of judgment in foreign state for same cause of action is not demurrable: Gleason v. Northwestern M. L. Ins. Co., 189 N. Y. 100, aff'g 118 App. Div.

l. **Frivolous answer.**—Allegations of the complaint are not put in issue merely by statements inconsistent therewith contained in the answer, and consequently where the plaintiff alleges an unlawful entry of her dwelling and a battery of her person, the defendant's answer, that he entered under authority of a chattel mortgage on the plaintiff's goods and to assist in removing them and did not assault her, raises no issue and makes the answer frivolous: Zwerling v. Annenberg, 38 Misc. 169.

m. **Sheriff.**—In an action against a sheriff for damages for a false return to an execution against the person, the answer as a partial defense set up that the sheriff advised the sureties pursuant to §§ 591 and 592 to surrender their principal. *Held*, a good partial defense in mitigation of damages and that a demurrer to said answer would not lie: Prividi v. O'Brien, 46 Misc. 56.

n. **Slander.**—Where the plaintiff sues the defendant for having said to

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divers persons that the plaintiff stole diamonds from a company of which the defendant was a director, an alleged defense, not pleading the truth in justification nor any facts to rebut malice in making the charge, but merely things which the defendant has heard in disparagement of the plaintiff from the employees of the company, and further alleging that the defendant saw the plaintiff's brother steal some diamonds from the company, is bad on demurrer: Zilver v. Cooper, 37 Misc. 158; 74 N. Y. Supp. 850.

§ 495. Demurrer to counterclaim, when defendant demands an affirmative judgment.

a. Where the answer interposed in an action, for a second and third defense, reiterates and realleges certain denials contained in the first defense as though they were again set forth at length, and then sets forth new matter as a part of such defenses, a demurrer will not lie to the new matter set forth in the second and third defenses, as such a demurrer is only addressed to a part of such defenses and is, therefore, ineffectual; a demurrer searches the whole record and relates back to the first fatally defective pleading: Holmes v. Northern Pacific R. Co., 65 App. Div. 49; 72 N. Y. Supp. 476.

b. A defense set up in an answer will, if not designated as a partial defense, be treated for the purposes of a demurrer thereto as having been pleaded as a complete defense: Loos v. McCormack, 107 App. Div. 8.

c. **Precise objection.**—The objection that a counterclaim is not sufficient in law upon the face thereof is not an authorized ground of demurrer to the counterclaim within § 495 of the Code of Civil Procedure; the contention that a counterclaim is not a proper one within the provisions of the Code of Civil Procedure is not available on a demurrer to such counterclaim unless such objection is specified in the demurrer: Hudson River W. P. Co. v. Glens Falls Gas Co., 90 App. Div. 513; 85 N. Y. Supp. 577.

d. A demurrer to a defense of new matter on the ground that it does not state facts sufficient to constitute a defense must state that the defense is insufficient in law, upon the fact thereof, and the demurrer is bad where it merely states that the defense is insufficient: McCann v. Hazard, 36 Misc. 7.

e. **Conversion.**—A complaint which alleges the title to personal property in the plaintiff under a promise by the defendant to deliver it upon demand, that demand was made and refused, states an action for conversion, and a counterclaim thereto founded upon contract is subject to demurrer: McIntyre v. Smathers, 118 App. Div. 776.

f. **Duress.**—Pleading a threat to pursue a legal remedy is not duress: Lilienthal v. Bechtel Brewing Co., 118 App. Div. 205.

g. **Specific performance.**—In an action by the assignee of a contract of sale of real estate against the vendor in possession to recover deposits paid and expenses incurred in searching title, a counterclaim for specific performance is demurrable as insufficient in law: Forbes v. Reynard, 46 Misc. 154.

h. **Dower.**—In an action for the admeasurement of dower of which plaintiff's husband was seized and which he conveyed by a deed in which she did not join, a counterclaim that plaintiff's husband in his will devised her other real property greater in value than her dower interest in the property in suit is demurrable, as such counterclaim is not in any way connected with the subject-matter of plaintiff's action, and hence did not constitute a counterclaim under § 501: Burnett v. Burnett, 86 App. Div. 386.

i. **Special defense.**—Where a counterclaim is in the nature of a complaint several special grounds of demurrer are provided; where the counterclaim set up is for the purpose of defeating the plaintiff's recovery, with no demand for affirmative judgment, it partakes of the nature of a special defense, and can be demurred to only on the ground that it is insufficient in law: Isbell-Porter Co. v. Heineman, 113 App. Div. 79.

j. A demurrer to a counterclaim, upon the ground that it is not of the character specified in § 501, is sufficiently specific; a counterclaim open to the objection of duplicity if properly raised, is not demurrable upon the ground that it does not state a cause of action, if one good cause of action can be spelled out as pleaded: Kneeland v. Pennell, 49 Misc. 94.

k. Where but one separate defense was stated though it was divided into two paragraphs, a demurrer to this defense referring to the defense as a whole and referring to both paragraphs is proper in form: Bates v. D. L. & W. R. Co., 109 App. Div. 774.

§ 496. Demurrer to counterclaim must specify grounds of objection.

l. The objection that a counterclaim is not sufficient in law upon the face thereof is not an authorized ground of demurrer to the counterclaim within § 495; the contention that a counterclaim is not a proper one within the provisions of the Code of Civil Procedure is not available on a demurrer to such counterclaim unless such objection is specified in the demurrer: Hudson River W. P. Co. v.

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Glens Falls Gas Co., 90 App. Div. 513; 85 N. Y. Supp. 577.

a. A counterclaim although admissible under § 501 may be demurrable as failing to state facts from which the reasonable inference is deducible that deceit, a form of tort, was practiced on the party setting up the counterclaim: Gause v. Commonwealth Trust Co., 44 Misc. 46; 89 N. Y. Supp. 723.

b. A demurrer to a counterclaim. upon the ground that it is not of the character specified in § 501, is sufficiently specified; a counterclaim open to the objection of duplicity if properly raised, is not demurrable upon the ground that it does not state a cause of action, if one good cause of action can be spelled out as pleaded: Kneeland v. Pennell, 49 Misc. 94.

§ 497. Amendments in certain cases after decision of demurrer.

c. When the appellate division, after holding that the complaint fails to state a cause of action, grants a new trial, it is for the purpose of allowing the plaintiff, by amendment, to complete his cause of action if he has one: Mossein v. Empire State Surety Co., 112 App. Div. 69.

d. When the court of appeals has overruled a plaintiff's demurrer to a separate defense to the entire cause of action contained in the answer and has remitted the case to the court below for judgment in accordance therewith and without granting leave to plaintiff to withdraw the demurrer, the defendant is entitled, as a matter of law, to final judgment dismissing the complaint: National Contracting Co. v. Hudson River W. P. Co., 110 App. Div. 133.

e. When the plaintiff is served with a copy of a judgment overruling his demurrer and giving him ten days in which to withdraw the same after notice of entry, and the notice of entry served therewith stated that such judgment has been duly entered in the office of the clerk, such notice is insufficient to set running the ten days within which the plaintiff must withdraw his demurrer; hence, a final judgment, subsequently entered because of plaintiff's default in withdrawing such demurrer, should be set aside: Tudor v. Ebner, 109 App. Div. 521; 96 N. Y. Supp. 392.

f. **Parties.**—When a demurrer to a complaint has been sustained, and the plaintiff has been allowed to serve a supplemental summons and amended complaint on terms, the amended complaint should not thereafter be dismissed on the ground that the party was not sued individually as well as executor, which defect of parties appeared upon the face of the first complaint, but was not pointed out on the first demurrer, as required by § 488: Smith v. Irvin, 113 App. Div. 55.

g. **Costs.**—When a demurrer to the entire complaint in a common-law action is sustained and leave is given to the plaintiff to amend, the defendant is entitled, as a matter of right, on entering the interlocutory judgment, to costs of the trial of the issue of law and of all proceedings after notice and before trial: De Turckheim v. Thomas, 113 App. Div. 123; 99 N. Y. Supp. 104.

h. Where an interlocutory judgment, overruling a demurrer to a complaint with leave to withdraw the demurrer and plead over, is on appeal affirmed in the appellate division without granting such leave, the defendant must under § 497 apply to that tribunal, and not to the special term, for such leave: White v. Jackson, 39 Misc. 218; 79 N. Y. Supp. 393.

i. Complaint against husband and wife for breach of contract held not demurrable on the ground that two causes of action had been improperly united: Tew v. Wolfsohn, 174 N. Y. 272, aff'g 77 App. Div. 454; 79 N. Y. Supp. 286.

j. Where a complaint states but a single cause of action against a corporation, the mere fact that it contains some expressions which might be construed as evidencing an intent to state a cause of action against the individual defendants does not render it demurrable on the ground that two causes of action were improperly united therein: Mack v. Latta, 83 App. Div. 242; 83 N. Y. Supp. 130, rev'd on other grounds 178 N. Y. 525.

k. **Two or more causes of action.**—As § 497 provides that when a demurrer to a complaint is allowed, on the ground that two or more causes of action have been improperly united, the court may direct that the action be divided into as many actions as are necessary, this clearly implies that, in order to sustain a demurrer on this ground, the complaint must contain two or more causes of action so well stated and so complete and perfect that the court can divide them into the necessary number of actions: Tew v. Wolfsohn, 174 N. Y. 272; 33 Civ. Pro. R. 382, aff'g 77 App. Div. 454; 33 Civ. Pro. R. 278; 79 N. Y. Supp. 286.

l. Although a plaintiff is ordered to sever actions improperly joined he may, pursuant to leave to amend the complaint, redraw his pleading so as to embrace the separate causes of action in a single action against all the defendants. He is not required to sever if the defect can be cured by amendment: Myers v. Lederer, 119 App. Div. 332.

§ 498. When objection may be taken by answer.

m. **Objection.**—A plaintiff should demur to objections to the sufficiency of an amended complaint taken under § 498 by answer and those objections are to be

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deemed defenses and must specify not only the supporting facts but also the particular grounds of each objection as provided by § 490: Nellis v. Rowles, 41 Misc. 313.

a. **Legal capacity.**—The objection that the plaintiff has no legal capacity to sue appears on the face of the complaint and is waived by the defendant's failure to answer or demur thereto: Van Zandt v. Grant, 67 App. Div. 70; 73 N. Y. Supp. 600, aff'd 175 N. Y. 150.

b. **Defect of parties plaintiff.**—Where there is a defect of parties plaintiff which appears upon the face of the complaint, the objection should be taken by demurrer; it is only where the objection does not appear upon the face of the complaint that it can be taken by answer, and where it is not taken by demurrer it is deemed waived: Hyde & Sons v. Lesser, 93 App. Div. 320; 87 N. Y. Supp. 878.

c. When a defect of parties appears upon the face of the complaint the defendant may demur thereto, and if the defect does not appear upon the face of the complaint, the objection may be taken by answer; a failure to take such objection by demurrer or answer is a waiver of the defect; but even though objection be so waived, the court on its own motion may direct parties to be brought in if a complete determination of the controversy cannot be had without their presence; an objection to defect of parties must be made by demurrer or answer and cannot be made by motion: Knickerbocker Trust Co. v. O. C. & R. S. R. Co., 111 App. Div. 812; 97 N. Y. Supp. 673, appeal dis. 186 N. Y. 527.

d. **Defect of parties defendant.**—It seems that notwithstanding the fact that the Code of Civil Procedure declares that the failure to raise the question of a defect of parties defendant, either by answer or demurrer shall constitute a waiver of the defect, yet the question may be raised for the first time upon the trial: Kent v. Aetna Ins. Co., 84 App. Div. 428; 82 N. Y. Supp. 817.

e. The objection to a defect of parties defendant, which appears upon the face of the complaint may only be taken by demurrer; it is improper for the court upon the trial of issues of law raised by a demurrer to separate defenses contained in the defendant's answer to grant the defendant leave to demur to the complaint on the ground of such defect of parties; the objection that causes of action have been improperly united in the complaint, must, where such objection appears upon the face of the complaint, be taken by demurrer or it will be deemed to have been waived: Ward v. Smith, 95 App. Div. 432; 88 N. Y. Supp. 700.

f. **Non-joinder of parties defendant.**—A plea of non-joinder of proper parties defendant without pointing out the precise defect or bringing the matter to the attention of the trial court, or showing that a complete determination of the controversy cannot be had without the presence of an additional party, is ineffectual: Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, aff'g 82 App. Div. 72; 81 N. Y. Supp. 794.

g. **Former action pending.**—The plea of a former action pending constitutes an affirmative defense which can be supported only by showing, as a matter of fact, that the former suit was brought upon the same cause of action and was pending undetermined at the time the later suit was commenced. Service of the summons in the former action, coupled with a finding that such action had never been brought to trial, is insufficient to show that the action was pending at the time the second action was commenced: Hirsch v. Manhattan Ry. Co., 84 App. Div. 374; 82 N. Y. Supp. 754.

h. **Statute of frauds.**—Where it appears on the face of the complaint that the contract sued upon is void under the statute of frauds, the question need not be raised by demurrer but may be raised by an answer pleading the statute and, at the opening of the trial, a motion for judgment on the pleadings should be made: Seamans v. Barentsen, 180 N. Y. 333; 34 Civ. Pro. R. 178, rev'g 78 App. Div. 36; 79 N. Y. Supp. 212.

i. A party to avail himself by a defense of the statute of frauds must in a proper case plead that statute: Brauer v. Oceanic Steam Nav. Co., 178 N. Y. 339.

j. The statute of frauds is a rule of evidence which is not available as a defense to an action unless raised by demurrer or answer; if the complaint does not show upon its face whether the contract in question is oral or written the defense of the statute is properly raised by answer: Daniels v. Rogers, 108 App. Div. 338.

k. In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a demurrer will be sustained to a separate defense alleging that the complaint does not state a cause of action, as such alleged defense is neither a general nor specific denial of the allegations of the complaint, nor a statement of any new matter constituting a defense or counterclaim, nor is it a demurrer authorized to be taken by answer under § 498, because the allegations attacked appear upon the face of the complaint: Jackson v. Salvage, 109 App. Div. 556.

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§ 499. Objection; when deemed waived.

a. Where a life insurance policy was erroneously, or fraudulently, made payable to the insured, or his legal representatives, instead of to a creditor thereof, for whose benefit the policy was obtained and by whom the premiums were paid, the legal representatives of the insured are necessary parties to an action brought by the creditor, after the death of the insured, against the company to have the policy reformed and made payable to such creditor instead of to the legal representatives of the insured and for judgment upon the policy so reformed for the money due thereunder, and although no attempt was made by defendant to raise the objection, by demurrer or answer, that there was a defect of parties defendant, a motion, made at the close of the evidence upon the trial, to dismiss the complaint for such defect of parties should have been granted unless within a reasonable time the personal representatives of the insured were brought in, not necessarily for the protection of the defendant, for it had neglected its right, but for the protection of the representatives of the insured as well as the seemly and orderly administration of justice, that there might be a complete determination of the controversy; since § 499 must be read in connection with § 452: Steinbach v. Prudential Ins. Co., 172 N. Y. 471; 33 Civ. Pro. R. 218, rev'g 62 App. Div. 133; 70 N. Y. Supp. 809.

b. Where the objection appears on the face of the complaint and the defendant does not demur thereto, the objection is not thereby waived: Potts v. Baldwin, 67 App. Div. 434; 74 N. Y. Supp. 655, aff'd 173 N. Y. 335.

c. **Jurisdiction.**—Under § 499 an objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of action, is not waived by a failure to take such objection by demurrer or answer as they may be raised by any party at the trial; a defendant may object to the jurisdiction of the court upon the trial, even though his answer demands affirmative relief: Le Brantz v. Campbell, 89 App. Div. 583.

d. **Legal capacity.**—The objection that the plaintiff has no legal capacity to sue appears on the face of the complaint and is waived by the defendant's failure to answer or demur thereto: Van Zandt v. Grant, 67 App. Div. 70; 73 N. Y. Supp. 600, aff'd 175 N. Y. 150.

e. **Misjoinder.**—The objection that two causes of action are improperly united in the same complaint will be deemed to be waived unless taken by answer or demurrer: Shaw v. City of New York, 83 App. Div. 212; 82 N. Y. Supp. 44.

f. **Defect of parties plaintiff.**—Where there is a defect of parties plaintiff, which appears upon the face of the complaint, the objection should be taken by demurrer; it is only where the objection does not appear upon the face of the complaint that it can be taken by answer, and where it is not taken by demurrer it is deemed waived: Hyde & Sons v. Lesser, 93 App. Div. 320; 87 N. Y. Supp. 878.

g. When a defect of parties appears upon the face of the complaint the defendant may demur thereto, and if the defect does not appear upon the face of the complaint, the objection may be taken by answer; a failure to take such objection by demurrer or answer is a waiver of the defect; but even though objection be so waived, the court on its own motion may direct parties to be brought in if a complete determination of the controversy cannot be had without their presence; an objection to defect of parties must be made by demurrer or answer and cannot be made by motion: Knickerbocker Trust Co. v. O. C. & S. R. Co., 111 App. Div. 812; 97 N. Y. Supp. 673, appeal dis. 186 N. Y. 527.

h. **Defect of parties.**—The objection to a defect of parties defendant, which appears upon the face of the complaint, may only be taken by demurrer; it is improper for the court upon the trial of issues of law raised by a demurrer to separate defenses contained in the defendant's answer to grant the defendant leave to demur to the complaint on the ground of such defect of parties; the objection that causes of action have been improperly united in the complaint, must, where such objection appears upon the face of the complaint, be taken by demurrer or it will be deemed to have been waived: Ward v. Smith, 95 App. Div. 432; 88 N. Y. Supp. 700.

i. Though the defendants in an action, by their omission to raise the question of a defect of parties by answer or demurer, must be deemed to have waived such defect under §§ 488, 499, the court will not direct final judgment, if, because of its inconclusiveness upon persons interested in the subject of the action who have not been made parties thereto, the parties to the action or any of them will be exposed to risk in respect to the rights of such omitted persons: Jewett v. Schmidt, 45 Misc. 34; 90 N. Y. Supp. 848.

j. It seems that where a necessary party was not made a defendant, notwithstanding the fact that § 499 declares that a failure to raise the question of the defect of the parties defendant, either by answer or demurrer, shall constitute a waiver of the defect, the defendant may raise the question for the

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first time upon trial: Kent v. Aetna Ins. Co., 84 App. Div. 428; 82 N. Y. Supp. 817.

a. **Essential allegation.**—An objection that the complaint in an action brought by an assignee of a husband against his wife and the trustee to recover upon an agreement, does not allege notice to, and a refusal by, the trustee to sue, must be taken by answer or demurrer, and if not so taken will be deemed to be waived: Minor v. Parker, 65 App. Div. 120; 72 N. Y. Supp. 549.

b. **Statute of frauds.**—Where it appears on the face of the complaint that the contract sued upon is void under the statute of frauds, the question need not be raised by demurrer but may be raised by an answer pleading the statute and at the opening of the trial, a motion for judgment on the pleadings should be made: Seamans v. Barentsen, 180 N. Y. 333; 34 Civ. Pro. R. 178, rev'g 78 App. Div. 36; 79 N. Y. Supp. 212.

c. The statute of frauds is a rule of evidence which is not available as a defense to an action unless raised by demurrer or answer; if the complaint does not show upon its face whether the contract in question is oral or written the defense of the statute is properly raised by answer: Daniel v. Rogers, 108 App. Div. 338.

d. **Motion to amend complaint.**—The fact that an objection was not raised by demurrer or by answer, may properly be taken into consideration by the court in determining the proper disposition to make of a motion to amend the complaint: Mooney v. Valentine, 79 App. Div. 41; 79 N. Y. Supp. 690.

e. It seems that an order allowing an amendment of a complaint is unnecessary as the objection that the complaint did not state facts sufficient to constitute a cause of action may be raised by the defendant at any time: Colell v. D., L. & W. R. R. Co., 80 App. Div. 342; 80 N. Y. Supp. 675.

f. **Wrongful dissection.**—In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a demurrer will be sustained to a separate defense alleging that the complaint does not state a cause of action, as such alleged defense is neither a general nor specific denial of the allegations of the complaint, nor a statement of any new matter constituting a defense or counterclaim, nor is it a demurrer authorized to be taken by answer under § 498, because the allegations attacked appear upon the face of the complaint: Jackson v. Salvage, 109 App. Div. 556.

§ 500. Answer; what to contain.

The answer of the defendant must contain:

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language without repetition.

Co. Proc., § 149.

Amended by chap. 416 of 1877, chap. 500 of 1904 and chap. 431 of 1905.

g. A pleading does not meet the requirements of § 500, subd. 2, which requires a clear, precise and unequivocal statement of any new matter constituting a defense or counterclaim, which merely has annexed and referred to in the answer a bill of lading that the goods were consigned to the order of a person but there was no allegation that the consignees had indorsed the bill of lading to another person and that he was entitled to receive the goods: Ullmann v. Southern Railway Co., 47 Misc. 107.

h. Where part of an answer was intended as a separate and affirmative defense, in determining the sufficiency of this affirmative defense, all the allegations of the complaint not controverted in the affirmative defense should be treated as admitted: Eells v. Dumary, 84 App. Div. 105; 82 N. Y. Supp. 531.

i. The fact that denials, contained in an answer, of material allegations of the complaint, are preceded by the words, "for a second further, separate and distinct defense," does not render them inoperative to raise an issue to such allegations, nor does it relieve the plaintiff, in the event of defendant's making default at the trial, from the necessity of proving the allegations so denied: Hopkins v. Meyer, 76 App. Div. 365; 78 N. Y. Supp. 459.

j. A motion to make a pleading more definite and certain is proper only where the precise meaning and application of an allegation of the pleading is indefinite or uncertain: Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181; 84 N. Y. Supp. 669.

k. **Denial.**—A denial in an answer of "knowledge or information sufficient to form a belief" is a substantial and reason

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ably strict compliance with § 500, which provides that an answer may contain a denial of "*any* knowledge or information thereof sufficient to form a belief:" Hidden v. Godfrey, 88 App. Div. 496; 85 N. Y. Supp. 197.

a. A separate and distinct defense cannot be aided by denials in another part of the answer unless incorporated therein by reference to them: Singer v. Abrams, 47 Misc. 360.

b. A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not a good pleading; it should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by motion to have the answer made more specific and certain: Thompson v. Wittkop, 184 N. Y. 117, rev'g 97 App. Div. 642; 90 N. Y. Supp. 1116.

c. An answer denying any knowledge or information sufficient to form a belief as to a material allegation of a complaint raises an issue and cannot be stricken out as sham, and the court cannot say that such a denial is untrue merely because the party making it presumably had sufficient knowledge absolutely to deny the allegation if untrue: Nichols v. Corcoran, 38 Misc. 671; 78 N. Y. Supp. 242.

d. A denial on knowledge or information sufficient to form a belief, although adequate to form an issue in pleading, is not a sufficient denial of a fact stated positively in an affidavit: People ex rel. Wanzor v. Sturgis, 38 Misc. 433; 77 N. Y. Supp. 1008.

e. Where, by omitting to deny either generally or specifically the allegations of a complaint in an action for goods sold and delivered, the answer admits an agreement to manufacture the goods, counterclaim based upon the existence of a warranty and allegations of the answer in regard to the terms of the contract, although inconsistent with the allegations of the complaint, are properly dismissed: Smith v. Coe, 170 N. Y. 162.

f. An answer which denies knowledge or information sufficient to form a belief as to whether a bond and mortgage in suit had been assigned to the plaintiff and which allege payments other than those stated in the complaint, is not a sham: Reese v. Walworth, 61 App. Div. 64; 69 N. Y. Supp. 1115.

g. Issues raised by denials on information and belief in action to collect personal tax in New York city considered: City of New York v. Streeter, 91 App. Div. 206; 86 N. Y. Supp. 665.

h. An answer which denies any knowledge or information sufficient to form a belief as to the allegations of the complaint in regard to the execution and delivery of a certain bond or mortgage and a default in payment, is good and cannot be stricken out as sham: Alexander v. Aronson, 65 App. Div. 174; 72 N. Y. Supp. 640.

i. An answer is indefinite in which the defendant admitted that he entered into a contract which he believed to be the contract referred to in the complaint, and asked leave to have the original contract produced upon the trial: Borsuk v. Blauner, 93 App. Div. 306; 87 N. Y. Supp. 851.

j. An allegation that he "has not sufficient knowledge or information to form a belief" and that "he therefore denies the same," is a slovenly and unscientific allegation for the "denial" permitted by § 500: Johnson v. Andrews, 34 Misc. 89; 68 N. Y. Supp. 764.

k. **Bill of particulars.**—Where no answer has been served, a motion for a bill of particulars upon the ground that it was necessary for his defense must be denied, as under § 500 he may deny any knowledge or information sufficient to form a belief as to the allegations of the complaint: Schulz v. Rubsam, 104 App. Div. 20.

l. Fraud can only be pleaded by alleging specifically the facts constituting it; a bill of particulars will be granted stating the facts constituting such fraud: Douthitt v. Nassau Fire Ins. Co., 115 App. Div. 902.

m. A motion for a bill of particulars on the ground that it is necessary to enable the defendant to prepare his defense is premature, if made before the service of the answer as under § 500 the defendant may interpose an answer denying any knowledge or information sufficient to form a belief as to the material allegations of the complaint: Hicks v. Eggleston, 95 App. Div. 162; 88 N. Y. Supp. 528.

n. **Insufficient denial.**—An answer which simply denies in the precise words of the complaint "that in the month of April plaintiff did not work" constitutes a negative pregnant and must be construed to mean that plaintiff rendered the services at some time other than as alleged, and the trial justice may treat the allegations of the complaint as having been admitted: Levin and Meyer Con. Co. v. Jackson, 46 Misc. 445.

o. A defense which contains neither a specific nor general denial and only certain pretended denials, so qualified as to be ineffective, must be stricken out; a denial of each and every allegation of the complaint, "except as herein admitted, qualified or controverted," cannot be sustained unless the excepted matter is so clearly specified that there can be no doubt as to what was intended to be covered by the general denial: Zimmerman v. Meyrowitz, 34 Misc. 307; 69 N. Y. Supp. 800.

p. Facts alleged in a defense, inconsistent with and contradictory of the allegations of a complaint cannot supply a failure to deny such allegations in due

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form; a denial cannot be a material part of a defense: Pascekwitz v. Richards, 37 Misc. 250; 75 N. Y. Supp. 291.

a. Allegations of the complaint are not put in issue merely by statements inconsistent therewith contained in the answer, and consequently where the plaintiff alleges an unlawful entry of her dwelling and a battery of her person, the defendant's answer, that he entered under authority of a chattel mortgage on the plaintiff's goods and to assist in removing them, and did not assault her, raises no issue and makes the answer frivolous: Zwerling v. Annenberg, 38 Misc. 169.

b. The denial of plaintiff's allegation, that his loss is irreparable and that a judgment for damages would not compensate him, scarcely constitutes a plea of legal adequacy, and such plea could, under no circumstances, constitute a counterclaim or partial defense: Goldberg v. Kirschstein, 36 Misc. 249; 73 N. Y. Supp. 358.

c. **Denials striken out.**—Where a defense set forth in an answer contains new matter and denials of material allegations of the complaint, such denials may be stricken out upon motion, .. the plaintiff is aggrieved thereby, but so long as they remain, a demurrer will not lie to the defense, even though the other matter pleaded therein does not constitute a defense: Uggla v. Brokaw, 77 App. Div. 310; 79 N. Y. Supp. 244.

d. **Denials v. Defense.**—A "denial" and a "defense" are distinct and separate parts of an answer; there can be no denial of the complaint or of any part of it in a "defense:" Burkert v. Bennett, 35 Misc. 318; 71 N. Y. Supp. 144.

e. Denials must be stated before and apart from affirmative allegations of an answer, so that if the denials are frivolous, the plaintiff may move for judgment on them, or if the affirmative allegations are immaterial or frivolous, the plaintiff may move to strike them out or demur to them in case they are insufficient as a defense: Carpenter v. Mergert, 39 Misc. 634; 80 N. Y. Supp. 615.

f. Where an answer consists of two parts, a general denial and matter apparently pleaded as a defense, a demurrer "to the defense set up in the answer" upon the ground that upon its face it is insufficient in law, aims at the new matter and cannot aim at the general denial; however inconsistent with the allegations of the complaint, those of a defense may be, they cannot be accepted in lieu of the formal denial required by the Code of Civil Procedure; a denial must be stated separately and not mingled with a defense: Jaeger v. City of New York, 39 Misc. 543; 80 N. Y. Supp. 356.

g. Denials of each and every allegation of the complaint are not a proper part of a defense in mitigation and reduction of damages in an action for libel: Dinkelspiel v. N. Y. E. Journal Pub. Co., 42 Misc. 74; 85 N. Y. Supp. 570.

h. **Negative pregnant.**—Where the plaintiff in an action serves an amended complaint and the defendant serves an answer "to the complaint," such answer should not be stricken out as frivolous, simply because it fails to state that the answer was interposed to the amended complaint; an answer which denies in *haec verba* all the substantive allegations of a paragraph in the complaint is not improper, where the denial is not framed in such a manner as to form a negative pregnant: Donovan v. Main, 74 App. Div. 44; 77 N. Y. Supp. 229.

i. Where an answer instead of making a general denial denies the complaint in *haec verba* as alleged, it is a negative pregnant and is no denial of the complaint; on such a pleading the defendant's motion for a bill of particulars should be denied. A motion for minute and unnecessary particulars is an imposition on the court, which is not obliged to pick out from among unnecessary requests those to which the plaintiff would have been entitled: Shepard v. Wood, 116 App. Div. 861; 102 N. Y. Supp. 306.

j. **General denial.**—The defenses which are and the defenses which are not available under general denial — considered: Grant v. Pratt et al., 37 App. Div. 490; 84 N. Y. Supp. 983.

k. Separate defenses which might be proved under a general denial should be stricken out: Cooley v. City of New York, 85 App. Div. 107; 82 N. Y. Supp. 1067.

l. Under § 500. which requires that new matter constituting a defense of counterclaim must be pleaded, a party is not entitled under a general denial to introduce in evidence a judgment entered in another action between the same parties. Lytle v. Crawford, 69 App. Div. 273; 32 Civ. Pro. R. 360.

m. It *seems* that where facts set forth in a separate defense could have been proved under the general, that such facts did not constitute a separate defense within § 500, subd. 2, and the remedy of the plaintiff was by motion to strike out such defense: Kraus v. Agnew, 80 App. Div. 1; 80 N. Y. Supp. 518.

n. In an action for commissions by a firm of real estate brokers, the defense that in selling the property the plaintiffs acted without the written authority of defendant, the owner of the property, cannot be availed of under a general denial: Cox v. Hawke, 49 Misc. 106; 96 N. Y. Supp. 433.

o. A general denial cannot be striken out as a sham under § 538, but only a fense " in the terminology of pleading:
fense " in the terminology of pleading:
Schmidt v. McCaffrey, 34 Misc. 693; 70 N. Y. Supp. 1011.

p. In an action to recover final payment claimed to be due upon a building and loan contract, the defendant may

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prove under general denial facts tending to show that final payment is not yet due upon said contract: Adams v. Lawson, 188 N. Y. 460, rev'g 112 App. Div. 886.

a. "**Defense.**"—A "defense" in pleading can only consist of "new matter constituting a defense," that is, new matter which, if all the allegations of the complaint be true, will nevertheless defeat the action: Staten Island M. R. R. Co. v. Hinchcliffe, 34 Misc. 624; 70 N. Y. Supp. 601.

b. A defense in pleading can consist only of "new matter," i. e., matter which cannot be proved under a denial, and if a pleaded defense does not contain such new matter it is "insufficient in law on the face thereof:" George v. City of New York, 42 Misc. 270.

c. A defense can consist only of matter which, if the allegations of the complaint are true, defeats the action; a motion for leave to serve an amended answer setting up as a "defense" matter, evidence of which is admissible under a general denial, should not be granted: Schultz v. Greenwood Cemetery, 46 Misc. 299.

d. A defense pleaded as a separate and distinct defense must be complete in itself and contain all that is necessary to answer the whole cause of action, or that part thereof which it purports to answer. Such defense cannot be aided by resorting to other parts of the answer to which it contains no reference in terms or by necessary implication: Outcault v. Bonheur, 120 App. Div. 168.

e. **Conclusion of law.**—An allegation contained in an answer interposed in an action brought to foreclose a mortgage to the effect "that there never was any valuable or other legal consideration" for the mortgage, is equivalent to an allegation that there was no consideration for the mortgage, and is an allegation of fact and not a conclusion of law: First National Bank of Towanda v. Robinson, 105 App. Div. 193.

f. It is no answer to allege that the transferee of a bank is not a *bona fide* owner and holder of a note, and that the note, after maturity and payment, was delivered by the bank for no value, and that the plaintiff is maintaining the action for the benefit of the original payee, and is not the real party in interest; such allegations are mere conclusions of law, and the answer does not comply with § 500 which requires new matter to be stated in ordinary and concise language: Ludlow v. Woodward, 117 App. Div. 525.

g. **Partial defense.**—Matter pleaded as a complete defense which constitutes only a partial defense is demurrable: Ivy Courts Realty Co. v. Morton, 73 App. Div. 335; 76 N. Y. Supp. 687.

h. **Reiteration.**—The court is not justified in striking out portions of a reply as redundant and irrelevant where it is not claimed that the matter in question is immaterial to the issue, and the only objection thereto is that averments have been reiterated in several instances, and it does not appear that the defendant will be prejudiced in its defense if such matter is allowed to remain: Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349.

i. **Information and belief.**—Answer denying allegations of complaint on information and belief and verified by attorney, held sufficient: American Audit Co. v. Industrial Federation, 84 App. Div. 304; 82 N. Y. Supp. 642.

j. **Bond.**—Denials in answer in action on bond held sufficient: Burr v. Union Surety & Guaranty Co., 86 App. Div. 545; 83 N. Y. Supp. 756.

k. **Specific defense.**—A defense in an action against a director of a corporation to enforce his personal liability for debts of the corporation because of failure to file annual reports, which specifically alleges that the debts were paid by a third party, and if paid by the plaintiff were paid by him as agent therefor, is sufficient in law upon its face — that it might be proved under a general denial in the answer does not prevent it from being pleaded and render it demurrable: Staten Island M. R. R. Co. v. Hinchliffe, 170 N. Y. 473.

l. **Action to reform deed.**—In an action by a grantee in possession of real estate, to have his deed reformed in relation to the description so as to make it conform to the intention of the parties, § 388 is no defense: Brennan v. Thompson, 46 Misc. 317.

m. **Landlord and tenant.**—An alleged violation of a landlord's agreement to keep a liquor license in force for the tenant is no defense in a proceeding to dispossess the tenant for non-payment of rent; nor is the landlord estopped from asserting the tenancy to be in one other than the person in whose name the license was issued: Liebmann's Sons Brewing Co. v. Nicolo, 46 Misc. 268.

n. **Insurance premium.**—Service of notice to pay the premium required by the Insurance Law, chap. 690 of 1892, § 92, is a defense growing out of new matter and as such must be pleaded: Fischer v. Met. Life Ins. Co., 167 N. Y. 178.

o. **Surety.**—Where a surety, for the performance by the owner of premises of a contract to alter them, alleges that he is discharged from liability to the contractor by virtue of variations from the contract, which occurred during its performance, and by a failure to complete the contract within the time fixed by it, he must plead the defenses in order to make them available, as they constitute new matter and relate to things which happened, if at all, after he had become liable as surety: Kunzweiler v. Lehman, 34 Misc. 466; 70 N. Y. Supp. 290.

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a. In an action against a guardian and her sureties upon her bond to recover money alleged to have been lost through improper investments, it is no defense to the sureties that they were induced to sign the bond by the false and fraudulent representation of the guardian as to the investment of the ward's money, made at or prior to the execution of the bond: Rouse v. Whitney, 53 Misc. 56.

b. **Vicious dog.**—It is not an affirmative defense to a complaint against the defendant for knowingly keeping a vicious dog which, when at large, bit the plaintiff, for the defendant to answer that the plaintiff was a trespasser upon the defendant's premises at the time when the plaintiff was bitten; denials of allegations of the complaint being no part of a defense, it cannot be held bad on demurrer for not containing denials: Leonorovitz v. Ott, 40 Misc. 551; 82 N. Y. Supp. 880.

c. **Ultra vires.**—The defense of *ultra vires* is an affirmative defense and is not available unless pleaded: Keating v. American Brewing Co., 62 App. Div. 501; 71 N. Y. Supp. 95.

d. **Promissory note.**—A valid consideration is an essential element of an agreement after maturity, to extend the time of payment of a promissory note, such as will discharge a surety thereon; and in an action upon a note, if such an agreement is relied upon as a defense, the consideration therefore must be pleaded and proved: National Citizen's Bank v. Toplitz, 178 N. Y. 464.

e. In an action upon a demand note, the defense that the note was not presented within a reasonable time after its issue need not be specially pleaded by an indorser: Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, aff'g 105 App. Div. 627; 94 N. Y. Supp. 1141.

f. Defenses in action on promissory note made by defendant to his own order and indorsed and delivered to the president of a bank for value considered: Empire Trust Co. v. Magee, 117 App. Div. 34.

g. A judgment should not be opened where an action was brought upon a promissory note secured by collateral; it is no defense to allege that the holder of the note converted the collateral, if it be not set out as a set-off or counterclaim that the collateral was of value or that the defendants have sustained damage: Wills v. Rowland & Co., 117 App. Div. 122.

h. **Divorce.**—In an action for divorce, allegations of cruel and inhuman treatment on the part of the plaintiff and his failure to support defendant may not be stricken from the answer as irrelevant, and the fact that the answer did not define such allegations as a counterclaim is not fatal: Mason v. Mason, 46 Misc. 361.

i. **Wages.**—In an action upon an assigned claim for wages, the defendant may not plead that the assignment was made to secure a usurious loan: Union C. & I. Co. v. Union S. Y. & M. Co., 46 Misc. 431.

j. **Misjoinder of parties.**—The objection that there is a misjoinder of parties defendant is not a defense which may be raised by answer: Adams v. Slingerland, 87 App. Div. 312; 84 N. Y. Supp. 323.

k. A defendant in an action brought to foreclose a mortgage is not entitled to have the complaint therein dismissed, upon the ground that the owner of the premises is living and has not been made a party, unless he has interposed that objection by plea in abatement: Donovan v. Twist, 105 App. Div. 171.

l. **Independent defense.**—The defense, that an appropriation for street cleaning purposes was exhausted and that payment of claims for extra work would be a violation of the Consolidation Act, must be pleaded if relied on: McNulty v. City of New York, 168 N. Y. 117, aff'g 60 App. Div. 250; 70 N. Y. Supp. 133.

m. **Statute of frauds.**—Where it appears on the face of the complaint that the contract sued upon is void under the statute of frauds, the question need not be raised by demurrer, but may be raised by an answer pleading the statute, and at the opening of the trial a motion for judgment on the pleadings should be made: Seamans v. Barentsen, 180 N. Y. 333, rev'g 78 App. Div. 36; 79 N. Y. Supp. 212.

n. **Libel.**—An answer interposed in a libel action, which alleges, as a separate defense and in mitigation, "that the matters and things stated in the complaint were reported and believed in and about the village of Granville prior to the time of said publication. That as defendant is informed and believes said publication is made in good faith, as a matter of news, without malice," is insufficient, both as a separate defense and in mitigation, because of the defendant's failure to allege that he heard the reports and believed them to be true and published them in that belief: Brown v. McArthur, 106 App. Div. 366.

o. Mere investigation of a detective character, conducted by members of the coroner's office and the municipal police, are not judicial and official proceedings within the meaning of § 1907, and a demurrer to an answer which claims a privilege for the report thereof should be sustained: Nunnally v. Press Pub. Co. 110 App. Div. 10.

When one paragraph of a complaint sets out the whole of an article charging the plaintiff with the commission of several acts, and the following paragraph contains an innuendo referring only to some of the charges set forth in the preceding paragraph, such following paragraph is surplusage when the article set out is libelous on its face, and an alleged defense in par-

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tial justification of the charges not referred to in the innuendo is good and demurrer thereto should be overruled. Id.

a. **Affirmative defense.**—In an action on a policy of life insurance, breach of warranty is an affirmative defense which the defendant must both plead and prove: Carmichael v. John Hancock Ins. Co., 48 Misc. 386.

b. Accord and satisfaction is an affirmative defense, and the plaintiff is entitled to recover unless such defense is established: Mitterwallner v. Supreme Lodge, 109 App. Div. 70.

c. **Irrelevancy.**—A defense complete in itself cannot be stricken out as irrelevant even though it be insufficient: Noval v. Haug, 48 Misc. 198.

d. The sufficiency of a defense set up in an answer should be determined upon a demurrer or upon the trial; it cannot be determined upon a motion to strike out portions of such defense as irrelevant: Rankin v. Bush-Brown, 108 App. Div. 294.

e. The proper way in which to present the question as to the sufficiency of a defense is by demurrer or upon the trial and not by motion to strike out as irrelevant or redundant the allegations constituting the same: Rankin v. Bush, 108 App. Div. 295; 95 N. Y. Supp. 718.

f. **Assignment.**—In an action upon an assigned claim for wages due, the defendant may not defend upon the ground that certain notes, to secure which the assignment was made, were usurious: Thompson v. Interborough R. T. Co., 49 Misc. 102.

g. In an action by the assignee of a draft, the debtor cannot offset a note of the assignor, which, though made and delivered before the assignment, did not mature until after such assignment: Michigan Sav. B. v. Millar, 110 App. Div. 670; 96 N. Y. Supp. 568, aff'd 186 N. Y. 606.

h. Where, in an action to recover the amount of insurance policies, the answer alleges that prior to the assignment of the policies to the plaintiff they had been assigned to the defendants, the defendants are entitled to show that their assignment was made as collateral security for a loan which had not been paid; under such allegation the defendants are not required to prove an absolute assignment, but any assignment to them which will defeat plaintiff's claim: Howe v. Hagan, 110 App. Div. 392; 97 N. Y. Supp. 86.

i. **Wrongful dissection.**—In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a demurrer will be sustained to a separate defense alleging that the plaintiff's wife was brought to the hospital suffering from a tumor and was operated upon by her own request, as such defense does not meet the cause of action set forth in the complaint: Jackson v. Salvage, 109 App. Div. 556.

In an action against the officers of a hospital for the wrongful dissection of the body of plaintiff's wife after her death, a demurrer will be sustained to a separate defense alleging that the complaint does not state a cause of action, as such alleged defense is neither a general nor specific denial of the allegations of the complaint, nor a statement of any new matter constituting a defense or counterclaim, nor is it a demurrer authorized to be taken by answer under § 498, because the allegations attacked appear upon the face of the complaint. Id.

j. **Account stated.**—In an action upon an account stated where the defense was a general denial, the defendant should not be permitted to introduce evidence showing that the plaintiff was indebted to him for matters altogether outside the matter embraced in the account: Uhlhorn v. Hovey, 49 Misc. 638.

k. A judgment for the defendant, in an action upon an account stated, is not a bar to a subsequent action against him for goods sold and delivered, in which the plaintiff seeks to recover for the same goods specified in the account: Mincer v. Green, 47 Misc. 374.

l. Where a defendant merely denies the plaintiff's allegation that a dispute as to a balance due from the defendant to plaintiff arose and the account of each party was then and there stated, whereupon it was agreed that a certain amount was due and owing plaintiff from defendant which he agreed to pay, he is not entitled to a certified copy of the account: Herbert v. Hellbut, 119 App. Div. 426.

m. **Account.**—When the defendant's answer pleads an account without setting forth the items, the plaintiff is entitled to a copy of the account under § 531; the court may in its discretion preclude the defendant giving evidence of the account unless copies are furnished within the time specified: Smith v. Irvin, 116 App. Div. 359.

n. **Specific performance.**—A denial, contained in an answer interposed in an action for specific performance, of an allegation in the complaint to the effect that the plaintiff had no adequate remedy at law is sufficient to enable the defendant to raise the objection that the action could not be maintained: Clements v. Sherwood-Dunn, 108 App. Div. 327; 95 N. Y. Supp. 766, aff'd 187 N. Y. 521.

o. In an action for specific performance, the defense that the plaintiff has an adequate remedy at law must be pleaded to be available: Ursbansky v. Shirmer, 111 App. Div. 50.

p. A vendor's complaint in an action for specific performance of a contract to

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convey lands need not allege that the plaintiff was "able" to convey. It is sufficient that he is ready and willing to perform the agreement on his part, and that he did tender to the defendant a deed of the premises pursuant to the terms of the agreement, etc. Inability of the vendor to perform is a matter of defense: Clexton v. Tunnard, 119 App. Div. 709.

a. **Foreign corporation.**—The complaint of a foreign corporation seeking to recover for goods sold in this state which fails to allege that the plaintiff has complied with § 15 of the General Corporation Law, fails to state a cause of action. The defense need not be taken by demurrer or answer, but is available on a motion for a nonsuit after the evidence is in: Wood & Selick v. Ball, 114 App. Div. 743.

b. **Admissions.**—Matters of fact alleged in an answer are not to be regarded as admitted by the complaint for the purpose of a motion to dismiss such complaint; proof of such allegations must be given: Bannister v. Michigan Mutual Life Ins. Co., 111 App. Div. 765.

c. The failure of the plaintiff to reply to an answer, setting up a former judgment as a defense, is not an admission of the allegation that said judgment was paid, as such a defense is not a counterclaim and requires no reply; it merely sets out new matter in avoidance: Reno v. Thompson, 111 App. Div. 316.

d. When the complaint does not allege performance but merely the making of certain sales upon which the plaintiff would be entitled to commissions, the answer, by admitting the sales, does not admit such performance by the plaintiff as entitles him to recover: Vernon v. Vulcanite Portland Cement Co., 119 App. Div. 39.

e. **Proper form.**—Where but one separate defense was stated, though it was divided into two paragraphs, a demurrer to this defense referring to the defense as a whole and referring to both paragraphs, is proper in form: Bates v. Delaware, L. & W. R. Co., 109 App. Div. 774.

f. **Affirmative judgment.**—In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor: Consolidated Fruit J. Co. v. Wisner, 110 App. Div. 99; 97 N. Y. Supp. 52.

g. **Fraudulent grantee.**—When plaintiff claiming title against fraudulent grantee cannot demur to answer of third person claiming rights as against such fraudulent grantee: Darragh v. Rowe, 109 App. Div. 560.

h. **Final judgment.**—When the court of appeals has overruled a plaintiff's demurrer to a separate affirmative defense to the entire cause of action contained in the answer and has remitted the case to the court below for judgment in accordance therewith and without granting leave to plaintiff to withdraw the demurrer, the defendant is entitled, as a matter of law, to final judgment dismissing the complaint: National Contracting Co. v. Hudson River W. P. Co., 110 App. Div. 133.

i. **Demurrer.**—A demurrer to a counterclaim, upon the ground that it is not of the character specified in § 501 is sufficiently specified; a counterclaim open to the objection of duplicity if properly raised, is not demurrable upon the ground that it does not state a cause of action, if one good cause of action can be spelled out as pleaded: Kneeland v. Pennell, 49 Misc. 94.

j. Facts sonstituting a cause of action on contract in defendant's favor which might form a valid counterclaim in an action upon a promissory note, if pleaded as such, but not related to the cause of action alleged in the complaint, when stated only as a separate defense, following a general denial, are demurrable: Prosser v. Maxon, 52 Misc. 18.

k. **Chattel mortgage.**—In an action for a deficiency upon the foreclosure of a chattel mortgage of saloon fixtures, the defense that defendant assumed the apparent relation of mortgagor and conducted the saloon solely for the benefit of plaintiff, and that it was understood the writing was to have no efficacy as a contract, is not of an equitable nature: Koehler & Co. v. Duggan, 49 Misc. 100.

l. **Breach of contract.**—When, in an action for the breach of a contract, the answer, as a counterclaim, alleges a breach of the contract by the plaintiff's assignor after said contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract, "and fully assented to the carrying out of the same" in that manner, does not state a defense to the counterclaim, and a demurrer thereto should be sustained: Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341; 97 N. Y. Supp. 73.

m. When the plaintiff sues for a breach of a tripartite contract whereby he was to be paid certain sums of money in consideration of a transfer of patent rights, a defendant sued alone can only assert a defect of parties defendant by demurrer or by an allegation in the answer, if the fact of the complaint does not show the defect: Wills v. Pennell, 116 App. Div.. 493.

n. Where, in an action for breach of contract, the pleadings are oral and the answer is a general denial, a refusal to dismiss the complaint for failure to prove plaintiff's capacity to sue is not error:

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Independent T. Y. M. B. Assn., 52 Misc. 538.

a. **Guaranty.**—In an action to recover the reasonable value of an inefficient machine under a guaranty as to its performance based on an alleged acceptance by the defendant, an answer alleging that there was no waiver of the guaranty states a defense: Isbell-Porter Co. v. Heineman, 113 App. Div. 79.

b. In an action on a guaranty to take a loss in case the customers fail to pay, it is a good defense to allege that the plaintiffs had neglected to collect the claims against the debtors and had not exhausted their remedy against them; the complaint was defective as it did not show that the plaintiff had been and will be unable to realize the advances made by them: Nachod v. Hindley, 118 App. Div. 658.

c. **Statute of limitations.**—In an action under § 1937 to charge a joint debtor not personally served in a prior action, the defendant is entitled to plead the statute of limitations as a defense, the period of limitations being ten years, as provided by § 388; the ten years given to run from the date the former judgment was recovered: Hofferberth v. Nash, 117 App. Div. 284.

d. The plaintiff is not required to plead in his complaint facts to take the case out of the statute of limitations either as a part of his cause of action or in anticipation of the setting up of that statute as a defense. Such defense must be set up by answer and cannot be raised by demurrer: Willis v. Wileman, 53 Misc. 465.

e. **Action pending.**—The defense that an action is pending is not a bar to subsequent action, unless judgment is entered thereon prior to the second action: Wilson v. Locke, 116 App. Div. 421.

f. In an action by an architect to recover the balance alleged to be due him for services in drawing plans and specifications for improvements to defendant's buildings, the pendency of an action by defendant against plaintiff to recover a sum paid him on account of such services as an advance payment, on the ground of plaintiff's failure to perform his contract, cannot be pleaded in abatement, as it is not for the same cause of action: Tyler v. Standard Wine Co., 52 Misc. 374.

g. **Alter ego.**—When the plaintiff who was hired by the defendant's brother to work in a livery stable and was endeavoring to start a gas engine, alleges that the brother was the defendant's manager and superintendent, which the defendant admits by answer, it is established so far as the management of the business is concerned that the brother was the *alter ego* of the defendant: Tivnan v. Keahon, 117 App. Div. 50.

h. **Quo warranto.**—The bringing of an action of *quo warranto* against a person who usurps or unlawfully holds a public office is in the discretion of the attorney-general. A decision by a prior incumbent of the office that the action should not be brought is not *res adjudicata* or binding upon his successor; when the attorney-general has served a summons and complaint in an action of *quo warranto*, the questions as to whether the action was barred by the decision of his predecessor and whether service should be set aside should be raised by motion and not by answer or plea in bar: People v. McClellan, 118 App. Div. 177; 103 N. Y. Supp. 146, aff'd 188 N. Y. 618.

i. **Public records.**—An answer in an action for rent, that defendant has no knowledge or information sufficient to form a belief as to an allegation of the complaint that, by a deed recorded the day of its date, the premises were conveyed to plaintiffs by a former owner, defendant's lessor, and denies the same, raises no issue, as defendant cannot plead ignorance of a public record: Schwartz v. Ribaudo, 52 Misc. 102.

j. **False imprisonment.**—In actions for false imprisonment and malicious prosecution a general denial raises the whole issue, and it is not necessary to plead justification in order to show all the circumstances leading to the arrest: East v. Brooklyn Heights R. R. Co., 115 App. Div. 684.

k. **Bankruptcy.**—The recording of an assignment of a mortgage is not constructive notice thereof to the mortgagor; and, where a bankrupt, having no actual notice that the mortgage given by him had been assigned, scheduled the original mortgagee as the creditor, his discharge in bankruptcy is a defense to an action upon the accompanying bond: Mueller v. Goerlitz, 53 Misc. 53.

l. **Corporation.**—When a defendant answers without pleading a misnomer or questioning the correctness of a corporate name, it is estopped thereafter from denying that it was sued by its correct name; when a party is known by different names he may be sued under either without an alias, which rule applies to corporations as well as individuals: McNeal v. Hayes Machine Co., Incorporated, 118 App. Div. 130.

m. **Title to real property.**—When, in an action to determine the title to real property, both the plaintiffs and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt due the grantee, the court is without power to render judgment that the deed was void as champertous and because given while the property was in the adverse possession of another:

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Bradt v. McClenahan, 118 App. Div. 768.

a. Under an agreement to convey lands subject to a mortgage then due, the vendee may refuse title if prior to the contract the mortgagor has brought an action of foreclosure, and filed a *lis pendens*. He may recover the earnest money and expenses of examining the title; the defense that the vendor offered to pay the costs of the foreclosure is not available unless set up in the answer: Wacht v. Hart, 120 App. Div. 189.

b. **Jurisdiction.**—Lack of jurisdiction depending upon a question of fact, such as the non-residence of the plaintiff, must be pleaded as a defense, or else evidence thereof may be excluded: Ubart v. Baltimore & Ohio R. R. Co., 117 App. Div. 831.

c. **Summary proceedings.**—It is no defense to summary proceedings brought to dispossess a tenant for failure to pay a month's rent to allege that the landlord's predecessor in title has leased the premises to the tenant for a year: Frank v. Miller, 116 App. Div. 855.

d. **Codefendant.**—A defendant, without the service of an answer by himself, cannot require a determination of the ultimate rights of himself and codefendant as between themselves, on an answer demanding such determination served on him by such codefendant: Knickerbocker Trust Co. v. O. C. & R. S. R. Co., 188 N. Y. 38.

e. **Goods sold and delivered.**—In an action to recover the value of merchandise sold and delivered to defendant and received and used by it, the defendant cannot defend upon the ground that the plaintiff paid a gratuity to the defendant's purchasing agent in contravention of § 384r of the Penal Code, without any allegation that the defendant has suffered from the wrong either of its agent or the seller: Sirkin v. 14th St. Store, 54 Misc. 135.

f. **Counterclaim.**—A judgment previously obtained by defendants against the plaintiff is not a counterclaim as that term is used in § 636; there is nothing in § 1913 to prevent the owner of such a judgment from asserting his cause of action by way of counterclaim: Brown v. English, 115 App. Div. 884.

g. **Verification.**—Where defendants served an amended answer to the original complaint and later are served with an amended unverified complaint, said defendants may not only serve an unverified answer, but an unverified amended answer: Brooks Brothers v. Tiffany, 117 App. Div. 470.

h. **Discrimination.**—When a plaintiff sues to recover sums paid to a defendant electric lighting company under a contract which unjustly discriminated against the plaintiff by requiring higher rates than those given to other customers, it is no defense to allege that such payments were made under a specific contract, and that prior to the action the plaintiff settled and adjusted all accounts with the defendant and paid the same in full: Armour & Co. v. Edison El. Il. Co., 115 App. Div. 57.

i. **Marriage.**—The circumstances stated in the Domestic Relations Law, § 3, under which a marriage by a person whose husband or wife is living is not absolutely void need not be specifically negatived in pleading capacity to marry, and a reply to the defendant's allegation that the plaintiff was incompetent to enter into a contract of marriage by reason of the fact that another husband was living, is sufficient when it alleges that at the time of her former marriage the other party was married to another woman now living and that no divorce or annulment of that marriage had been obtained: Stein v. Dunne, 119 App. Div. 2.

§ 501. Counterclaim defined.

j. Matter without any allegations as a counterclaim, but stated "by way of offset to plaintiff's claim," is to be considered a counterclaim, as the word "offset" as used there is equivalent to counterclaim, and comes with the definition given in § 502, subd. 2: Cable Flax Mills v. Early, 72 App. Div. 213; 76 N. Y. Supp. 191.

k. A separate and distinct cause of action for damages for breach of contract remains a counterclaim, although pleaded as a set-off: Liebmann's Sons Brewing Co. v. Nicolo, 46 Misc. 268.

l. **Insufficient denial.**—Where an answer contains no general or specific denial, as required by § 501, subd. 1, allegations therein, however inconsistent with those of the complaint, cannot be accepted as a substitute for such a denial: Sopher v. St. Regis Paper Co., 38 Misc. 294; 77 N. Y. Supp. 896.

m. An allegation that "the said defendant on information and belief has no knowledge of the truth of the facts of the allegations contained in the first, etc., allegations in said complaint and therefore denies the same," is not a compliance with § 501, subd. 1, and is bad as a denial; no demurrer can be interposed to a denial however defective, as that remedy is confined to defenses and counterclaims; a "denial" is not a "defense in the nomenclature of pleading; they are separate pleas: Galbraith v. Daily, 37 Misc. 156.

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a. **Counterclaim.**—In an action brought by a sub-contractor against general contractors for balance of work done, the defendants cannot set up as counterclaims damages claimed in actions still pending for negligence of such sub-contractors, but may counterclaim damages which have been recovered against them in similar actions and sums voluntarily paid by them upon proof of their liability and the reasonableness of the amount paid: Dunn v. Uvalde Asphalt Paving Co., 175 N. Y. 214, mod'y 74 App. Div. 631; 77 N. Y. Supp. 1125.

b. A judgment previously obtained by defendants against the plaintiff is not a counterclaim as that term is used in § 636; there is nothing in § 1913 to prevent the owner of such a judgment from asserting his cause of action by way of counterclaim: Brown v. English, 115 App. Div. 884.

c. Where the tenant of a store having a privilege of renewal for three years from May 1, 1906, unless the owner could get more rent from somebody else, sublets the same for five years from May 1, 1904, and the subtenant obtains a three-year lease of the store from the owner at an increased rental, he cannot, in an action for the rent of March and April, 1906, counterclaim for the difference in the rent: Maas v. Kramer, 52 Misc. 151.

d. **Partial defenses.**—Separate defenses setting up new matter and constituting only partial defenses to the entire action, must, unless stated to be partial, be considered upon demurrer as complete defenses and be tested as such; separate defenses setting up new matter are to be treated as separate pleas, and the defendant is not entitled to the benefit of denials contained in another part of the answer unless they are incorporated by reference into the separate defense or defenses: Bernascheff v. Roeth, 34 Misc. 588; 70 N. Y. Supp. 369.

e. Facts constituting a cause of action on contract in defendant's favor which might form a valid counterclaim in an action upon a promissory note, if pleaded as such, but not related to the cause of action alleged in the complaint, when stated only as a separate defense, following a general denial, are demurrable: Prosser v. Maxon, 52 Misc. 18.

f. **Insufficient plea.**—Plea of a recovery for the same cause by third persons claiming to be assignees of the plaintiff, *held* insufficient either as a complete or partial defense or as a counterclaim: Cassidy v. Arnold, 100 App. Div. 412; 91 N. Y. Supp. 570.

g. **County court.**—While the jurisdiction of the county court is limited by § 340 to actions in which the complaint demands judgment for a sum not exceeding two thousand dollars, yet the court has, under § 348, jurisdiction and power to render judgment on a counterclaim for any amount: Howard Iron Works v. Buffalo El. Co., 176 N. Y. 1, rev'g 81 App. Div. 386; 81 N. Y. Supp. 452.

h. **Divorce.**—In an action for divorce, allegations of cruel and inhuman treatment on the part of the plaintiff and his failure to support defendant may not be stricken from the answer as irrelevant, and the fact that the answer did not define such allegations as a counterclaim is not fatal: Mason v. Mason, 46 Misc. 361.

i. **Specific performance.**—In an action by the assignee of a contract of sale of real estate against the vendor in possession to recover deposits paid and expenses incurred in searching title, a counterclaim for specific performance is demurrable as insufficient in law: Forbes v. Reynard, 46 Misc. 154.

j. **Settlement of issues.**—Where there are no issues of fact arising on the complaint and the only issues of fact are those arising on the counterclaim, the defendant may notice such issues for trial at the trial term without having them settled: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

k. **Promissory note.**—In an action on promissory notes given in payment of subscriptions to corporate stock, a counterclaim for damages resulting from a loan to the corporation, induced by fraudulent representations of plaintiff cannot be maintained: Story v. Richardson, 91 App. Div. 381; 86 N. Y. Supp. 843.

l. **Assault and battery.**—In an action for assault and battery committed on the plaintiff by the defendant, the defendant may interpose as a counterclaim an assault on him by the plaintiff during the affray out of which the cause of action arose; the word "transaction" as used in subd. 1, § 501, includes torts: Deagan v. Weeks, 67 App. Div. 410; 73 N. Y. Supp. 641.

m. **Quantum meruit.**—Where the complaint in an action brought in the municipal court is framed upon a *quantum meruit*, while the proof establishes the existence of an express contract, the court may, under § 2943, disregard the variance; § 2938, which provides that the answer may set forth "one or more defenses or counterclaims," must be construed in connection with § 2945 which makes §§ 501-502 applicable to counterclaims interposed in actions commenced in justices' courts; the legislature when making § 2938 applicable to the municipal court and omitting to make § 2945 applicable to such court, to allow any new matter constituting a counterclaim to be set up in an answer interposed, but only new matter constituting a counterclaim as defined in §§ 501-502: Lundine v. Callaghan, 82 App. Div. 621.

n. **Partition.**—In an action of partition brought by a minor after reach-

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ing the age of twenty-one years, against his father's widow, who was his guardian in socage, the widow is not entitled to interpose as a counterclaim for her proportionate share of the rental value of real property located in the state of New Jersey which her husband owned at the time of his death and which the plaintiff occupied without paying rent, as such counterclaim does not arise out of the transaction set forth in the complaint and is not connected with the subject matter of the action in any way: Williams v. Clarke, 82 App. Div. 199; 81 N. Y. Supp. 381.

a. **Rescission of contract.**—A counterclaim in an action in equity brought in the supreme court for a rescission of the contract for the sale of personal property, considered: Kerngood v. Pond, 84 App. Div. 227; 82 N. Y. Supp. 723.

b. **Conversion.**—Where a principal sues his agent for conversion of moneys collected upon sales, the agent may interpose a counterclaim for commissions on such sales as such a counterclaim is within § 501, subd. 1, "connected with the subject of the action:" Benton v. Moore, 42 Misc. 660.

c. In an action of tort for the conversion of money a counterclaim of a margin deposited to secure a purchase of stock ordered but not purchased is "connected with the subject of the action," and is proper under § 501, subd. 1: O'Brien v. Dwyer, 76 App. Div. 516.

d. In an action for the conversion of money, the defendant may interpose a counterclaim for services rendered in the same transaction: Numan v. Wolf, 73 App. Div. 38; 76 N. Y. Supp. 371.

e. In an action for the conversion of rents collected, the defendant cannot set up a counterclaim for the use of other premises let to the plaintiff by the defendant: Frick v. Freudenthal, 45 Misc. 348.

f. **Replevin.**—In an action of replevin against a receiver of an insolvent firm to retake goods alleged to have been obtained by the vendors by fraud, a counterclaim that sheriff did not seize certain goods but did take other goods which never belonged to the vendors is demurrable: Marshall v. Friend, 35 Misc. 101; 71 N. Y. Supp. 221.

g. **Deceit.**—A counterclaim although admissible under § 501 may be demurrable as failing to state facts from which the reasonable inference is deducible that deceit, a form of tort, was practiced on the party setting up the counterclaim: Gause v. Commonwealth Trust Co., 44 Misc. 46; 89 N. Y. Supp. 723.

h. **Goods sold and delivered.**—In an action for goods sold and delivered, where the answer does not deny the allegations of the complaint and admits an agreement to sell and purchase goods of certain specifications without warranty, counterclaims based on the existence of a warranty should be dismissed: Smith v. Coe, 170 N. Y. 162, aff'g 55 App. Div. 585; 67 N. Y. Supp. 350.

i. **Dower.**—In an action for the admeasurement of dower of which plaintiff's husband was seized and which he conveyed by a deed in which she did not join, a counterclaim that plaintiff's husband in his will devised her other real property greater in value than her dower interest in the property in suit is demurrable as such counterclaim was not in any way connected with the subject matter of plaintiff's action and hence did not constitute a counterclaim under § 501: Burnett v. Burnett, 86 App. Div. 386; 83 N. Y. Supp. 760.

j. **Assignment.**—In an action by the assignee of a draft, the debtor cannot offset a note of the assignor, which, though made and delivered before the assignment, did not mature until after such assignment: Michigan Sav. B. v. Millar, 110 App. Div. 670; 96 N. Y. Supp. 568, aff'd 186 N. Y. 606.

k. An assignee of a claim against a bankrupt may plead such claim as a counterclaim in an action brought on a claim assigned by the bankrupt: Stich v. Berman, 49 Misc. 104.

l. **Executor.**—In an action against an executor to compel the payment of a general legacy, he may not plead as a counterclaim that, after he had reduced the assets of the estate to possession, plaintiff's assignor forcibly took and converted a portion thereof: Lehleuter v. Schano, 49 Misc. 99.

m. **Subject of the action.**—The words "subject of the action," as used in this section, denote the plaintiff's principal primary right to enforce which the action is brought: Steinmetz v. Cosmopolitan Range Co., 47 Misc. 611.

n. **Public accountant.**—In an action by a public accountant for services rendered, the defendants may counterclaim for damages suffered by reason of the negligence of the plaintiff in failing to check accounts in violation of the contract of employment: Smith v. London Assur. Corp., 109 App. Div. 882.

o. **Duplicity.**—A demurrer to a counterclaim, upon the ground that it is not of the character specified in § 501, is sufficiently specific; a counterclaim open to the objection of duplicity if properly raised, is not demurrable upon the ground that it does not state a cause of action, if one good cause of action can be spelled out as pleaded: Kneeland v. Pennell, 49 Misc. 94.

p. **Mortgage.**—Where defendants gave a chattel mortgage as further security for a debt covered by a realty mortgage under an agreement that resort should be had first to the realty mortgage, a counterclaim for damages for breach of such agreement cannot be

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interposed in an action to foreclose the realty mortgage: McEchron v. Martine, 111 App. Div. 805.

a. **Judgment on counterclaim.**—In an action for conversion of the security of a debt, if a counterclaim interposed by defendants asks the rescission of a sale of the debt as affirmative relief, and the plaintiff has not replied thereto, the defendant's motion for judgment on the counterclaim should be granted: Flynn v. Smith, 111 App. Div. 870.

b. **General denial.**—In an action upon an account stated where the defense was a general denial, the defendant should not be permitted to introduce evidence showing that the plaintiff was indebted to him for matters altogether outside the matter embraced in the account: Uhlhorn v. Hovey, 49 Misc. 638.

c. **Royalties.**—A counterclaim for royalties already paid by the licensee is not good when the answer does not show that the license was surrendered and the benefits received by the licensee restored to the plaintiff: Outcault v. Bonheur, 120 App. Div. 168.

d. **Matter in avoidance.**—Where, in an action for a tort, the answer alleges that a former recovery was had for the same tort against a joint tort feasor, the failure of the plaintiff to reply to the answer is not an admission of the allegation that such judgment was paid, as such defense is not a counterclaim, and requires no reply; it merely sets out matter in avoidance: Reno v. Thompson, 111 App. Div. 316.

e. **Affirmative judgment.**—In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor: Consolidated Fruit J. Co. v. Wisner, 110 App. Div. 99; 97 N. Y. Supp. 52.

f. **Breach of contract.**—When, in an action for the breach of a contract, the answer, as a counterclaim, alleges a breach of contract by the plaintiff's assignor after the contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract, "and fully assented to the carrying out the same" in that manner, does not state a defense to the counterclaim, and a demurrer thereto should be sustained: Pope Mfg. Co. v. Rubber Goods Co., 110 App. Div. 341; 97 N. Y. Supp. 73.

g. **Carrier.**—When, according to a custom, it is usual for a carrier to advance certain towing charges for which the shipper reimburses him, a shipper who has himself paid such charges cannot, in an action on another transaction, set the same up as a counterclaim against the carrier, for he has only paid his own debt: Neville v. Pennsylvania & West Virginia Co., 113 App. Div. 768.

h. **Guaranty.**—In an action to recover the reasonable value of an inefficient machine under a guaranty as to its performance, based on an alleged acceptance by the defendant, the purchaser cannot counterclaim for extra expense sustained through using the inefficient machine: Isbell-Porter Co. v. Heineman, 113 App. Div. 79.

i. **Mortgage.**—Uuder §§ 502 and 1909 the assignment of a mortgage is subject to every counterclaim which might have been set up against the assignor; one of two defendants may set up a counterclaim against plaintiff's assignor: American Guild v. Damon, 186 N. Y. 360, rev'g 107 App. Div. 140.

j. **Foreign judgment.**—In an action to recover upon a foreign judgment, a motion will be granted to compel the defendant to make her counterclaim more definite and certain by alleging certain facts: Pearce v. Weidemeyer, 52 Misc. 458.

k. **Duress.**—Pleading a threat to pursue a legal remedy is not duress: Lilienthal v. Bechtel Brewing Co., 118 App. Div. 205.

§ 502. Rules respecting the allowance of counterclaims.

See § 1909, post, When transferee of claim may sue.

l. A counterclaim for damages resulting from the plaintiff's failure to properly care for boilers, under his charge as the employee of the defendant, is based on contract: Hagin v. Cayuga Lake Cement Co., 105 App. Div. 269; 93 N. Y. Supp. 428.

m. **Promissory note.**—Where in an action upon a promissory note, the defendant sets up several counterclaims pursuant to § 502, subd. 2, and the plaintiff does not reply to such counterclaims, the defendant may under § 515 take such proper judgment as he is entitled to because of the failure of the plaintiff to reply; there is no distinction, regarding the necessity of a reply, between a counterclaim under § 502 and any other counterclaim: Hunter v. Fiss, 92 App. Div. 164.

n. **Quantum meruit.**—Where the complaint in an action brought in the municipal court is framed upon a *quantum meruit*, while the proof establishes the existence of an express contract, the court may, under § 2943, disregard the variance; § 2938, which provides that the answer may be set forth "one or more defenses or counterclaims," must be construed in connection with

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§ 2945 which makes §§ 501-502 applicable to counterclaims interposed in actions commenced in justices' courts; the legislature when making § 2938 applicable to the municipal court and omitting to make § 2945 applicable to such court, to allow any new matter constituting a counterclaim to be set up in an answer interposed, but only new matter constituting a counterclaim as defined in §§ 501-502: Lundine v. Callaghan, 82 App. Div. 621.

a. **Foreclosure.**—On the foreclosure of a mortgage made by a testator, his representatives may counterclaim for injury done to the lands by the mortgagee by flooding the same with waters from a dam, whereby the value was reduced. Such fact, if true, is available to diminish or defeat the plaintiff's claim and is connected with the subject-matter of the action: Ft. Miller Pulp & Paper Co. v. Bratt, 119 App. Div. 685.

b. **Mortgage.**—Under §§ 502 and 1909 the assignment of a mortgage is subject to every counterclaim which might have been set up against the assignor; one of two defendants may set up a counterclaim against plaintiff's assignor: American Guild v. Damon, 196 N. Y. 360.

c. **Bankrupt.**—An assignee of a claim against a bankrupt may plead such claim as a counterclaim in an action brought on a claim assigned by the bankrupt: Stich v. Berman, 49 Misc. 104.

d. **Services.**—In an action for services rendered under a contract of employment, a statement by plaintiff that all the time he was in defendant's employ he drew moneys "from time to time, as shown by the account," referring to an account produced by defendant, but not shown to be correct, is not an admission of its correctness, and, in the absence of such proof, the account is not available as a counterclaim: Caldwell v. Caldwell Co., 47 Misc. 599.

e. **Stockholder.**—A national banking association cannot offset a debt due from a stockholder against a claim of the stockholder's assignee for liquidation dividends payable upon his assignor's stock: Bridges v. Nat. Bank of Troy, 185 N. Y. 146.

f. **Discretion.**—Where a counterclaim is pleaded, the granting of a motion for leave to discontinue the action upon payment of costs, is a matter of discretion: Fizburg v. Ramsey, 49 Misc. 216.

g. **Cross-action.**—A defendant cannot be compelled to set up a counterclaim which exists in his favor against the plaintiff; he has a right to reserve his own claims for a cross-action and to confine his defense in the action brought against him to such matters as would defeat the claims there set up: Walkup v. Mesick, 110 App. Div. 326.

h. **Draft.**—In an action by the assignee of a draft, the debtor cannot offset a note of the assignor, which, though made and delivered before the assignment, did not mature until after such assignment; such note not yet matured is not a defense or counterclaim "existing" against the transferror at the time of the assignment within the meaning of § 1909: Michigan Sav. B. v. Millar, 110 App. Div. 670; 96 N. Y. Supp. 568, aff'd 186 N. Y. 606.

i. **Conversion.**—In an action for conversion the defendant cannot interpose a counterclaim for storage of furniture: Beale Furn. Co. v. McGrorty, 53 Misc. 645.

j. In an action against an attorney for conversion in refusing to turn over to the executor money which he had been given for certain funds, it is necessary to allege facts other that "he converted the same to his own use," the complaint held to be one for moneys had and received, and the defendant was entitled to set up counterclaims for sums due on other contracts: Lange v. Schule, 117 App. Div. 233.

k. **Bill of particulars.**—In an action to recover moneys expended for the benefit of the real estate of a client, a bill of particulars should be required as to matter alleged as a counterclaim: Washburn v. Graves, 117 App. Div. 343.

§ 503. Judgment, when demand and counterclaim are equal or unequal.

l. The judgment when a counterclaim is interposed should be for the balance after deducting the amount of the counterclaim proved on the trial; the failure of the referee to pass upon a counterclaim constitutes error requiring the reversal of the judgment: Cable Flax Mills v. Early, 72 App. Div. 213; 76 N. Y. Supp. 191.

§ 504. Id.; for affirmative relief.

m. In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor: Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99; 97 N. Y. Supp. 52.

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§ 505. Counterclaim, when defendant is sued in a representative capacity.

a. In an action against an executor to compel the payment of a general legacy, he may not plead as a counterclaim that, after he had reduced the assets of the estate to possession, plaintiff's assignor forcibly took and converted a portion thereof: Lehleuter v. Schano, 49 Misc. 99.

§ 507. Defendant may interpose several defenses or counterclaims; rules relating thereto.

See § 536, post, Mitigating circumstances may be pleaded in an action for a wrong.

b. A defendant has a right to set up several inconsistent defenses, but every defense stands separate and independent: Manhattan Brick Co. v. Clark, 34 Misc. 819; 69 N. Y. Supp. 649.

c. **Partial defense.**—If a defense be not pleaded as a "partial" defense, it is taken to be pleaded as a complete defense: Burkert v. Bennett, 35 Misc. 318; 71 N. Y. Supp. 144.

d. **Denials and defenses.**—In an answer the order should be: 1st, a denial or denials, 2nd, a defense or defenses sometimes referred to as "affirmative defenses" or "affirmative defenses of new matter;" a "denial" can have no place in a defense:" Staten Island M. R. Co. v. Hinchcliffe, 34 Misc. 49; 68 N. Y. Supp. 556.

e. Denials must be stated before and apart from affirmative allegations of an answer to the end that, if the denials are frivolous, the plaintiff may move for judgment on them, or that, if the affirmative allegations are immaterial or irrelevant, the plaintiff may move to strike them out, or demur to them in case they are insufficient as a defense: Carpenter v. Mergert, 39 Misc. 634; 80 N. Y. Supp. 615.

f. Facts alleged in a defense, inconsistent with and contradictory of allegations of the complaint, cannot supply a failure to deny such allegations in due form; a denial cannot be a material part of a defense: Pascekwitz v. Richards, 37 Misc. 250; 75 N. Y. Supp. 291.

g. **Equitable defense.**—"Equitable defense" means a defense which the court of equity would recognize or a defense founded upon some distinct ground of equitable jurisdiction: City of New York v. Holzderber, 44 Misc. 509; 90 N. Y. Supp. 63.

h. **Equitable counterclaim.**—In an action at law based on a contract the defendant may set up in his answer an equitable counterclaim asking a refusal or cancellation of the contract: Madison v. Benedict, 73 App. Div. 112; 76 N. Y. Supp. 402.

i. **Breach of contract and negligence.**—Under § 507 where the counterclaim unites a cause of action for breach of contract and a cause of action based on plaintiff's negligence, the causes of action should be separately stated and numbered: Bernascheff v. Roeth, 34 Misc. 588; 70 N. Y. Supp. 369.

j. **Statute of limitations.**—A defense of the statute of limitations is a separate affirmative defense not to be assisted by other denials of the complaint unless repeated in the defense: Grey Lith. Co. v. Am. W. T. D. Co., 44 Misc. 206; 88 N. Y. Supp. 857.

k. **Foreclosure.**—In an action to foreclose a purchase money mortgage covering premises conveyed by the plaintiff to the defendant, the defendant may counterclaim for breach of covenant against incumbrances: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

l. In an action for a deficiency upon the foreclosure of a chattel mortgage of saloon fixtures, the defense that defendant assumed the apparent relation of mortgagor and conducted the saloon solely for the benefit of plaintiff and that it was understood the writing was to have no efficacy as a contract, is not of an equitable nature: Koehler & Co. v. Duggan, 49 Misc. 100.

m. **Demurrer.**—A demurrer will not lie to a paragraph of a pleading not separately stated and numbered as a cause of action or defense. If the party desiring to interpose the demurrer claims that the facts alleged in the paragraph constitute a separate defense, his remedy is to make a motion to compel the pleader to so designate it: New Jersey Steel & Iron Co. v. Robinson, 60 App. Div. 69; 69 N. Y. Supp. 728.

n. **Defenses separately stated.**—While several defenses may be separately stated each defense must be complete in itself and must contain all that is necessary to answer the cause of action alleged in the complaint or that part of it which defendant purports to answer: Royal Bank of New York v. Goldschmidt, 51 Misc. 622.

o. The requirement of § 507, that defenses containing new matter must be separately stated and numbered, is mandatory, and the court is without power to refuse to require the defendant to comply with the section; the former rule that a demurrer will not lie to a defense of new matter if a de-

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nial of a material part of the complaint is contained therein, does not now obtain: Stern v. Marcuse, 119 App. Div. 478.

a. **Insurance.**—A pendency of action upon a fire insurance policy is not a bar to an equitable action to reform the policy so as to conform to contract of insurance: Nat. Fire Ins. Co. v. Hughes, 189 N. Y. 84, aff'g 105 App. Div. 632.

§ 508. Partial defenses.

See §§ 535, 536, post, Pleading mitigating circumstances in actions for libel and slander and other actions for wrongs.

b. The defendant may under § 508 set out in his answer, as a partial defense and in mitigation of damages, occurrences which took place since the action began and which have a relation to the cause of action alleged; § 508 does not limit the right to interpose such defenses to actions to recover damages for a breach of a promise to marry or for a personal injury or an injury to property, but applies in all cases: Gabay v. Doane, 77 App. Div. 413, 79 N. Y. Supp. 312.

c. **Pleading.**—Where the complaint in an equitable action states several transactions or transfers of property following a general allegation of a conspiracy to defraud and procure the title to the property by means of certain written instruments, all grouped and connected together so as to constitute but one cause of action or omnibus bill, the defendant may plead facts that constitute a defense to any one of the causes of action or a partial defense to the whole complaint, and upon demurrer thereto the only question that can arise is whether the facts so pleaded are sufficient for that purpose: Coyle v. Ward, 167 N. Y. 240.

d. **Partial defense, how pleaded.**—This section requires that a partial defense must be expressly stated to be such: Bernascheff v. Roeth, 34 Misc. 588; 70 N. Y. Supp. 369.

e. Where allegations are pleaded as a defense in bar and not as a partial defense as required by § 508, such defense is demurrable: Freeman v. U. S. Fidelity & Guar. Co., 43 Misc. 364.

f. If a defense be not pleaded as a "partial" defense it is taken to be pleaded as a complete defense: Burkert v. Bennett, 35 Misc. 318; 71 N. Y. Supp. 144.

g. Matter pleaded in an answer, which is upon its face insufficient as a defense to the cause of action alleged and which, at most, is a partial defense, is demurrable unless it is expressly stated to have been pleaded as a partial defense as required by § 508: Butler v. General Accident Assur. Corp., 103 App. Div. 273.

h. Allegations not designated as a partial defense must be tested as though pleaded for the purpose of a complete defense and when it is not a complete defense a demurrer will lie: Loos v. McCormack, 46 Misc. 144; 93 N. Y. Supp. 1088, aff'g 107 App. Div. 8.

i. § 508, which requires a partial defense to be pleaded as such in order to resist a demurrer, is not applicable to an equitable action for discretionary relief, in which the defendant sets up facts which he will ask the court to consider in determining the extent of such relief: Straus v. American Publishers' Assn., 103 App. Div. 277.

j. **Libel.**—In an action for libel, a demurrer lies to matter alleged to mitigate or reduce damages under § 508 of the Code; if any fact thus alleged is competent the demurrer to the whole defense is not well taken as there cannot be a demurrer to a part of a separate defense: Morse v. Press Publishing Co., 63 App. Div. 61; 32 Civ. Pro. R. 152; 71 N. Y. Supp. 348.

k. **Slander.**—In an action of slander allegations by way of justification or by way of mitigation should be pleaded separately: Doyle v. Fritz, 86 App. Div. 515; 83 N. Y. Supp. 762.

l. **Reply.**—A reply which alleges the modification of the contract on which a counterclaim is founded is not a denial thereof, but, at most, a partial defense, and if pleaded as a complete defense, a demurrer thereto will be sustained: Pope Mfg. Co. v. Rubber Goods Co., 110 App. Div. 341; 97 N. Y. Supp. 73.

m. **Surplusage.**—When one paragraph of a complaint sets out the whole of the article charging the plaintiff with the commission of several acts, and the following paragraph contains an innuendo referring only to some of the charges set forth in the preceding paragraph, such following paragraph is surplusage when the article set out is libelous on its face, and an alleged defense in partial justification of the charges not referred to in the innuendo is good and demurrer thereto should be overruled: Nunnally v. Press Pub. Co., 110 App. Div. 10.

n. **Demurrer.**—A partial defense must be pleaded as such, as provided by § 508, and on demurrer thereto the question is whether it is sufficient for that purpose: Murphy v. Eidlitz, 113 App. Div. 659.

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§ 509. When defendant to demand affirmative judgment.

See § 495, ante, Demurrer to counterclaim, when defendant demands an affirmative judgment.

See § 504, ante, Judgment for affirmative relief, when counterclaim is established.

a. **Accounting.**—In an action for an accounting the defendant is entitled to an affirmative judgment, though his answer makes no demand therefor: Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99; 97 N. Y. Supp. 52.

§ 511. When pleadings admit part of plaintiff's claim to be just, action may be severed, etc.

b. Where an action is brought upon two causes of action, one of which is admitted by the answer, the plaintiff cannot sever the causes of action and enter judgment for the amount of the admitted cause of action with costs, as costs are not to be allowed unless he elects not to continue the action as to the remaining causes of action: Walsh v. Empire Brick & Supply Co., 90 App. Div. 498.

§ 512. Judgment, where counterclaim only is interposed for less than plaintiff's claim.

See rule 26 (Sup. Ct.), Application for judgment on defendant's failure to answer.

See §§ 1212, 1213, post, Judgment taken on default without application to the court.

See §§ 1214-1219, post, When judgment by default must be taken by application to the court.

§ 514. Reply; what to contain.

Where the answer contains a counterclaim, the plaintiff, if he does not demur, may reply to the counterclaim. The reply must contain a general or specific denial of each material allegation of the counterclaim controverted by the plaintiff, or of any knowledge or information thereof sufficient to form a belief; and it may set forth in ordinary and concise language, without repetition, new matter not inconsistent with the complaint, constituting a defense to the counterclaim.

Co. Proc., § 153.

Amended by chap. 416 of 1877, chap. 500 of 1904 and chap. 431 of 1905.

c. The plaintiff in his reply in addition to denials relating to the counterclaim, can insert "in ordinary and concise language" new matter constituting a defense to the counterclaim if not inconsistent with the complaint: Dumar v. Witherbee et al., 88 App. Div. 181; 84 N. Y. Supp. 669.

d. **Counterclaim.**—A counterclaim is unauthorized by § 514, and the remedy for the plaintiff on receipt of the answer setting up the counterclaim is to move for leave to amend the complaint: Fett v. Greenstein, 46 Misc. 574.

e. The fact that a counterclaim set up in a reply does not state facts sufficient to constitute a cause of action may not be pleaded as a defense: Schlesinger v. Thalmessinger, 46 Misc. 403.

f. **Insurance policy.**—In an action to recover damages upon an alleged policy of fire insurance the defendant set up as a defense an award of damages, to which the plaintiff replied denying the making of the award and that if it was made it was obtained by fraud, as the defendant did not return the reply or raise any question upon the trial as to its contents, the plaintiff, although the reply was unnecessary, has a right to establish the facts alleged therein: Sullivan v. Traders' Insurance Co., 169 N. Y. 213 at 219.

g. **Partial defense.**—A reply which alleges the modification of the contract on which a counterclaim is founded is not a denial thereof, but, at most, a partial defense, and if pleaded as a complete defense, a demurrer thereto will be sustained: Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341; 97 N. Y. Supp. 73.

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Breach of contract.—When, in an action for the breach of a contract, the answer, as a counterclaim, alleges a breach of the contract by the plaintiff's assignor after said contract was modified in particulars set forth, a reply which alleges that the defendant "has at all times had knowledge of the manner" in which the plaintiff's assignor carried out the provisions of the contract "and fully assented to the carrying out of the same" in that manner, does not state a defense to the counterclaim, and a demurrer thereto should be sustained. Id.

a. **Tort.**—Where, in an action for a tort, the answer alleges that a former recovery was had for the same tort against a joint tort feasor, the failure of the plaintiff to reply to the answer is not an admission of the allegation that such judgment was paid, as such defense is not a counterclaim and required no reply; it merely sets out matter in avoidance: Rice v. Thompson, 111 App. Div. 316.

b. **General release.**—In an action to recover the amount paid for two steamship tickets which were invalid and worthless where the defendant sets up a general release the plaintiff may show that he did not know the contents of the instrument and signed it in consequence of a misrepresentation as to its import: Creshkoff v. Schwartz, 53 Misc. 579.

c. **Marriage.**— The circumstances stated in the Domestic Relations Law, § 3, under which a marriage by a person whose husband or wife is living is not absolutely void need not be specifically negatived in pleading capacity to marry, and a reply to the defendant's allegation that the plaintiff was incompetent to enter into a contract of marriage by reason of the fact that another husband was living, is sufficient when it alleges that at the time of her former marriage the other party was married to another woman now living, and that no divorce or annulment of that marriage had been obtained: Stein v. Dunne, 119 App. Div. 2.

§ 515. Judgment upon failure to reply.

d. **Promissory note.**—Where in an action upon a promissory note, the defendant set up several counterclaims pursuant to § 502, subd. 2, and the plaintiff does not reply to such counterclaims, the defendant may under § 515 take such proper judgment as he is entitled to because of the failure of the plaintiff to reply; there is no distinction, regarding the necessity of a reply, between a counterclaim under § 502 and any other counterclaim: Hunter v. Fiss, 92 App. Div. 164.

e. **Conversion.**—In an action for the conversion of the security of a debt, if a counterclaim interposed by the defendant asks the rescission of a sale of the debt as affirmative relief, and the plaintiff has not replied thereto, the defendant's motion for judgment on the counterclaim should be granted: Flynn v. Smith, 111 App. Div. 870.

§ 516. Cases where the court may require a reply.

f. The defendant alone has the authority to apply to the court to compel a reply to the new matter constituting a defense by way of avoidance: McRoy Clay Works v. Naughton, 84 App. Div. 477; 82 N. Y. Supp. 979.

g. **Discretionary.**—It is discretionary with the court to grant an order that a reply be made to an amended answer after a cause has been set down for trial: Hallenborg v. Greene, 87 App. Div. 259; 84 N. Y. Supp. 319.

h. The right to require the plaintiff in an action to reply to new matter set out in the answer, is, under the provisions of § 516 within the discretion of the court, and will not be exercised where the only purpose subserved thereby is to avoid the necessity of taking testimony by commission: Toplitz v. Garrigues, 71 App. Div. 37.

i. **General denial.**—Where the allegations of the answer are simply specific denials of the allegations of the complaint, supplementing a general denial incorporated in the answer, such denials do not consist of new matter and the defendant is not entitled to require the plaintiff to serve a reply: Burr v. Union Surety and Guaranty Co., 86 App. Div. 545; 83 N. Y. Supp. 756.

j. A reply will not be required to so called "defenses," the subject matter of which may properly be proved under a general denial: Johnson v. Andrews, 34 Misc. 89; 68 N. Y. Supp. 764.

k. **Tort.**—Where, in an action for a tort, the answer alleges that a former recovery was had for the same tort against a joint tort feasor, the failure of the plaintiff to reply to the answer is not an admission of the allegation that such judgment was paid, as such defense is not a counterclaim and requires no reply; it merely sets out matter in avoidance: Rice v. Thompson, 111 App. Div. 316.

l. **Goods sold and delivered.**—§ 516 authorizes the court, in its discretion, to compel a reply to new matter by way of avoidance contained in an answer. When, in an action for goods sold and delivered to a woman, the defendant answers that the plaintiff had accepted

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part payment by her husband and his confession of judgment for the balance of the value of the same goods prior to the action, the plaintiff should be ordered to reply to the new matter: Seaton v. Garrison, 116 App. Div. 301.

§ 517. Plaintiff may set forth several avoidances in reply.

See § 500, ante, Answer, what to contain.

§ 518. Application and effect of this chapter.

See rule 19 (Sup. Ct.), Pleadings must be folioed.

See rule 19 (Sup. Ct.), The admitted and controverted parts of the pleadings for the use of the court must be marked.

See § 727, post, A pleading shall not be altered without direction of the court.

See § 981, post, Pleadings must be furnished the court on trial.

See §§ 1720-1725, post, Pleadings in an action of replevin.

See § 1775, post, Complaint in action by or against a corporation.

§ 519. Pleadings to be liberally construed.

a. Pleadings are to be liberally construed, and that will be deemed to be alleged which by fair intendment can be implied: Howe v. Hagan, 110 App. Div. 393.

b. **Penalty.**—A person seeking to maintain an action for a statutory penalty must state every fact required to enable the court to judge whether he has a cause of action under the statute; in such an action the pleadings are strictly construed: Ithaca Fire Dept. v. Rice, 108 App. Div. 100; 95 N. Y. Supp. 464.

c. An allegation that the defendant knew his horse to be nervous, high-spirited and unaccustomed to cars may be treated, not as ground of recovery, but as stating a circumstance tending to show the negligence of the defendant: West v. Woodruff, 112 App. Div. 133.

d. **Demurrer.**—Under the rule that a pleading should be liberally construed in favor of the plaintiff, a demurrer not only admits the direct allegations of a complaint, but also whatever may be fairly inferred therefrom: Wright v. Glen Telephone Co., 48 Misc. 192; 95 N. Y. Supp. 101, aff'g 112 App. Div. 745.

e. A complaint will be sustained if a cause of action can reasonably be deduced from the allegations which it contains: Albany Belt & S. Co. v. Grell, 67 App. Div. 81; 73 N. Y. Supp. 580.

f. A pleading will be deemed to allege what can be implied by fair and reasonable intendment: Acker, Merrall and Condit v. Richards, 63 App. Div. 305; 71 N. Y. Supp. 929.

g. **Non-compliance.**—Answer pleading that plaintiff had failed to request or demand of engineers as to the value and amount of extra work in accordance with the terms of a contract. *Held*, to plead plaintiff's non-compliance with an essential condition precedent and a demurrer to such a defense upon the ground that it is "insufficient in law upon the face thereof" is not well taken: Nat. Contracting Co. v. Hudson R. W. P. Co., 170 N. Y. 439, rev'g 67 App. Div. 620; 73 N. Y. Supp. 1142.

h. **Contract.**—Answer in action on contract, considered: Plass v. Weil, 39 Misc. 777; 81 N. Y. Supp. 299.

i. **Money borrowed.**—Demurrer in action for money borrowed: Fiss v. Van Schaick, 63 App. Div. 300; 71 N. Y. Supp. 588.

j. **Negligence.**—An answer in action for negligence containing affirmative statement of facts showing contributory negligence, discussed: Donovan v. Main, 74 App. Div. 44; 77 N. Y. Supp. 229.

k. **General denial.**—Although an answer be frivolous, yet if it contain a general denial an issue is raised and the defendant is entitled to trial of such issues: Maccarone v. Hayes, 85 App. Div. 41; 82 N. Y. Supp. 1005.

§ 520. Pleadings to be subscribed; within what time to be served.

See § 781, post, Extension of time in which to serve a pleading.

See § 783, post, Relief after the time for service of a pleading has expired.

See §§ 796-801, post, As to the service of pleadings.

l. **Sunday.**—The service of a summons and complaint on Sunday is absolutely void: Scott Shoe Mach. Co. v. Dancel, 63 App. Div. 172; 71 N. Y. Supp. 263.

m. **Admission of service.**—Where the complaint in an action is served upon the defendant's attorney on January 15, 1904, and such attorney gives admission of service dated January 12, 1904, the defendant has twenty days from the date of actual service of the complaint within which to serve his answer and not simply twenty days from the date of the admission: Tolhurst v. Howard, 94 App. Div. 439; 88 N. Y. Supp. 235.

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a. **Counterclaim.**—Judgment for defendant for failure of plaintiff to reply to counterclaim: City of Ironwood v. Wickes, 93 App. Div. 164; 87 N. Y. Supp. 554.

b. A provision extending defendant's time to answer or demur, contained in an order which also requires the plaintiff to file security for costs, founded on papers that do not comply with Rule 24 of the General Rules of Practice, will be stricken out on motion: Kinley v. Hardware Mfg. Co., 49 Misc. 334.

§ 521. When defendant to serve copy answer on co-defendant.

See § 1204, post, Judgment may determine the ultimate rights of the parties between themselves.

c. **Co-defendants.**—§ 1204 is to be construed with § 521 which provides for service of copies of the answers upon co-defendants: Earle v. Earle, 73 App. Div. 300; 76 N. Y. Supp. 851, aff'g 173 N. Y. 480.

d. **Association.**—Even where the constitution of a mutual benefit association provided that the supreme council shall have the right, in case of adverse claimants of a benefit fund, to pay such fund into court, in proceedings in the nature of an interpleader, and such right is made a condition to the right of persons entitled to participate in such fund, yet such right is not absolute and like the statutory provisions in such cases clearly relates to cases of controversy between claimants for the fund alone, and not to a case in which different parties claim a liability on the part of the association arising out of its wrongful or negligent acts, where its presence as a party is necessary to a proper determination of the controversy: Fanning v. Supreme Council, 61 App. Div. 190; 32 Civ. Pro. R. 82.

e. **Liens.**—This section was designed to prevent a multiplicity of suits, and is applicable to actions for the enforcement of mechanic's liens when a defendant serves an answer upon one of his co-defendants: Hinkle v. Sullivan, 108 App. Div. 316.

f. **Service.**—When an action may determine the rights of defendants as between themselves a defendant asking such a determination must serve his answer on co-defendants to be affected by the determination twenty days before trial; although the cause was ready for trial before the service of such answer, but was adjourned, the service is not too late if made twenty days before the adjourned day fixed for trial: Muller v. City of Philadelphia, 114 App. Div. 139.

§ 522. Allegation not denied; when to be deemed true.

See § 500, ante, What answer to contain.

See § 514, ante, What reply to contain.

g. **Avoidance.**—Where an answer contains new matter but a reply is not required under § 522, such matter is deemed to be controverted by the plaintiff by traverse or avoidance as the case requires: McRoy Clay Works v. Naughton, 84 App. Div. 477; 82 N. Y. Supp. 979.

h. The allegations of an answer setting up a contract are deemed to be traversed or avoided although no reply is served: Nesbit v. Jencks, 81 App. Div. 140; 80 N. Y. Supp. 1085.

i. Each material allegation of the complaint, not controverted by the answer, and each material allegation of new matter in the answer not controverted by the reply, where a reply is required, must, for the purposes of the action, be taken as true. But an allegation of new matter in the answer, to which a reply is not required, or of new matter, in a reply, is deemed to be controverted by the adverse party, by traverse or avoidance as the case requires: Sullivan v. Trader's Insurance Co., 169 N. Y. 213.

j. New matter alleged in an answer not directed to anything alleged in the complaint will, under § 522, be deemed to be denied for all purposes of the action although no reply is served and plaintiff may give any evidence which will avoid the new matter in the answer: Fox v. Powers, 65 App. Div. 112; 72 N. Y. Supp. 573.

k. **Rent.**—In an action for rent a failure of the defendants to deny an allegation in the complaint that the defendants entered and have since been in possession, is vital and it must be deemed admitted as true for all purposes of the action: Forgotson v. Becker, 39 Misc. 816; 81 N. Y. Supp. 319.

l. **Amended answer.**—Where an amended answer contains no denial whatsoever under § 522, each and every allegation of the complaint stands admitted and must be taken as true: Halliday v. Barber, 38 Misc. 116; 77 N. Y. Supp. 98.

m. **Mandamus.**—The denial of the unlawful removal in a return to an alternative writ of mandamus to compel the restitution to office is required in order to permit the setting up of separate defenses: People ex rel. McEnroe v. Wells, 89 App. Div. 89; 85 N. Y. Supp. 438.

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a. **Previous rule.**—A failure to deny a material allegation of the complaint is equivalent to an admission of such allegation and is but a re-enactment of a rule as old as the principles of pleading: Corn v. Levy, 97 App. Div. 48; 89 N. Y. Supp. 658; Mussinan v. Willner Wood Co., 69 App. Div. 448; 74 N. Y. Supp. 1026.

b. **Separate defenses.**—Where allegations in a complaint are not denied but separate defenses against such allegations are interposed, such allegations must, under § 522, be taken as true and the separate defenses are unavailable to the defendants: Driscoll v. Brooklyn Union El. R. R. Co., 95 App. Div. 146.

c. **Bill of particulars.**—Where the defendant's answer denies all the material allegations of the complaint, the fact that the defendant's counsel, when cross-examining the president of the plaintiff, who had verified the complaint and the bill of particulars, asked if the facts stated in the bill of particulars were true, does not entitle the plaintiff to introduce the bill of particulars as evidence against the defendant: Roscoe Lumber Co. v. Standard Silica Co., 62 App. Div. 421; 70 N. Y. Supp. 1130.

d. **Inconsistent facts.**—A material fact alleged in a complaint is not controverted or put in issue by matter alleged in an answer which is merely inconsistent with the facts set forth in the complaint or from which a denial of such facts may be implied or inferred. The specific facts stated must be such as necessarily controvert the allegations in the complaint: Soper v. St. Regis Paper Co., 76 App. Div. 409; 78 N. Y. Supp. 782.

e. **Not sufficient knowledge.**—An allegation "that the defendant has not sufficient knowledge or information to form a belief" as to certain allegations in the complaint "and therefore denies the same" is not a scientific pleading: Johnson v. Andrews, 34 Misc. 89; 68 N. Y. Supp. 764.

f. Matters of fact alleged in an answer are not to be regarded as admitted by the complaint for the purpose of a motion to dismiss such complaint; proof of such allegations must be given: Bannister v. Michigan Mut. Life Ins. Co., 111 App. Div. 765.

g. **Tort.**—Where, in an action for a tort, the answer alleges that a former recovery was had for the same tort against a joint tort feasor, the failure of the plaintiff to reply to the answer is not an admission of the allegation that such judgment was paid, as such defense is not a counterclaim and required no reply; it merely sets out matter in avoidance: Rice v. Thompson, 111 App. Div. 316.

h. **Foreign corporation.**—An answer that a foreign corporation, plaintiff, has not complied with certain provisions of the General Corporation Law, being merely a conclusion, is not admitted by a demurrer: Burrowes Co. v. Rapid Safety Filter Co., 49 Misc. 539; 97 N. Y. Supp. 1048.

i. **Habeas corpus.**—Facts not traversed or denied, alleged in a petition for a writ of *habeas corpus* instituted to procure the relator's discharge from imprisonment under an order adjudging her to be in contempt, even if not admitted, constitute evidence upon the hearing of the writ, and if they show that she was not guilty of contempt, she is entitled to be discharged: Matter of Depue, 185 N. Y. 60.

§ 523. When pleading must be verified; and when verification may be omitted.

See § 513, ante, Dilatory defenses to be verified.

See § 1757, post, It is not necessary that the answer in a divorce action be verified.

See § 1776, post, Answer denying incorporation of a party to be verified.

See § 1938, post, Complaint in an action to charge joint debtors to be verified.

See § 2026, post, Return of writ of habeas corpus to be verified.

See § 2151, post, Petition for discharge of insolvent must be verified.

See §§ 2235, 2244, post, Petition and answer in summary proceedings to be verified.

See § 2350, post, Petition on application to sell land of infants to be verified.

See § 2412, post, Petition to change name of individual or corporation to be verified.

See § 2533, post, Surrogate may require petition or answer to be verified.

See § 3343, subd. 11, A verified pleading or petition is deemed an affidavit.

See § 3367, post, Petition or answer in condemnation proceedings must be verified.

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a. **Attorney.**—A person called upon to verify the complaint in an action in which an attorney, without her consent, had assumed to commence in her behalf, and, who, upon being told by the attorney that he could verify the complaint if she did not refuse to allow him to do so, replies, "I do not refuse anything, you can do as you please, but I will sign no papers except what come to me through Mr. Smith" (her duly authorized attorney), does not thereby authorize the attorney to commence the action in her name and to verify the complaint as her attorney: Timpson v. Mock, 105 App. Div. 299.

b. **False representation.**—Where, in an action for goods obtained by false representation, the facts are set forth in the complaint and are also established by affidavits used on a motion to obtain the arrest of the defendant, such order of arrest will not be vacated, although the verification of the complaint be defective because taken by a notary in New Jersey, whereas the venue was laid in New York; such complaint is good as an unverified complaint, and § 557 allows the facts necessary to an arrest in such action to be shown by affidavit: Voorhees Rubber Mfg. Co. v. McEwen, 111 App. Div. 541.

c. **Inquest.**—Where the plaintiff serves an unverified answer the plaintiff may take an inquest, unless an affidavit of merits is filed and served; but, in view of the rare enforcement of the right and the consequent unfamiliarity of counsel with the procedure upon such application, the defendant will be permitted to file and serve his affidavit of merits forthwith, whereupon the application will be denied without costs to either party: Reglin v. People's Trust Co., 48 Misc. 494.

d. **Amended answer.**—Where defendants served an amended answer to the original complaint and later are served with an amended unverified complaint, said defendants may not only serve an unverified answer, but an unverified amended answer: Brooks Brothers v. Tiffany, 117 App. Div. 470.

§ 524. Form and construction of certain allegations and denials in verified pleading.

e. An answer denying "knowledge or information sufficient to form a belief" as to paragraphs of the complaint and verified by the attorney for a non-resident corporate defendant, *held*, sufficient and that it was not necessary for the attorney to state in the verification the grounds of his belief: Am. Audit Co. v. Industrial Fedn., 84 App. Div. 304; 82 N. Y. Supp. 642.

§ 525. Verification; how and by whom made.

See § 526, post, Form of affidavit of verification.

f. **Agent.**—An agent of a domestic corporation may and an officer thereof need not verify its petition to initiate summary proceedings to dispossess its tenant: Matter of Stuyvesant Real Est. Co., 40 Misc. 205; 81 N. Y. Supp. 642.

g. **Director.**—A director of a domestic corporation is an officer thereof within the terms of § 525 and may verify a pleading of the corporation in an action in which it is a party: Eastham v. York State Telephone Co., 86 App. Div. 562.

h. **Foreign corporation.**—An answer denying "knowledge or information sufficient to form a belief" as to paragraphs of the complaint and verified by the attorney for a non-resident corporate defendant, *held*, sufficient and that it was not necessary for the attorney to state in the verification the grounds of his belief: Am. Audit Co. v. Industrial Fedn., 84 App. Div. 304; 82 N. Y. Supp. 642.

i. The liquidating committee of a corporation, authorized to take all legal proceedings necessary to carry the liquidation into effect, are officers of the corporation within the meaning of § 525, subd. 1, and may defend an action: Wills v. Rowland & Co., 117 App. Div. 122.

j. **Residence.**—A justice of the city court of Elmira has statutory power to enter judgment on a verified complaint after default by the defendant when the complaint is properly verified; a verification by the plaintiff's attorney is not sufficient for the entry of judgment on default when it does not show that the plaintiff was not within the county when the verification was made; a mere allegation that the plaintiff resides in another county is not sufficient: Boyce v. Dumars, 114 App. Div. 284.

k. A verification of a complaint in justice's court in an action upon a promissory note, made by the attorney and agent of the plaintiff, which gives as a reason why the verification is not made by the plaintiff, that he is within another county and not within the county where the action is brought, is sufficient, although it contains no positive statement that the affiant resides in the county where the action is brought or that he has possession of the note: Johnson v. Freeman, 49 Misc. 304.

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§ 526. Form of affidavit of verification.

a. A substantial compliance with § 526 prescribing the form for the verification of pleadings, should be enforced: Morris v. Fowler, 99 App. Div. 245.

b. **Domestic corporations.**—An officer of a domestic corporation is, for the purpose of verifying a pleading interposed by it, to be deemed a party within § 525, subd. 1, and therefore need not state in his affidavit of verification the grounds of his belief as to all matters not stated upon his knowledge: Henry v. Brooklyn Heights R. R. Co., 43 Misc. 589; 89 N. Y. Supp. 525.

§ 528. Remedy for defective verification, or want of verification.

c. This section applies simply to cases where the pleading is defectively verified, and permits the party, after notice, to treat it as a nullity; which means that, if the defect is not cured, application may be made for judgment as by default: Reglin v. People's Trust Co., 48 Misc. 494.

§ 530. Private statute; how pleaded.

d. **New York charter.**—The Greater New York charter is a public statute and need not be pleaded by a civil engineer in order to entitle him to justify thereunder: Edwards v. Law, 63 App. Div. 451; 71 N. Y. Supp. 1097.

§ 531. Account, how pleaded. Bill of particulars.

It is not necessary for a party to set forth, in a pleading, the items of an account therein alleged; but in that case, he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, which, if the pleading is verified, must be verified by his affidavit, to the effect, that he believes it to be true; or, if the facts are within the personal knowledge of the agent or attorney for the party, or the party is not within the county where the attorney resides, or capable of making the affidavit, by the affidavit of the agent or attorney. If he fails so to do, he is precluded from giving evidence of the account. The court, or a judge authorized to make an order in the action, may direct the party to deliver a further account, where the one delivered is defective. Upon application in any case, the court, or a judge authorized to make an order in the action, may, upon notice, direct a bill of the particulars of the claim of either party to be delivered to the adverse party, and in case of default the court shall preclude him from giving evidence of the part or parts of his affirmative allegation of which particulars have not been delivered.

Co. Proc., § 158.

Amended by chap. 500 of 1904.

See § 2942, post, In justice's court, court may require items to be exhibited.

e. The granting of a bill of particulars does not depend upon the actual facts or the knowledge of the opposite party concerning them, but it is dependent upon the facts claimed to exist. The purpose of a bill of particulars is to amplify the pleading and to indicate more particularly the nature of the claim in order that surprise at trial may be avoided: Dwyer v. Slattery, 118 App. Div. 345.

f. It is not the province of a bill of particulars to require the dates of the execution and delivery of an instrument pleaded as a defense: Pigone v. Lauria, 115 App. Div. 286.

g. A bill of particulars is not part of the complaint and cannot change the cause of action therein: Dixon v. Bunnell, 52 Misc. 560.

h. **Accounting.**—Complaint in an action for an accounting by a corporation, which, holding a majority of stock of another corporation, had brought about the insolvency of the latter, considered and a bill of particulars denied: Ingraham v. International Salt Co., 114 App. Div. 791.

i. In an action for an accounting where the answer alleged that accounts were stated between the parties from

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time to time and that one of such accounts showed a balance due by the plaintiff to the defendant, the plaintiff was entitled to a copy of the alleged account stated under § 531: Keyes v. Flint Co., 69 App. Div. 141.

a. **Account.**—Where an account is pleaded and the plaintiff fails to furnish a copy of such account within ten days after a notice, the court may preclude the defendant from giving evidence of the account, but it has no power to preclude him from giving evidence of his cause of action because he failed to serve a bill of particulars until required so to do by the court: Fischer-Hansen v. Stierngranat, 65 App. Div. 162.

b. When the defendant's answer pleads an account without setting forth the items, the plaintiff is entitled to a copy of the account under § 531; the court may in its discretion preclude the defendant giving evidence of the account unless copies are furnished within the time specified: Smith v. Irvin, 116 App. Div. 359.

c. **Account stated.**—Where a defendant merely denies the plaintiff's allegation that a dispute as to a balance due from the defendant to plaintiff arose and the account of each party was then and there stated, whereupon it was agreed that a certain amount was due and owing plaintiff from defendant which he agreed to pay, he is not entitled to a certified copy of the account: Herbert v. Hellbut, 119 App. Div. 426.

d. **Discretionary.**—The granting or withholding of a bill of particulars is within the discretion of the court, and where there has been no abuse of this discretion, the appellate courts will not, as a rule, interfere: Spencer v. Fort Orange Paper Co., 74 App. Div. 74; 77 N. Y. Supp. 251.

e. The granting or withholding of a bill of particulars is within the discretion of the court and, where there has been no abuse of this discretion, the appellate courts will not as a rule interfere; the only proper office of a bill of particulars is to give information of the specific proposition for which the pleader contends in respect to any material and issuable fact in the case, but not to disclose the evidence relied upon to establish any such proposition: Knipe v. Brooklyn Daily Eagle, 101 App. Div. 43; 34 Civ. Pro. R. 44.

f. A bill of particulars cannot change the cause of action stated in the complaint: St. Albans Beef Co. v. Aldridge, 112 App. Div. 803.

g. Whether plaintiff should serve a bill of particulars must be determined from the complaint, not from the defendant's particulars of a counterclaim: Fickingar v. Ives, 109 App. Div. 684.

h. **Answer.**—Where no answer has been served, a motion for a bill of particulars upon the ground that it was necessary for his defense must be denied, as under § 500 he may deny any knowledge or information sufficient to form a belief as to the allegations of the complaint: Schultz v. Rubsam, 104 App. Div. 20.

i. When the plaintiff sets out a contract of specific date made by the defendant through a specific agent, employing the plaintiff to secure contracts with the government for the purchase of torpedo boats at a specific commission, and that he procured the purchase of four boats, the defendant having served an answer denying the contract and having an affidavit of the agent denying the same, is not entitled to a bill of particulars for the purpose of preparing an amended answer: Sands v. Holland Torpedo Boat Co., 115 App. Div. 151.

j. **Receipt.**—A copy of a receipt is not an account or bill of particulars and the defendant, under § 531, is entitled to a further account or bill of particulars: Beirne v. Sanderson, 83 App. Div. 62.

k. **Defense.**—The plaintiff may demand a bill of particulars of an affirmative defense: Spitz v. Heinze, 77 App. Div. 317.

l. **Special damage.**—A bill of particulars will be ordered where the defendant sets up special damages alleging that the failure of the plaintiff to deliver machinery prevented him from making contracts with "various persons:" Mussinan v. Willner Wood Co., 69 App. Div. 448; 74 N. Y. Supp. 1026.

m. **Code of Procedure.**—§ 158 of the former Code of Procedure in relation to a bill of particulars and §§ 390 and 391 of said Code of Procedure in regard to the examination of a party to a pending action upon or before its trial were incorporated and continued in §§ 531, 870, 872 and 873 of the Code of Civil Procedure: Grout v. Williams, 105 App. Div. 98; 34 Civ. Pro. R. 231.

n. **Landlord and tenant.**—A bill of particulars as to the defendant's cancelling leases because of plaintiff's delay in putting elevators in demised premises and of others refusing to rent them for that purpose: Baltimore Machine Co. v. McKelvey, 71 App. Div. 340; 75 N. Y. Supp. 1090.

o. In an action by a landlord against tenants to recover damages to the freehold and the value of articles wrongfully removed from the premises by the defendants, and advertised for sale by them, of which sale a catalogue was issued, a copy of which plaintiff has in his possession, the plaintiff should be required to give a bill of particulars stating which articles are claimed to have been wrongfully removed, together with the claimed value of each, as well as a statement of the character and nature of the damages to the building itself: Chisolm v. Straus, 110 App. Div. 552.

p. **Policy.**—It may also require an insurance company to serve a bill of particulars specifying in what respect the policy was a wager policy and who were interested in the wager or speculation:

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Taylor v. Security Mutual Life Ins. Co., 73 App. Div. 319; 76 N. Y. Supp. 671.

a. **Tort.**—Where the complaint in an action sets up a cause of action in tort, the defendant is not entitled under § 531 to serve a written demand for a bill of particulars on the plaintiffs' attorney, but under that section he may apply to the court for an order directing the plaintiffs to deliver to him a bill of particulars; if the defendant's attorney serve upon the plaintiffs' attorney a demand for a bill of particulars, the plaintiffs' attorney should make a motion to strike out the demand in order that it may be determined whether the action was one in which a demand for a bill of particulars was proper: Main v. Pender, 88 App. Div. 237; 85 N. Y. Supp. 428.

b. **Ejectment.**—Where a landlord brings an action in ejectment against a tenant, claiming that the tenant has violated various conditions of the lease and is not entitled to any renewal thereof or to continue in the occupation of the demised premises, and that the lease in fact has not been renewed, the tenant is entitled to a bill of particulars specifying the conditions and covenants of the lease claimed to have been violated, and how and when they were violated and what action the landlord took which deprived the tenant of his right to renew the lease and when such action was taken; the tenant is not, however, entitled to a bill of particulars concerning the allegation that the lease has not been renewed, as he has as much knowledge upon the subject as the landlord: Slingerland v. Corwin, 105 App. Div. 310; 93 N. Y. Supp. 953.

c. **Assessments.**—An action to recover the amount of certain assessments, made by a casualty association against a member, is not an action upon an account, and a demand for a bill of particulars is a nullity and may properly be disregarded: Stone v. Hudson Valley R. Co., 47 Misc. 5.

d. **Injuries.**—Where the complaint in an action to recover damages for personal injuries alleges that "the plaintiff was injured and bruised in his person and rendered sick, sore and lame," and contains no allegation of any permanent injury, the defendant is not entitled to a bill of particulars of "the nature, location and probable duration of each and every injury alleged in the complaint, except as specifically stated therein, showing particularly how plaintiff was injured and bruised, and rendered sick, sore and lame:" English v. Westchester Electric R. Co., 69 App. Div. 576; 75 N. Y. Supp. 45.

e. **Negligence action.**—If the purpose of the party is to obtain a more particular statement of his opponent's claim, for the purpose of narrowing the issues at the trial or to prevent surprise, his remedy is by an application for a bill of particulars: Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181; 84 N. Y. Supp. 669.

f. A bill of particulars will be ordered where the complaint in a negligence action merely sets out general allegations of negligence: Causullo v. Lenox Construction Co., 106 App. Div. 575.

g. When the negligence charged against the defendant is that the locomotive which exploded and killed plaintiff's intestate was "in a weak, dangerous, defective and unsafe condition, and unfit because of such weakness; because of its brakes, levers, throttle, valves and other parts being out of repair," etc., a plaintiff who has been allowed with her expert an inspection of the locomotive by the defendant should be required to give a bill of particulars stating in what respect the locomotive was defective: Heslin v. Lake Champlain & Moriah R. R. Co., 109 App. Div. 814.

h. **Libel.**—In an action for libel, in which both general and special damages are sought to be recovered, the court may require the plaintiff to serve a bill of particulars of the special damages, but not of the general damages: Bell v. Heatherton, 66 App. Div. 603; 73 N. Y. Supp. 242.

i. In an action for libel the court will not order a bill of particulars where it appears that the sole reason for making the motion is to narrow the issues of the action: Kuster v. New York Times Co., 79 App. Div. 39; 79 N. Y. Supp. 978.

j. Where an article is libelous *per se*, the defendant is not entitled to a bill of particulars of the general damage: Town Topics Publishing Co. v. Collier, 114 App. Div. 191.

k. **Insufficient bill.**—Where a bill of particulars is insufficient, it is proper to return the bill already furnished if defective, and demand that the previous order be complied with and a proper bill furnished or to demand a further bill of particulars: Faller v. Ranger, 44 Misc. 424; 34 Civ. Pro. R. 23; 99 N. Y. Supp. 374.

l. **Corporation.**—An attorney for a corporation may make an affidavit as to the necessity for a bill of particulars where he gives a sufficient reason why an officer of the corporation did not make it: Field v. N. Y. C. & H. R. R. Co., 35 Misc. 111; 71 N. Y. Supp. 220.

m. **Affidavit.**—The rule of practice, that a motion to procure a bill of particulars must be upon the affidavit of the party and not upon that of his attorney, is not absolute: Kirkland v. Kirkland, 39 Misc. 423; 80 N. Y. Supp. 21.

n. The affidavit of the president of a railroad used in a motion for a bill of particulars which admitted that the services were rendered "for the defendant" is competent evidence against it: Bogart v. New York & Long Island R. R. Co., 118 App. Div. 791.

o. **Motion.**—A motion for a bill of particulars which is really an attempt

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to have the complaint made more definite and certain, or to compel the disclosure of the defendant's evidence, should be denied: Ingraham v. International Salt Co., 114 App. Div. 791.

a. The denial of a motion for a bill of particulars is a bar to a second motion for the same relief but the court has power to allow an application for such relief once denied to be reviewed, but it must be based upon some substantial reason: Floersheim v. Musical Courier Co., 103 App. Div. 388.

b. A motion for a bill of particulars in an action by an electric light and power company against the contractors to recover the costs of changing its wires, etc., and underground service made necessary by reason of the construction of the subway, the plaintiff will be required to state the dates on which the interferences occurred, but not the names of defendants' agents: New York Edison Co. v. McDonald, 54 Misc. 63.

c. Motions to make a complaint more definite and certain or for a bill of particulars in the alternative cannot be united, because the first may only be made before and the latter ordinarily after answer unless necessary to enable the defendant to plead: Mut. Life Ins. Co. v. Grannis, 118 App. Div. 830.

d. A motion by a defendant for a bill of particulars before answer will be denied, even though it be necessary for his defense: Standard Materials Co. v. Bowne & Son Co., 118 App. Div. 91.

e. When a bill of particulars of a counterclaim for moneys advanced for the plaintiff states that the defendant expended on plaintiff's account ten dollars per week for 141 weeks between certain specified dates for theatre tickets, meals, etc., and also two dollars per week for trips and excursions during four months of each year for five years, and is unable to furnish a more detailed statement because no such statement was kept, a motion for further particulars should be denied: Kindberg v. Chapman, No. 1, 115 App. Div. 153.

f. **Claim.**—The word "claim," as used in the last clause of § 531 is that ground of fact which he alleges in his answer as the reason why judgment should not go against him: Swan v. Swan, 44 Misc. 163.

g. **Proper remedy.**—A defendant may not demur to a complaint in an action for services performed because it is vague and indefinite; the defendant should either demand a bill of particulars or move to make the complaint more definite and certain: Fleck v. Friedman, 49 Misc. 220.

h. It is improper in an action of negligence for the defendant to move under § 546 that the complaint be made more definite and certain in respect to certain allegations of the defendant's negligence; the proper remedy is for a bill of particulars: Mullen v. Hall, 51 Misc. 59.

i. **Trust company.**—When a plaintiff, a trust company, having a large number of officers and employees, brings an action upon an underwriting agreement and notes collateral thereto, of which it is assignee, and the defendant alleges that the underwriting agreement and notes were executed under such a proviso that they were not to be operative or effective, except under certain conditions, of which conditions plaintiff had knowledge and notice, the plaintiff is entitled to a bill of particulars stating whether the agreement was oral or in writing, the names of the officers, agents or employees of the plaintiff to whom notice of such agreement was given, the time and place of such notice and the names of persons in plaintiff's employ who gave notice to the plaintiff: Knickerbocker Trust Co. v. Packard, 109 App. Div. 421.

j. **Judgment creditor.**—When, in an action by a judgment creditor to set aside a conveyance by the judgment debtor as fraudulent, the defendant answers that the conveyance which reserved a life interest to the judgment creditor was made in consideration for services rendered by the grantee, and it appears that the judgment creditor has never attempted to collect his judgment from the reserved life interest, the defendant should not be required to file a bill of particulars of the services rendered by the grantee when no special reason is shown therefor by the judgment creditor: Allter v. Jerome, 110 App. Div. 813.

k. **Services.**—A plaintiff suing to recover services in effecting a sale of business will be required to state whether the agreement was in writing and the particulars concerning the agreement and also to specify what services were rendered that were of the value claimed: Rhodes v. Adams, 113 App. Div. 304; 99 N. Y. Supp. 913.

l. Where, in an action to recover a balance due for services as an architect, the bill of particulars contained but a single item for plans, specifications, applications and permits for the defendant's premises, it is manifest that plaintiff elected to make the drawing of the plans an entire contract: Dunne v. Robinson, 53 Misc. 548.

m. In an action by an attorney against his client to recover the value of legal services a bill of particulars should not be granted giving the valuation of each detail in each proceeding, though the attorney should specify the lump sum charged for each suit or proceeding and other services rendered so as to indicate the method of computing the bill: Aub v. Hoffman, 120 App. Div. 50.

n. **Moving papers.**—In an action by a passenger to recover for non-delivery of

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his truck, given into the custody of a steamship company in Naples, Italy, a motion for a bill of particulars, based upon affidavits of the defendant's local attorney and its resident agent, neither of whom discloses a knowledge of defendant's course of business abroad, and its ignorance of the matters as to which information was sought, is properly denied for insufficiency of the moving papers: Canonico v. Cunard Steamship Co., 49 Misc. 92.

a. **Money loaned.**—In an action for money loaned, the defendant is entitled to a bill of particulars, but the defendant is not entitled to have the bill specify the manner in which the loan was made: Dunn v. Dunn, 108 App. Div. 308.

b. In an action to recover moneys expended for the benefit of the real estate of a client, a bill of particulars should be required as to matter alleged as a counterclaim: Washburn v. Graves, 117 App. Div. 343.

c. **Specific performance.**—A bill of particulars in an action for specific performance of the contract to sell lands will be granted to show the incumbrances and damages, but not the respects in which defendants are alleged to have refused to comply with the terms of the contract: Gross v. Conner, 114 App. Div. 32.

d. **Default.**—When, pursuant to an order, a plaintiff has served a bill of particulars which was deemed by him to comply with the particulars required and the defendant has neither returned the same nor moved for further particulars on the ground that the particulars furnished were defective the court should not grant an order precluding the plaintiff from giving evidence as to certain allegations of the complaint; § 531 authorizes such an order only when the party ordered to serve particulars is in default: Reader v. Haggin, 114 App. Div. 112; 99 N. Y. Supp. 681.

e. **Conversion.**—In an action for the conversion of stock where the complaint alleges that the plaintiff was the owner and entitled to the immediate possession thereof and that between certain dates the defendants, being then in possession of said stock and the certificates thereof, unlawfully converted and disposed of the same to their own use, she should not be required to give a bill of particulars stating the date she delivered the stock or parted with possession, or the date the stock was taken from her possession without her consent, and specifying whether the stock was delivered by the plaintiff or taken without her consent: Farwell v. Boody, 112 App. Div. 493.

f. In an action for the conversion of specific machines "and other machinery," a bill of particulars of the "other machinery" should not be granted on the affidavit of the defendant's attorney who has no personal knowledge of the matter and whose only excuse for making the affidavit is that no officers of defendant corporation were within the county: St. Regis Paper Co. v. Santa Clara Lumber Co., 112 App. Div. 775.

g. **Carrier.**—In an action against a carrier, the plaintiff should furnish a bill of particulars stating the amount claimed to have been paid on a lost bond required to obtain the reissue of certain shares of stock, and the items going to make up the same claimed to have been the cost of procuring it: McIntosh v. Pullman Co., 53 Misc. 286.

h. **Deposit.**—In an action to recover a deposit made to bind a contract for the sale of real property, the plaintiff will be ordered to furnish a bill of particulars as to certain alleged incumbrances and defects and also as to an alleged payment for examination of title: Markowitz v. Teichman, 52 Misc. 458.

i. **Fraud** can only be pleaded by alleging specifically the facts constituting it; a bill of particulars will be granted stating the facts constituting such fraud: Douthitt v. Nassau Fire Ins. Co., 115 App. Div. 902.

j. **Counterclaim.**—A bill of particulars will not be directed as to matters alleged in a counterclaim to which no reply has been made: Paul v. Nahl, 119 App. Div. 880.

k. **Breach of contract.**—When the plaintiff sets out a contract by defendant to sell and deliver certain goods for a specified period, and that the plaintiff relying on such contract entered into contracts with other persons to sell goods to be manufactured out of the goods to be delivered by the defendant, but that by reason of the defendant's breach the plaintiff was unable to carry out its sales, etc., the defendant under a general denial is entitled to a bill of particulars, setting out the contract with the defendant, and also the names of the persons to whom the plaintiff agreed to sell and deliver goods, and the items of special damage sustained: United States Paper Co. v. De Haven, 115 App. Div. 403.

l. A plaintiff suing to recover damages for the breach of a contract whereby the defendant was to complete the erection of buildings in accordance with certain plans and to convey to the plaintiff, should be required to give a bill of particulars specifying in what respects the buildings were not completed as required by the contract; but particulars of damage alleged generally by plaintiff will not be required: Breslauer Realty Co. v. Cohen, 115 App. Div. 360.

m. When a plaintiff sues on a breach of contract of employment as assistant superintendent of the defendant, and the latter alleges justification because "for a long time * * * he had persisted in a course of conduct antagonistic to the defendant's superintendent and injurious

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to and destructive of discipline among the employees," the plaintiff is entitled to a bill of particulars specifying the nature and items of the "course of conduct" referred to in the answer. A verbal statement of the conduct complained of, previously made by the defendant, does not take the place of a bill of particulars, and is no ground for refusing one: Burhans v. H. R. Wood Pulp M'f'g Co., 116 App Div. 132.

a. **Negative pregnant.**—Where an answer instead of making a general denial denies the complaint in *haec verba* as alleged, it is a negative pregnant, and is no denial of the complaint; on such a pleading the defendant's motion for a bill of particulars should be denied. A motion for minute and unnecessary particulars is an imposition on the court, which is not obliged to pick out from among unnecessary requests those to which the plaintiff would have been entitled: Shepard v. Wood, 116 App. Div. 861; 102 N. Y. Supp. 306.

b. **Examination before trial.**—Even if defendants might have procured the information asked for by a bill of particulars, they had a right to obtain it under an order for plaintiff's examination as a party before trial; where the requirements of §§ 870 and 873 and the General Rules of Practice have been complied with, a motion for an order for the examination of a party before trial must be granted unless made in bad faith: Tirpak v. Hoe, 53 Misc. 532.

c. The granting of a bill of particulars should not be conditioned on a waiver of a right to a physical examination: Baker v. New York City Railway Co., 116 App. Div. 858.

d. **Assault and battery.**—In an action for assault and battery against a street railway, the plaintiff should be required to give a bill of particulars naming the exact place, time of day and also the direction in which the car was going. He should also be required to give the number of the car, the line and the badge number of the motorman and conductor, if he knows them. He should not be required to give an exact statement of the injuries sustained, or the nature of the same when there is no allegation of permanent injuries; if the plaintiff be unable to furnish these particulars, he should state his lack of knowledge or inability as a substitute for the information required: Ferris v. Brooklyn Heights Railroad Co., 116 App. Div. 892.

§ 532. Judgments; how pleaded.

e. When the transcript of a judgment of a municipal court has been docketed in the county clerk's office, it becomes a judgment of the supreme court and the defendants who have recovered a judgment for costs may have an order requiring the plaintiff's assignors who are beneficially interested in the action to pay such costs, but the moving papers must show or state that the judgment was only given as required by § 532: Friedman v. Met. Steamship Co., 109 App. Div. 600.

f. In pleading a judgment or determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made: Bouton v. Wheeler, 118 App. Div. 426.

§ 533. Conditions precedent; how pleaded.

g. Conditions precedent to a plaintiff's right to recover should be pleaded and proved on the trial; that the defendant prevented the happening of the contingency may not be shown as an excuse for its not happening unless pleaded: Turner v. Lane, 47 Misc. 387; 93 N. Y. Supp. 1083.

h. In an action to recover the contract price of a wind-mill, the plaintiff is obliged to allege and prove the substantial completion of the wind-mill according to the terms of the contract: Fisher v. Goodrich, 61 App. Div. 534; 70 N. Y. Supp. 38.

i. **Due performance.**—An allegation of due performance of all the conditions of a contract held to be sufficient where payments were to be made only with the assent of a third person: Fox v. Cowperthwait, 60 App. Div. 528; 69 N. Y. Supp. 912.

j. In alleging the performance of a condition precedent in a contract under § 533 while it is not necessary to state the facts constituting the performance, yet the plaintiff must allege that he has duly performed all the conditions precedent on his part to be performed; a mere allegation of general performance is insufficient: Gansevoort Bank v. Empire State Surety Co., 117 App. Div. 455.

k. Where the plaintiff, in an action to recover damages for breach of a contract alleges full performance, he cannot recover unless he proves that fact; if he relies upon proof that he was excused from full performance, he is bound to allege the facts constituting such excuse and that he was ready and able to perform: Stern v. McKee, 70 App. Div. 142; 75 N. Y. Supp. 157.

l. Where an amended complaint served in an action to recover upon a fire insurance policy does not allege the facts showing performance by the plaintiff of its conditions, the defect is not cured by a general allegation of performance, permitted by the provisions of § 533, relative to pleading conditions precedent, where the word "duly," required by that section,

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is omitted: Guarino v. Fireman's Insurance Co., 44 Misc. 218.

a. Under § 533 a pleader must, in relation to the performance of a condition precedent allege that the party "duly" performed: Clemens v. American Fire Insurance Co., 70 App. Div. 435; 75 N. Y. Supp. 484; 33 Civ. Pro. R. 1.

b. In an action to recover damages for failure to complete a building contract, a defense alleging that plaintiff's predecessors took the performance of the work out of defendant's hands, is a sufficient allegation of performance: Ivy Courts Realty Co. v. Morton, 73 App. Div. 335; 76 N. Y. Supp. 687.

c. Where the plaintiff has pleaded generally the performance by her of conditions precedent she may properly add an allegation of something else which she agreed to do and which she did: Cowen v. Rouss, 40 Misc. 105, aff'd 84 App. Div. 641.

d. **Judgment.**—An allegation of the complaint of the receiver of a judgment debtor that the said judgment was "duly recovered" is sufficient: Breen v. Henry, 34 Misc. 232; 69 N. Y. Supp. 627.

e. **Discharge in bankruptcy.**—A discharge in bankruptcy to be available must be pleaded as a defense and, either the facts showing jurisdiction in the bankruptcy court of the parties and the subject matter must also be pleaded, or there must be some allegation equivalent thereto: an allegation that a judgment was "duly rendered" is sufficient to admit proof of these facts, if the allegation is controverted: Broadway Trust Co. v. Manheim, 34 Civ. Pro. R. 310.

f. **Mechanic's lien.**—A complaint in an action to foreclose a mechanic's lien, which contains no allegation of facts excusing the production of an engineer's certificate required by the contract, may be amended on appeal to cure such defect, where proof was admitted at the trial, without objection, showing notice to the contractor that the owner himself assumed charge of the work and elected to complete it, which dispenses with the production of such a certificate: Smith v. Wetmore, 167 N. Y. 234.

g. In an action to enforce a mechanic's lien for labor and materials, the allegation in the complaint that plaintiff "has duly fulfilled and performed the conditions of the said contract on his part to be performed" is a sufficient compliance with § 553: Vandegrift v. Bertron, 83 App. Div. 548; 82 N. Y. Supp. 153.

h. **Waiver of performance.**—If the defendant relies upon waiver of performance, he must not only allege but prove such waiver: Todd v. Union Casualty and Surety Co., 70 App. Div. 52; 75 N. Y. Supp. 1062.

i. **Non-performance.**—Where the plaintiff, a corporation, sues for services and its allegations of performance of the contract and of indebtedness to it thereunder are denied, it can recover, under its complaint, by proving facts which excuse non-performance: Tribune Ass'n v. Eisner & Mendleson Co., 34 Misc. 658; 70 N. Y. Supp. 706; aff'd 70 App. Div. 112.

§ 534. Instrument for payment of money; how pleaded.

See § 1917, post, Action upon lost negotiable paper.

j. A complaint which alleges the execution by defendant and the delivery to the plaintiff of certain instruments set out in full and described as promissory notes, and of the demand for payment by plaintiff and of non-payment of any part thereof, states sufficient facts to constitute a cause of action within § 481, and a demurrer to the complaint on the ground that the instruments were not promissory notes and that the complaint fails to comply with § 534 will be overruled: Didato v. Coniglio, 50 Misc. 280.

§ 535. Pleadings in libel and slander.

See § 508, ante, Partial defenses in actions for libel and slander.

k. A cause of action in libel, cannot be created by pleading that the article counted upon was published "of and concerning the plaintiff," but § 535 gives this latter phrase the effect of the allegation of all extrinsic facts showing the application of the article to the plaintiff, and where the facts alleged are not at variance with the allegation that the article was published of and concerning the plaintiff, that allegation must, on demurrer to the complaint be given its due effect as one of fact: Lehmann v. Tribune Association, 37 Misc. 506.

l. **Application.**—The provisions of § 535 do not apply where the general averment that the defamatory matter was published of and concerning the plaintiff is contradicted and rendered nugatory by other allegations of the complaint, such as a description of plaintiff's name, age, occupation, etc., differing with the description in the libelous article: Corr v. Sun Printing & Publishing Ass'n, 177 N. Y. 131, aff'g 75 App. Div. 625; 78 N. Y. Supp. 1131.

m. **Two meanings.**—A complaint in an action for defamation which singles out a meaning of alleged libelous matter capable of both a harmless and a defamatory meaning is limited to the meaning alleged and the defendant has only to answer thereto: Lambertini v. Sun Printing & Pub. Co., 47 Misc. 174; 95 N. Y. Supp. 329, rev'g 111 App. Div. 437.

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a. **Relevancy.**—Matter pleaded either as a justification or in mitigation, in order to be relevant, must relate to the particular charge upon which the action was brought: Zilver v. Cooper, 37 Misc. 158; 74 N. Y. Supp. 850.

b. Although no specific person is named in an article as guilty of the offenses charged, the plaintiff may allege that it was published of and concerning her, and the complaint is good, as under such allegation direct proof may be made that she was the person referred to: Nunnally v. New Yorker Zeitung Publishing Co., 117 App. Div. 1.

c. **Justification.**—Where the complaint in an action of libel sets forth several independent alleged libelous charges, justification of a single one of such libelous charges is sufficient to sustain the answer as against a demurrer; justification of a charge must be as broad as the charge itself: Baldwin v. Genung, 70 App. Div. 271; 74 N. Y. Supp. 835.

d. The justification in an action for libel must be as broad as the charge, and the fact that the plaintiff in an action published some irritating matter concerning the defendant, or his newspaper, does not, as a matter of law, justify the defendant in publishing libel concerning the plaintiff, but such fact is, however, properly pleaded in mitigation of damages: Xavier v. Oliver, 80 App. Div. 292; 80 N. Y. Supp. 225.

e. The allegation in the complaint in an action for libel that the article was published of and concerning the plaintiff, is not sufficient under § 535 to justify the plaintiff, under the peculiar circumstances of the case, in proving any facts which would show that he was the individual referred to and the defect in the complaint was not cured by the answer, as matter alleged in justification is not an admission of any fact essential to the plaintiff's recovery: Hauptner v. White, 81 App. Div. 153; 80 N. Y. Supp. 895.

f. **Mitigation.**—By §§ 535 and 536, the defendant in a slander suit may plead facts tending to mitigate or otherwise reduce the plaintiff's damages, although not amounting to a total defense, and may prove such facts notwithstanding he may have pleaded a justification; the words "personal injury" in § 536 are defined in § 3343, subd. 9, to include slander: Doyle v. Fritz, 86 App. Div. 515; 83 N. Y. Supp. 762.

g. An answer interposed in a libel action, which alleges as a separate defense and in mitigation, "that the matters and things stated in the complaint were reported and believed in and about the village of Granville prior to the time of said publication. That as defendant is informed and believes said publication is made in good faith, as a matter of news, without malice," is insufficient, both as a separate defense and in mitigation, because of the defendant's failure to allege that he heard the reports and believed them to be true and published them in that belief: Brown v. McArthur, 106 App. Div. 366.

h. **Damages.**—An allegation that "by reason thereof plaintiff lost contracts and customers and has been deprived of business and profits which he could have otherwise made, and was injured in his reputation to his damage $10,000" is too general to entitle the plaintiff to recover thereunder special damages: Verbeck v. Duryea, 36 Misc. 242; 72 N. Y. Supp. 346.

i. **Special damage.**—In actions of libel based upon writings actionable *per se*, evidence of special damage may be given provided the special damage is pleaded, but not otherwise: Loftus & Co. v. Bennett, 68 App. Div. 128; 74 N. Y. Supp. 290.

j. Where it is necessary to plead special damage, each item thereof must be particularly pleaded; an allegation that "the young lady with whom" the plaintiff "kept company avoids him" since the publication is not an allegation that he suffered special damages by losing marriage with her: Rade v. Press Publishing Co., 37 Misc. 254; 75 N. Y. Supp. 298.

k. If the publication is not libelous *per se*, the plaintiff cannot recover general damages, nor can he recover special damages, unless the same are alleged and proved: Beecher v. Press Publishing Co., 60 App. Div. 536; 69 N. Y. Supp. 895.

l. **Sufficiency.**—A complaint is sufficient if it allege that the article was published of and concerning the plaintiff: Stokes v. Morning Journal Association, 72 App. Div. 184; 76 N. Y. Supp. 429.

m. What allegations are sufficient that the article was published of and concerning plaintiff: Peters v. Morning Journal Association, 74 App. Div. 305.

n. In an action for slander, it is not sufficient for the pleader to state the tenor, import or effect of the alleged slanderous words, but the particular words spoken by the defendant must be stated and it is required by § 535 that he state that the alleged defamatory matter "was published or spoken concerning" the plaintiff: Van Alstyne v. Lewis, 41 Misc. 355; 86 N. Y. Supp. 764.

o. **Complaint.**—Where the plaintiff is not named in an article libelous *per se*, but is indicated by circumstances described in the article, and the complaint contains a general allegation, pursuant to § 535, that the article was published concerning her, she may at trial show extrinsic facts which would connect her with the article, and the complaint is not subject to demurrer: Nunnally v. New Yorker Staats-Zeitung, 111 App. Div. 483.

p. The common-law rule which required the plaintiff in an action for libel to plead facts which connected the publication with him when such publication on its face did not directly nor necessarily refer to him, has been abrogated by

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this section; under this section both in libel and slander the application of the defamatory matter to the plaintiff has been made a question of fact; such fact may be alleged in general terms, and, if traversed by the answer, plaintiff at trial must prove that the words referred to him: Nunnally v. Tribune Assoc., 111 App. Div. 485; 97 N. Y. Supp. 908, aff'd 186 N. Y. 533.

a. Words which charge an incorporated reporters' association with begging subscriptions, and with being organized for the purpose of benefiting itself and allied concerns, are not libelous *per se* and charge no crime; but when the plaintiff has alleged special damage by stating that because of such publication it has met with serious loss in business by refusal of clients to pay just claims due on contract, the complaint states a cause of action and is not subject to demurrer: Reporters' Assn. v. Sun Printing and Pub. Assn., 112 App. Div. 247.

b. A complaint in an action for slander fails to state a cause of action when the words alleged to be spoken are that the plaintiff, in employing men for his employer, charged them a commission or fee on their wages, when no extrinsic facts showing a slanderous meaning are alleged: Finan v. N. Y. C. & H. R. R. Co., 111 App. Div. 382.

c. Although a writing charging persons with being "crooks" and "gold brick men" does not refer to the plaintiff by name, if the complaint alleges that the words referred to him in conformity with § 535, the complaint is not demurrable on the ground that the article is not sufficiently descriptive: Townes v. N. Y. Evening Journal Pub. Co., 109 App. Div. 852; 96 N. Y. Supp. 822.

d. **Privilege.**—Mere investigations of a detective character conducted by members of the coroner's office and the municipal police are not judicial and official proceedings within the meaning of § 1907 and a demurrer to an answer which claims a privilege for the report thereof should be sustained: Nunnally v. Press Pub. Co., 110 App. Div. 10.

e. **Innuendo.**—When one paragraph of a complaint sets out the whole of the article charging the plaintiff with the commission of several acts, and the following paragraph contains an innuendo referring only to some of the charges set forth in the preceding paragraph, such following paragraph is surplusage when the article set out is libellous on its face, and an alleged defense in partial justification of the charges not referred to in the innuendo is good and demurrer thereto should be overruled; Nunnally v. Press Pub. Co., 110 App. Div. 10.

f. A complaint in an action for libel is not demurrable for the publication of an article charging the plaintiff with drunkenness in a police station, and with "celebrating," which article is stated by innuendo to accuse the plaintiff of drunkenness in a public place, as such article is libelous *per se:* Morse v. Star Co., 118 App. Div. 256.

g. An article alleging that the popularity of a series of pictures is waning, is not libelous *per se,* and a complaint for libel thereon is demurrable unless the actionable meaning of which the words are capable is pointed out by innuendo: Outcault v. New York Herald Co., 117 App. Div. 534.

h. **A partnership,** unlike a corporation, has no legal existence apart from the members composing it; and, in an action by the copartners for libel, it is sufficient to allege and prove that the article complained of was published concerning the individual plaintiffs: Bergstrom v. Ridgway-Thayer Co., 53 Misc. 95.

i. **Conclusions.**—The complaint in an action for libel must state more than conclusions of fact; facts themselves must be alleged from which the conclusions may be drawn; hence, in an action for libel in writing a letter which charged the plaintiff with writing letters which, by innuendo, are said to be obscene, the complaint is subject to demurrer, as the characterization of the letters is a mere conclusion. The contents of the letters alleged to be obscene should be set forth: McNamara v. Goldan, 118 App. Div. 221.

§ 536. Pleading mitigating circumstances in an action for a wrong.

j. By §§ 535 and 536, the defendant in a slander suit may plead facts tending to mitigate or otherwise reduce the plaintiff's damages, although not amounting to a total defense and may prove such facts notwithstanding he may have pleaded a justification; the words "personal injury" in § 536 are defined in § 3343, subd. 9, to include slander: Doyle v. Fritz, 86 App. Div. 515; 83 N. Y. Supp. 762.

k. **Justification.**—The justification in an action for libel must be as broad as the charge, and the fact that the plaintiff in an action published some irritating matter concerning the defendant, or his newspaper, does not, as a matter of law, justify the defendant in publishing libel concerning the plaintiff, but such fact is however properly pleaded in mitigation of damages: Xavier v. Oliver, 80 App. Div. 292; 80 N. Y. Supp. 225.

l. **Criminal conversation.**—In an action for criminal conversation, evidence as to plaintiff's adultery, his treatment of his wife and other immoral practices, cannot be proved on the trial unless pleaded in the answer: Billings v. Albright, 66 App. Div. 239; 73 N. Y. Supp. 22.

m. **Competency.**—Matter pleaded in justification and mitigation should be

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tested as to its competency at the trial and not on motion: American Farm Co. v. Rural Pub. Co., 78 App. Div. 268; 79 N. Y. Supp. 911.

a. **Malice.**—Mitigating circumstances set up to negative a malicious motive must have been known to the defendant at the time of publication and must have induced a belief in its truth; in an action for libel, an allegation of the partial defense that a committee of a club tried the plaintiff for and acquitted him of the charge of cheating at cards may be relevant on the question of damages and cannot be stricken out; an offer to publish a retraction may be pleaded in a partial defense and should not be stricken out: Dunkenspiel v. N. Y. Eve. Journal Pub. Co., 42 Misc. 74; 85 N. Y. Supp. 570.

b. A motion for a judgment upon a demurrer to a complaint upon the ground that the demurrer is frivolous cannot be granted where the demurrer raises a question that is doubtful: People v. McClellan, 53 Misc. 472.

§ 537. Frivolous pleadings; how disposed of.

c. §§ 537, 538, 545 and 870 *et seq.*, the first providing for an immediate application for judgment on a frivolous answer, demurrer or reply, the next for the striking out on motion of sham answers, the next for the striking out on motion of irrelevant or redundant matter in a pleading, and the others for the taking of the deposition of a party before trial to be used on the trial, were designed to prevent delays by the device of pleadings which present no issue, to simplify pleading so that the issue would be plain to the trial judge, instead of his having to puzzle over useless and perplexing verbiage to ascertain what it is, and to shorten the trial and lessen expense in the preparation therefor by ascertaining in advance, when necessary, what the opposite party would testify to; and they were apt and ample for the purpose: Doll v. Smith, 43 Misc. 417; 89 N. Y. Supp. 331.

d. **Answer.**—There is no provision for striking out the answer or any part thereof as frivolous; the relief because of a frivolous answer is an application for judgment under § 537 and then only where the whole of said answer is frivolous; a sham answer or defense may be stricken out by the court under § 538: Reese v. Walworth, 61 App. Div. 64; 69 N. Y. Supp. 1115.

e. A frivolous answer is one which denies no material allegation of the complaint and sets up no defense, and the proper practice, where such an answer is interposed, is for the plaintiff to apply for judgment under § 537. This relief can only be granted where the whole answer is frivolous: Soper v. St. Regis Paper Co., 76 App. Div. 409; 78 N. Y. Supp. 782.

f. **Demurrer.**—A demurrer to a reply denying all the allegations in an answer which sets up a counterclaim is frivolous: Perry v. Levenson, 82 App. Div. 94; 81 N. Y. Supp. 586; aff'd 178 N. Y. 559.

g. A demurrer is frivolous only where it is clearly bad upon its face and requires no argument to demonstrate its frivolity, and a party aggrieved by a frivolous demurrer may apply for judgment to the court or to a judge thereof, and need not wait until the trial of issues of law or fact: Kirkbride v. Wilgus, 37 Misc. 519; 75 N. Y. Supp. 1036.

h. Where the only issue raised by the answer is that raised by a general denial, the demurrer must be sustained as it cannot lawfully be overruled, and the plaintiff be remitted to a motion for judgment on the defense as frivolous or strike it out as irrelevant or redundant: Jaeger v. City of New York, 39 Misc. 543; 80 N. Y. Supp. 365.

i. **No issue.**—If a denial raises no issue it is frivolous and judgment may be had upon it upon motion: Galbraith v. Daily, 37 Misc. 156; 74 N. Y. Supp. 837.

j. **Record.**—The granting of a motion for judgment on a pleading as frivolous does not strike the pleading from the record, and a pleading is to be deemed frivolous only in case it is so clearly without foundation that the defect appears upon mere inspection and without argument: Halliday v. Barber, 38 Misc. 116; 77 N. Y. Supp. 98.

§ 538. Sham defenses to be stricken out.

See § 545, post, Motion to strike out.

k. §§ 537, 538, 545 and 870 *et seq.*, the first providing for an immediate application for judgment on a frivolous answer, demurrer or reply, the next for the striking out on motion of sham answers, the next for the striking out on motion of irrelevant or redundant matter in a pleading, and the others for the taking of the deposition of a party before trial to be used on the trial, were designed to prevent delays by the device of pleadings which present no issue, to simplify pleadings so that the issue would be plain to the trial judge, instead of his having to puzzle over useless and perplexing verbiage to ascertain what it is, and to shorten the trial and lessen expense in the preparation therefor by ascertaining in advance, when necessary, what the opposite party would testify to; and they were apt and ample for the purpose: Doll v. Smith, 43 Misc. 417; 89 N. Y. Supp. 331.

l. **No issue.**—In an action, either at law or in equity, where the answer raises an issue as to any of the material allegations in the complaint, that issue can

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only be disposed of by a trial, and a denial in the answer which raises such issue cannot be stricken out as sham, even though such denial be inconsistent with a separate defense pleaded in the answer: Schlesinger v. Wise, 106 App. Div. 587; 94 N. Y. Supp. 718.

a. **Sham.**—Denials contained in an answer, interposed in an action at law, of material allegations of the complaint, cannot, although shown by affidavit to be false, or although the answer contains new matter pleaded as a separate defense which is inconsistent with the denials, be stricken out as sham, whether such denials are absolute or upon information and belief or upon an allegation that the defendant has not knowledge or information sufficient to form a belief as to the truth of such allegations of the complaint: Schlesinger v. McDonald, 106 App. Div. 570.

b. **General denial.**—A general denial cannot be stricken out as sham under § 538 but only a "defense." A "denial" is not a "defense" in the terminology of pleading: Schmidt v. McCaffrey, 34 Misc. 693; 70 N. Y. Supp. 1011.

c. **Answer.**—There is no provision for striking out the answer or any part thereof as frivolous; the relief because of a frivolous answer is an application for judgment under § 537 and then only where the whole of said answer is frivolous; a sham answer or defense may be stricken out by the court under § 538: Reese v. Walworth, 61 App. Div. 64; 69 N. Y. Supp. 1115.

§ 539. Material variances; how provided for.

See §§ 721-730, post, Mistakes, omissions, etc.

d. That the trial judge should have directed judgment for the plaintiff, and was not debarred from so doing because the question of delivery was alone submitted to him for determination: Butler Bros. v. Hirzel, 87 App. Div. 462; 84 N. Y. Supp. 693.

e. **Negligence.**—In an action for negligence the plaintiff should be allowed to amend his complaint so as to show that the accident was the result of careless and negligent management of the car, where the complaint originally charged general negligence: Williams v. N. Y. & Queens Co. R. Co., 97 App. Div. 133; 89 N. Y. Supp. 699.

f. The precise cause of the accident being known to the street railway company and not to the passenger, a recovery by the latter should not be set aside because the negligence charged in the complaint was that the defendant permitted the bearing upon one of the wheels to become overheated: Powell v. Hud. Val. R. Co., 88 App. Div. 133; 84 N. Y. Supp. 337.

g. **Amendment.**—Where the original complaint alleges that the plaintiff has been and "will be in the future maimed and disabled from properly attending to her household duties and business," the court may, in its discretion, allow her to amend her complaint by adding to the original specification the words "of dressmaking and the loss of income therefrom by reason of being maimed or disabled as aforesaid:" Buckbee v. Third Avenue R. R. Co., 64 App. Div. 360; 72 N. Y. Supp. 337.

h. The only limitation upon the power of the court to allow an amendment of a pleading upon the trial by conforming it to the facts proved is that the amendments shall be in furtherance of justice and shall not change substantially the claim or defense: Bovee v. International Paper Co., 108 App. Div. 94.

i. **Director.**—Where, in an action against a director of a corporation based upon the failure of defendant to file an annual report, the complaint states a cause of action for breach of contract and the proof shows a cause of action based on rescission of the contract, the pleadings cannot be conformed to the proof, even though the defendant was probably not misled: Hill v. Weidinger, 110 App. Div. 683.

j. **Usury.**—Where usury is the gravamen of an action, variances from the pleading in the proof may or may not be material: Hagaman v. Reinach, 48 Misc. 206.

k. **Negligence.**—Complaint in an action of negligence alleging the cause of the injury as the high speed of the car while rounding a curve is at variance with proof of injury while alighting: Scheu v. Union R. Co., 112 App. Div. 239; 98 N. Y. Supp. 278.

§ 540. Immaterial variances; how provided for.

See § 723, post, Amendments by the court, disregarding immaterial errors.

l. **Negligence.**—In an action for negligence the plaintiff should be allowed to amend his complaint so as to show that the accident was the result of the careless and negligent management of the car, where the complaint originally charged general negligence: Williams v. N. Y. & Queens Co. R. Co., 97 App. Div. 133; 89 N. Y. Supp. 699.

m. The omission of the plaintiff to prove an actual delivery did not constitute an absolute failure of proof, but simply a variance, and that, as it did not appear that the defendants were misled to

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their prejudice by such variance, an amendment of the complaint was not necessary in order to entitle the plaintiff to recover: Butler Bros. v. Hirzel, 87 App. Div. 462; 84 N. Y. Supp. 693.

a. When an objection, founded upon an alleged variance between the cause of action set forth in the complaint and the cause of action proved by plaintiff on the trial, is not available for the first time upon appeal from a judgment recovered by the plaintiff,—considered: Coley v. Tallman, 107 App. Div. 445; 95 N. Y. Supp. 339, aff'd 186 N. Y. 569.

b. **Performance.**—Under a complaint alleging performance of a building contract, a recovery by the contractor may be had when substantial performance is shown and found by the court; substantial performance is performance, especially so in the case of building contracts where some of the infinite details may be easily overlooked: Rowe v. Gerry, 112 App. Div. 358.

c. **Amendment.**—The only limitation upon the power of the court to allow an amendment of a pleading upon the trial by conforming it with the facts proved is that the amendment shall be in furtherance of justice and shall not change substantially the claim or defense: Bovee v. International Paper Co., 108 App. Div. 94.

d. **Director.**—Where in an action against a director of a corporation based upon the failure of defendant to file an annual report, the complaint states a cause of action for breach of contract and the proof shows a cause of action based on rescission of the contract, the pleadings cannot be conformed to the proof, even though the defendant was probably not misled: Hill v. Weidinger, 110 App. Div. 683.

e. **Contract.**—Where the complaint sets out a cause of action for breach of an express contract to carry and deliver goods, the plaintiff cannot recover on the common-law liability of a common carrier, and the failure to prove such contract is not a mere variance: Rosenfeld v. Central Vermont R. Co., 111 App. Div. 371.

f. **Usury.**—Where usury is the gravamen of an action, variance from the pleading in the proof may or may not be material: Hagaman v. Reinach, 48 Misc. 206.

§ 541. What to be deemed a failure of proof.

g. Where a complaint alleged a contract not within the provisions of the statute of frauds, and the plaintiff on the trial seeks to establish a contract which is within such statute, there is a variance under § 541 sufficient to defeat a recovery: Fanger v. Caspary, 87 App. Div. 417; 84 N. Y. Supp. 410.

h. When an objection, founded upon an alleged variance between the cause of action set forth in the complaint and the cause of action proved by the plaintiff on the trial, is not available for the first time upon appeal from a judgment recovered by the plaintiff,—considered: Coley v. Tallman, 107 App. Div. 445; 95 N. Y. Supp. 339, aff'd 186 N. Y. 569.

i. **Loan.**—Where plaintiff paid furniture dealers for furniture sold to defendants and then charged the defendants a greater sum because he expected them to repay him in installments, he cannot maintain an action to recover for furniture sold and delivered, as the transaction was really a loan: Zussman v. Woodbridge, 49 Misc. 496.

j. **Damages to personal property.**—In an action to recover for "damages to personal property," caused by blasting in the street in front of plaintiff's premises, where it appears upon the trial that no trespass is claimed and where plaintiff proves neither trespass nor negligence, a recovery cannot be had upon the ground that defendant has committed a nuisance by blasting upon the public highway without license from the municipality: Hoyne v. Slattery, 49 Misc. 260.

k. **Contract.**—Where the complaint sets out a cause of action for breach of an express contract to carry and deliver goods, the plaintiff cannot recover on the common-law liability of a common carrier and the failure to prove such contract is not a mere variance: Rosenfeld v. Central Vermont R. Co., 111 App. Div. 371.

l. **Conversion.**—The plaintiff, in an action for goods sold and delivered, may at the trial prove a forcible and wrongful taking of the goods, waive the facts in evidence constituting the tort and recover under the allegations of his complaint; and a dismissal thereof at the close of the plaintiff's case upon the ground that the cause of action proved was not the one alleged and that plaintiff should have sued for conversion is error: Kleinbohe v. Hoffman House, 50 Misc. 127.

m. **Director.**—Where, in an action against a director of a corporation based upon the failure of the defendant to file an annual report, the complaint states a cause of action for breach of contract and the proof shows a cause of action based on rescission of the contract, the pleadings cannot be conformed to the proof, even though the defendant was probably not misled: Hill v. Weidinger, 110 App. Div. 683.

n. **Telegraph company.**—Under a complaint against a telegraph company alleging an express contract to carry and deliver an envelope containing money, there can be a recovery only when such

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contract is established, and a recovery cannot be based upon the theory that the defendant is liable for the misfeasance or malfeasance of a messenger: Hirsch v. American Dist. Tel. Co., 112 App. Div. 265.

a. **Brokers.**—In an action by a broker for commissions for procuring a loan to be secured by mortgage, where the loan was not in fact made, in consequence of defects in the borrower's title, the plaintiff cannot recover upon allegations of full performance on his part nor, under such allegations, upon a *quantum meruit* for the value of the services he actually rendered: Stone v. Goostein, 49 Misc. 482.

§ 542. Amendments of course.

See § 727, post, When amendments must be made by order of court.

b. The power to amend a complaint given by the Code relates to the insertion of allegations of fact existing at the time of the commencement of the action: Harowitz v. Goodman, 112 App. Div. 13; 98 N. Y. Supp. 53.

c. Under § 542 a defendant is entitled to serve an amended answer as of course, and it is only where it is made to appear that the pleading was amended for the purpose of delay, and that the adverse party will lose the benefit of a term, that the amended pleading can be stricken out: Muglia v. Erie R. R. Co., 97 App. Div. 532.

d. When a defendant, sued for the value of goods sold and delivered, amends his answer within the time amendment may be made as of course by setting out a counterclaim for damages caused by the delay of the plaintiff in delivering, there is no presumption that the amendment is made for the purpose of delay, and if the case be on the calendar an order striking out the amended answer, unless the defendant consent that a reply be served and the cause retain its place on the calendar, is improper: Beyer v. Huber Co., 115 App. Div. 342.

e. Where a defendant serves by mail an answer to the complaint, the plaintiff has under § 798 forty days to serve by mail an amended complaint, as of course under § 542: Bucklin v. Buffalo, Attica & A. R. R. Co., 41 Misc. 557; 85 N. Y. Supp. 114.

f. A defendant who has served an answer by mail, may, as of course, serve an amended answer within 40 days thereafter: Bates v. Plasmon Co., 41 Misc. 16; 83 N. Y. Supp. 573.

g. **Surety.**—In an action against a surety upon a receiver's bond the court should allow an amendment that the receiver appropriated to his own use certain property, thus establishing liability on the part of the surety: Stratton v. City Trust, Etc., Co., 69 App. Div. 322; 74 N. Y. Supp. 670.

h. **Effect.**—An amended pleading supersedes the original pleading, and the action is thereafter to be tried as though the original pleading had never been served: Lewis v. Pollack, 85 App. Div. 577; 83 N. Y. Supp. 287.

i. **Verification.**—Where defendants served an amended answer to the original complaint and later are served with an amended unverified complaint, said defendants may not only serve an unverified answer, but an unverified amended answer: Brooks Brothers v. Tiffany, 117 App. Div. 470.

j. **Bill of particulars.**—A motion by the defendant for a bill of particulars of the complaint will not be permitted to be defeated by service, after notice of the motion, of an amended complaint where such service is evidently only made to defeat the motion and the amended complaint throws little or no light on the particulars demanded by the bill: Hanser v. Luther, 36 Misc. 730; 74 N. Y. Supp. 357.

k. **Motion.**—Upon a motion to strike out an amended pleading under § 542, it is proper to show a proposition looking to a compromise and the substance of letters or oral propositions which, not only proposed a compromise, but which contained or implied a threat to use dilatory tactics if the proposition was not accepted: Naylor v. Loomis, 79 App. Div. 21.

l. Where plaintiff once amends his complaint, in consequence of objections raised by a motion of defendants to compel him to separately state and number his causes of action, but where no order has been made compelling him to do so, he has exhausted his right to amend as of course; and his service of a second amended complaint is unauthorized and a motion to compel its acceptance will be denied: Freyhan v. Wertheimer, 52 Misc. 636.

m. A defendant may not combine in a single motion an application to serve both an amended and a supplemental answer, but permission therefor must be obtained by two separate motions: Washington Life Insurance Co. v. Scott, 52 Misc. 639.

n. **Forty days.**—By virtue of §§ 542 and 798, a defendant who has served his original answer by mail has a right to amend the same once as of course, without costs, within forty days, if it be not done for the purpose of delay or to deprive the plaintiff of a term of court: Schlesinger v. Borough Bank. 112 App. Div. 121; 98 N. Y. Supp. 136.

o. Although a defendant who serves his answer by mail has forty days within which to amend it, his right is without prejudice to proceedings already had; and where, in the meantime, the cause has been regularly noticed for trial and he has

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suffered default, his subsequent amendment of his answer will not render irregular the judgment against him, and his motion to set the same aside will be denied: Langer v. Swasey, 54 Misc. 301.

a. Service of an original answer by mail does not entitle the defendant to double time within which to serve an amended answer: Seckel v. Tangemann, 53 Misc. 268.

b. **Specific performance.**—A surety on a bond, given in an action for specific performance of a contract and conditioned "that the defendant will comply with any judgment or decree rendered herein and pay any and all costs recovered by the plaintiff," is liable to the plaintiff for a default of the defendant in paying a judgment for money damages after an amendment of the complaint within the time set by § 542, which amendment asked for damages for a breach of the contract instead of specific performance thereof: Doon v. Am. Surety Co., 110 App. Div. 215; 97 N. Y. Supp. 270, aff'd 186 N. Y. 598.

c. **Taxpayer's action.**—In a taxpayer's action to restrain the execution of a contract for the building of a reservoir, the contractors, who have asked to be joined as parties, should be brought in as they have a direct and substantial interest in the litigation: Walter v. McClellan, 48 Misc. 215; 96 N. Y. Supp. 479; aff'g 113 App. Div. 295.

d. **Costs.**—Where a case not noticed by plaintiff for trial goes over the term by reason of due service of an amended complaint, the term fees and witnesses' fees of the successful defendant are improperly taxed by the clerk: Fuller Buggy Co. v. Waldron, 49 Misc. 278.

§ 544. Supplemental pleadings.

e. Where some event has happened subsequent to the commencement of the action, it should be presented by a supplemental pleading: Bennett v. Lawrence, 71 App. Div. 413; 75 N. Y. Supp. 902.

f. **Discretionary.**—The right to serve a supplemental answer is not a legal right and rests in the sound discretion of the court and this discretion should not be interfered with by the appellate division unless an improper result has been reached: Jones v. Brooklyn Heights R. R. Co., 95 App. Div. 625; 89 N. Y. Supp. 1107.

g. **Policy.**—Where an action was brought by the insured to reform a policy and to recover its surrender value, he acts as the trustee for the benefit of the beneficiary, and at his death the assignee of the beneficiary is entitled to be substituted as plaintiff and to serve a supplemental complaint: Hunt v. Provident Savings Life Assurance Co., 77 App. Div. 338; 79 N. Y. Supp. 74.

h. Where, in an action on a Lloyds policy, a judgment, in a former action, determining the amount of the liability, was on appeal modified and reduced since the commencement of the action and before answer, the defendant may set up the modification as a partial defense and need not, under § 544, set it up by a subsequent and supplemental answer: Burke v. Rhoads, 39 Misc. 208; 33 Civ. Pro. R. 162; 79 N. Y. Supp. 407.

i. **Interpleader.**—The practice, after an order of interpleader has been made under § 820, is for the plaintiff to apply to the court under § 544 for leave to serve a supplemental complaint containing substantially the allegations of the former complaint and such further facts as may be necessary to show the facts preceding the making of the order of interpleader, etc.: Greenblatt v. Mendelsohn, 46 Misc. 554.

j. **Judgment.**—Under § 500 which requires that new matter constituting a defense or counterclaim must be pleaded, a party is not entitled, under a general denial, to introduce in evidence a judgment entered in another action between the same parties; in order to make the judgment available as a defense, it is necessary for the defendant to apply for leave to set it up by way of supplemental pleading: Lytle v. Crawford, 69 App. Div. 273; 32 Civ. Pro. R. 360.

k. **Divorce.**—The plaintiff in an action for absolute divorce will not be permitted to serve a supplemental complaint setting up acts of adultery alleged to have been committed since the joinder of issue on the original complaint: Campbell v. Campbell, 69 App. Div. 435; 74 N. Y. Supp. 979.

l. **Substituted defendant.**—Where, on the application of the original defendant in an action, an order is made permitting him to pay the amount sued for into court and directing that a third person, who claims the same, be substituted as a party defendant, the proper practice is for the plaintiff to serve a supplemental complaint setting forth such additional facts as are necessary to show that he has a right to recover the amount claimed from the substituted defendant: Sayer v. Beirne, 78 App. Div. 491; 79 N. Y. Supp. 696.

m. **Bankrupt.**—Where the defendant in an action has been adjudged a bankrupt, it is proper for the court to make an order permitting the plaintiff to bring in the trustee and to serve a supplemental complaint setting forth the bankruptcy proceedings: Latimer v. McKinnon, 85 App. Div. 224; 83 N. Y. Supp. 320.

n. **An executor** of a deceased defendant who has been substituted to defend the action has no right to require the service of a supplementary summons and complaint, with right to answer, unless there are facts other than the succession which should be alleged: Flannery v. Sahagian, 109 App. Div. 321.

o. **Appeal.**—When, pending an appeal in an action brought to recover certain

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securities, they become valueless, the plaintiff should be allowed to serve a supplemental complaint alleging that fact and asking judgment for the value of the securities at the time the demand was made therefor: Central T. Co. v. W. India Imp. Co., 109 App. Div. 517.

a. **Amended and supplemental complaint.**— No such pleading as an "amended and supplemental complaint" is recognized by the Code of Civil Procedure; the supplemental complaint authorized by this section may set out material facts which occurred after the service of the complaint, or of which the plaintiff was ignorant when the complaint was made, and such supplemental complaint may be served in the place of the original complaint, in which case it entirely supersedes it: Harowitz v. Goodman, 112 App. Div. 13; 98 N. Y. Supp. 53.

b. **Supplemental complaint.**—A plaintiff may not, by supplemental complaint, establish a cause of action where none existed at the time the action was brought; nor can a new injunction be granted after the filing of the bond, since the supplemental complaint cannot be filed and the original complaint fails to show a cause of action; nor will an injunction be granted in another similar case where the complaint shows the filing of a bond but fails to show that the bond was approved: South Shore T. Co. v. Town of Brookhaven, 53 Misc. 392.

c. **Motion.**—In an action to recover damages for false imprisonment, defendant's motion to set up by way of supplemental answer a general release will not be denied because the action has been set down for trial and marked ready, but not in fact reached, where it does not appear that plaintiff has been prejudiced by the delay: Rosenbaum v. Breslauer, 54 Misc. 76.

d. When a motion to amend a complaint by adding a party defendant has been denied without leave to renew the motion, a second motion brought without leave will be denied; however, when it appears that the defendant, as administrator of a deceased partner, did not demur to the first complaint because of a failure to join the surviving partner as party defendant, but does demur to an amended complaint on the ground of defect of parties, the court should grant a further amendment bringing in the surviving partner as defendant: Haskell v. Moran, 117 App. Div. 251; 102 N. Y. Sup. 388.

e. A defendant may not combine in a single motion an application to serve both an amended and a supplemental answer, but permission therefor must be obtained by two separate motions: Washington Life Insurance Co. v. Scott, 52 Misc. 639.

f. **Supplemental answer.**—A defense arising after the service of the answer can only be interposed by leave of court and should be in the form of a supplemental answer. Such defense cannot be set up by an amendment as of course: Glam v. Sullivan, 117 App. Div. 235.

§ 545. Motion to strike out irrelevant, etc., matter.

See rule 22 (Sup. Ct.), Notice of motion to strike out irrelevant, redundant or scandalous matter must be given.

g. §§ 537, 538, 545 and 870 *et seq.*, the first providing for an immediate application for judgment on a frivolous answer, demurrer or reply, the next for the striking out on motion of sham answers, the next for the striking out on motion of irrelevant or redundant matter in a pleading, and the others for the taking of the deposition of a party before trial to be used on the trial, were designed to prevent delays by the device of pleadings which present no issue, to simplify pleadings so that the issue would be plain to the trial judge, instead of his having to puzzle over useless and perplexing verbiage to ascertain what it is, and to shorten the trial and lessen expense in the preparation therefor by ascertaining in advance, when necessary, what the opposite party would testify to; and they were apt and ample for the purpose: Dell v. Smith, 43 Misc. 417; 89 N. Y. Supp. 331.

h. Motions to strike out part of a pleading as irrelevant and redundant are not favored; and where under any possible circumstances evidence of the facts pleaded in the allegations sought to be stricken out has any bearing on the subject-matter of the litigation, the motion will be denied: Dalziel v. Press Publishing Co., 52 Misc. 207.

i. **Discretionary.**—Motions under § 545 to strike from a pleading irrelevant matter are in one direction addressed, in no small degree, to the discretion of the supreme court, and if it should be of opinion that the matter complained of could in no way prejudice the adverse party, it might well refuse to strike it out, although the court deemed the allegations irrelevant and unnecessary: Kavanaugh v. Commonwealth Trust Co., 181 N. Y. 121; 34 Civ. Pro. R. 195, aff'g 99 App. Div. 620; 91 N. Y. Supp. 1099.

j. Motions to strike out irrelevant and redundant allegations in a complaint are addressed to the sound discretion of the court and should only be granted where it is evident that, if denied, the moving party will be aggrieved by allowing the allegation in question to remain in the pleading: Howard v. Mobile Co. of America, 75 App. Div. 23; 77 N. Y. Supp. 957.

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a. Allegations that have no substantial relation to the controversy between the parties to the suit, and in support of which evidence would not be admitted upon the trial, will be stricken from the pleading on motion: Noval v. Haug, 48 Misc. 198.

b. **Prejudice.**—The court is not justified in striking out portions of a reply as redundant and irrelevant where it is not claimed that the matter in question is immaterial to the issue, and the only objection thereto is that averments have been reiterated in several instances, and it does not appear that the defendant will be prejudiced in his defense if such matter is permitted to remain: Pope Mfg. Co. v. Rubber Goods Mfg. Co., 100 App. Div. 349; 91 N. Y. Supp. 826.

c. Motions to strike out allegations from an answer as irrelevant, redundant and scandalous should be granted only in cases where it is evident that such allegations, if allowed to remain a part of the record, would work an injustice to the moving party: Stokes v. Starr Co., 69 App. Div. 21; 74 N. Y. Supp. 528.

d. No part of a pleading will be stricken out as irrelevant unless the court can see that the moving party is aggrieved by it and that striking it out will not harm the pleader: Palmer v. Day, 44 Misc. 579; 90 N. Y. Supp. 133.

e. Motions to strike out a part of a pleading, as irrelevant and redundant, are not favored by the courts, and will invariably be denied unless the court can see that the moving party is or will be prejudiced by the retention of the part sought to be stricken out, and that the granting of the motion will not harm the adverse party: Dinkelspiel v. N. Y. Eve. Journal Co., 91 App. Div. 96; 86 N. Y. Supp. 375.

f. Motions to strike out allegations of a pleading as irrelevant or redundant are not favored by the courts, and should not be granted unless it is apparent that the moving party will be prejudiced by allowing the allegations to stand: Rockwell v. Day, 84 App. Div. 437, 82 N. Y. Supp. 993.

g. Motions to strike out allegations contained in pleadings are not encouraged or granted save on grievance shown; if the only fault of the allegations in question is that they are averments of evidence, the motion will not be granted, and it rests largely in the discretion of the court: Vogt v. Vogt, 86 App. Div. 437; 83 N. Y. Supp. 677.

h. **Ejectment.**—Allegations in a complaint in ejectment, giving a history of the title and of claims and disputes in regard to the land for many years between various persons, are irrelevant and redundant, and as such may be stricken out on the defendants' motion as they are "aggrieved thereby" within the meaning of § 545: Brown v. Fish, 37 Misc. 367; 75 N. Y. Supp. 460.

i. **Malicious prosecution.**—In an action for malicious prosecution, allegations of the publication in a certain paper of his arrest must be stricken out as irrelevant: Haughie v. New York & New Jersey Tel. Co., 34 Misc. 634; 70 N. Y. Supp. 584.

j. **Fraud.**—A complaint in an action at law to recover money wrongfully abstracted from a corporation by its president and his son acting in concert in a preconceived plan to defraud the corporation through the employment of the son on an unusual contract of agency made without authority at exorbitant commissions, etc., states but a single cause of action, although renewals of the agreements were made from time to time at increased commissions. Such acts are mere steps in the consummation of a single scheme or conspiracy to obtain moneys by fraud: Mut. Life Ins. Co. v. McCurdy and McCurdy, 118 App. Div. 827; 103 N. Y. Supp. 837.

k. **Consignee.**—The judge presiding at the trial of an action brought by the managing owner against the charterer to recover the one per centum which the charterer retained and for the demurrage, has no power, after the decision has been made and signed, to strike out, on the ground that it is immaterial, an admission contained in the answer that the charterer received the cargo at the port of discharge, as on appeal it might be considered that, whether the defendant was the consignee, had an important bearing upon the rights of the parties: Randall v. Brodhead, 60 App. Div. 567; 70 N. Y. Supp. 43.

l. **Negligence.**—In an action for negligence allegations that "whatever damages and injuries were sustained by the plaintiff were due to the negligence of the plaintiff and not the result of any negligence on the part of the defendant" will be stricken out as redundant: Bogardus v. Metropolitan Street R. R. Co., 62 App. Div. 376; 70 N. Y. Supp. 1094.

m. When a question arises as to whether a pleading states a cause of action or defense, the issue must be presented by demurrer, or upon trial at the opening thereof, or when the evidence is offered, or at the close of the case by motion. Especially is this true as to the measure or items of damage; thus when the complaint in an action to recover damages for death by wrongful act alleges that the widow of the deceased spent large sums of money for hospital room and board and for care and medical attendance, the right to recover such items cannot be decided upon a motion to strike the allegations from the complaint: Fox v. Chapman, 117 App. Div. 127.

n. **Note.**—An allegation that if the note described in the complaint was ever indorsed by the defendant's testator, it was indorsed by him under certain circumstances, does not affect any material

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allegation of the complaint, is to be regarded as mere surplusage and may be stricken out on motion: Corn v. Levy, 97 App. Div. 48; 89 N. Y. Supp. 658.

a. **General denial.**—Separate defenses which might be proven under a general denial should be stricken out: Cooley v. City of New York, 85 App. Div. 107; 82 N. Y. Supp. 1067.

b. **Denials.**—Denials raise an issue upon the complaint and can be no part of a "defense," as this must consist of new matter, which cannot be proved under a denial, or under the issue raised by a denial, but constitutes a defense to the action on the assumption that the complaint is true, and therefore denials in a defense will be struck out upon the ground of irrelevancy; in the nomenclature and terminology of pleading, a "denial" is not a "defense:" Staten Island M. R. R. Co. v. Hinchcliffe, 34 Misc. 49; 68 N. Y. Supp. 556.

c. **Partial defense.**—Facts alleged in an action which constitute a complete defense may not be stricken out as scandalous, but facts alleged as a complete defense which constitute only a partial defense or are available only in mitigation of damages may be stricken out as scandalous upon the theory that the party aggrieved thereby should not be required to admit the truth of the allegations by demurring thereto: Persch v. Weideman, 106 App. Div. 553.

d. **Defense.**—A separate defense which contains reiterations of admissions and denials contains irrelevant and redundant matter which may be stricken out on motion: Blaut v. Blaut, 41 Misc. 572; 85 N. Y. Supp. 146.

e. **Answer.**—Admissions are not necessary in an answer and neither they nor denials are relevant to or can be allowed in a defense: Sanford v. Rhoads, 39 Misc. 548; 80 N. Y. Supp. 404.

f. **Complaint.**—Allegations of a complaint which are irrelevant and redundant as to one of the defendants should not be stricken out on the motion of such defendant, where it appears that such allegations are material to the cause of action alleged against the other defendants: Brown v. Fish, 76 App. Div. 329; 78 N. Y. Supp. 414.

g. If a complaint states even the semblance of a cause of action, that semblance should not be destroyed by striking out irrelevant and redundant matter under the authority granted by § 548; allegations in a pleading should not be stricken out as irrelevant or redundant where the portions left consist of allegations, which, standing alone, are unintelligible: Day v. Day, 95 App. Div. 122.

h. **Entire count.**—It is within the power of the court to strike out matter, as irrelevant or redundant, which is an entire count pleaded as a separate defense or counterclaim; but, *quaere*, whether the power to so strike out is derived from the inherent power of the court or from § 545: Uggla v. Brokaw, 77 App. Div. 310; 79 N. Y. Supp. 244.

i. **The order.**—An order which effects a radical reformation of a pleading by striking out certain parts thereof should provide for the service of the reformed pleading: Watham Mf'g Co. v. Brady, 67 App. Div. 102; 73 N. Y. Supp. 540.

j. **Contributory negligence.**—Allegations in a complaint as to contributory negligence are unnecessary and may be regarded as surplusage: Hunter v. Metropolitan Ex. Co., 50 Misc. 158.

k. **Proper remedy.**—The sufficiency of a defense set up in an answer should be determined upon a demurrer or upon the trial; it cannot be determined upon a motion to strike out portions of such defense as irrelevant: Rankin v. Bush-Brown, 108 App. Div. 294.

l. The proper way in which to present the question as to the sufficiency of a defense is by demurrer or upon the trial and not by motion to strike out as irrelevant or redundant the allegations constituting the same: Rankin v. Bush, 108 App. Div. 295; 95 N. Y. Supp. 718.

m. **Complete defense.**—A defense complete in itself cannot be stricken out as irrelevant, even though it be insufficient: Noval v. Haug, 48 Misc. 198.

n. **Conspiracy.**—Though, in an action in equity for an accounting for moneys obtained by the defendants through a conspiracy of extraordinary character, the rules of pleading governing an action at law should be relaxed and allegations which bear upon the fraudulent scheme of the conspirators are proper, allegations which merely set out evidence of such conspiracy are improper and should be stricken out: Banker's Surety Co. v. Rothschild, 111 App. Div. 130.

o. **Amendments.**—The allowance of an amendment to a complaint is not an adjudication as to the materiality or effect of evidence that may be introduced thereunder, and thus the new allegations will not be stricken out as immaterial or irrelevant if they relate to the cause of action stated in the complaint: Michigan St. Co. v. Am. Bonding Co., 109 App. Div. 55.

p. **Loan.**—Where the complaint, in an action to recover moneys claimed to have been loaned to certain of the defendants through another defendant by plaintiff's assignor, alleges the purpose for which the moneys were claimed to have been borrowed and the manner of their application, such allegations may tend to show the joint nature of the transaction and will not be stricken out as irrelevant: Citizens' Central Nat. Bank v. Munn, 49 Misc. 319; 99 N. Y. Supp. 191, aff'd 114 App. Div. 902.

q. **Nuisance.**—Several owners of separate parcels of land cannot unite

in an action against a railroad company for damages to their respective lands from the flooding thereof by a stream whose natural flow has been impeded by the abutments of a bridge erected by the defendants; but they may unite in an action to abate the nuisance; and neither the allegations of damage nor the demand of separate money judgments render the complaint demurrable: Burghen v. Erie Railroad Co., 53 Misc. 460.

a. **Infancy.**—A motion will not be granted striking out from the complaint allegations that the judgment was recovered where the judgment would be conclusive; nor will the allegations be stricken out on the ground that the defendant is an infant, where the complaint does not state such infancy: Reynolds v. Alderman, 54 Misc. 73.

b. **Insurance.**—In an acion at law against the president of an insurance company to recover corporate moneys expended for political purposes and upon improvident contracts, each payment does not give rise to a separate cause of action; and allegations will not be struck out as irrelevant: Mut. Life Ins. Co. v. McCurdy, No. 1, 118 App. Div. 815; 103 N. Y. Supp. 829.

§ 546. Indefinite or uncertain allegations.

See rule 22 (Sup. Ct.), Time in which motion to require pleading to be made more certain and definite must be noticed.

c. If the meaning or application of an allegation contained in a complaint in an action for fraud is reasonably apparent and the party is informed of the nature of the charge, an amendment will not be directed on motion to make the complaint definite and certain: Smith v. Irwin, 45 Misc. 262; 92 N. Y. Supp. 170.

d. **Precise meaning.**—It is only where the precise meaning or application of the allegation of a pleading is indefinite and uncertain that the court can require the pleading to be amended; if the meaning and application can be seen with reasonable certainty an amendment should not be directed: Kavanaugh v. Commonwealth Trust Co., 45 Misc. 201; 91 N. Y. Supp. 967.

e. Application lies, under § 546, only when the precise meaning or application of the charge is not apparent: Day v. Day, 98 App. Div. 314.

f. A motion to make a pleading more definite and certain is proper only where the precise meaning and application of an allegation of the pleading is indefinite or uncertain; if the purpose of the party is to obtain a more particular statement of his opponent's claim, for the purpose of narrowing the issue at the trial or to prevent surprise, his remedy is by application for bill of particulars: Dumar v. Witherbee, Sherman & Co., 88 App. Div. 181; 84 N. Y. Supp. 669.

g. **Motion denied.**—When a complaint in an action alleges that the defendants, for the purpose of paying for certain stock, borrowed the amount through the defendant F, which amount they agreed to repay upon demand, etc., it is definite and certain and a motion to make more definite and certain should be denied: Citizen's Nat. Bank v. Munn, 115 App. Div. 471.

h. **Supplemental pleading.**—Where some event has happened subsequent to the commencement of the action, it should be presented by a supplemental pleading: Bennett v. Lawrence, 71 App. Div. 413; 75 N. Y. Supp. 902.

i. **Contract.**—It is proper to move to make a complaint more definite and certain by specifying whether the contract was oral or in writing and whether authorized by resolution of trustees: First Presbyterian Church v. Kennedy, 72 App. Div. 82; 76 N. Y. Supp. 284.

j. A motion to require the plaintiff to make her complaint, alleging two separate causes of action arising out of one transaction, definite and certain should not be granted, where the purpose is to compel the plaintiff to elect whether she will attempt to recover on the contract or independent of the contract: Seymour v. Warren, 71 App. Div. 421; 75 N. Y. Supp. 903.

k. **Proper remedy.**—A denial contained in an answer of all the allegations contained in specified folios of a complaint, except as hereinafter admitted, is not a good pleading; it should not, however, be treated as a nullity and thereby deprive the defendant of his right to trial or to amend; the proper remedy is by motion to have the answer made more specific and certain: Thompson v. Wittkop, 184 N. Y. 117, rev'g 97 App. Div. 642; 90 N. Y. Supp. 1116.

l. A defendant may not demur to a complaint in an action for services performed because it is vague and indefinite; the defendant should either demand a bill of particulars or move to make the complaint more definite and certain: Fleck v. Friedman, 49 Misc. 220.

m. While it is inartificial to set out the breach of an undertaking by negativing the language of its condition and such pleading is not commended, yet it is sufficient as an allegation of breach upon demurrer. In any event the remedy for the defect is by motion to make the complaint more definite and certain: Town of Hadley v. Garner, 116 App. Div. 68; 101 N. Y. Supp. 777.

n. **Conversion.**—A complaint against the president of an insurance corpora-

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tion and others which alleges that the defendants, acting jointly, wrongfully and without authority, took certain money belonging to the corporation, consisting of checks, bank bills, United States notes, treasury notes and gold and silver coins of a specified aggregate value, and wrongfully converted the same, should be made more definite and certain when the transactions covered a period of thirteen years, for it is improbable that the conversion was a single transaction: Mut. Life Ins. Co. v. Raymond, 118 App. Div. 828.

a. **Accounting.**—Though, in an action in equity for an accounting for moneys obtained by the defendants through a conspiracy of extraordinary character, the rules of pleading governing an action at law should be relaxed and allegations which bear upon the fraudulent scheme of the conspirators are proper, allegations which merely set out evidence of such conspiracy are improper and should be stricken out: Banker's Surety Co. v. Rothschild, 111 App. Div. 130.

b. In an action at law in equity for an accounting against a president of an insurance company, the defendant held and exercised the functions of his office continuously, and any matters for which he was accountable to the company are properly included in a single count, and a motion for separate actions will be denied: Mut. Life Ins. Co., 118 App. Div. 822.

c. **Bill of particulars.**—Motions to make a complaint more definite and certain or for a bill of particulars in the alternative cannot be united, because the first may only be made before and the latter ordinarily after answer unless necessary to enable the defendant to plead: Mut. Life Ins. Co. v. Grannis, 118 App. Div. 830.

d. **Counterclaim.**—In an action to recover upon a foreign judgment, a motion will be granted to compel the defendant to make her counterclaim more definite and certain by alleging certain facts: Pearce v. Weidemeyer, 52 Misc. 456.

e. **Compromise.**—In an action to recover damages for personal injuries when the answer alleges a compromise and general release of plaintiff's claim, the defendant should be required to make such allegation more definite and certain by stating the dates of the alleged compromise and release: Pigone v. Lauria, 115 App. Div. 286.

f. **Promissory note.**—In an action upon a promissory note the plaintiff should be required to state whether the note was transferred to the plaintiff before or after its maturity: McGehee v. Cooke, 55 Misc. 40.

g. **Negligence.**—It is improper in an action of negligence for the defendant to move under § 546 that the complaint be made more definite and certain in respect to certain allegations of the defendant's negligence; the proper remedy is for a bill of particulars: Mullen v. Hall, 51 Misc. 59.

§ 548. No person to be arrested in civil proceedings, without a statutory provision. Ne exeat abolished.

See § 111, ante, Length of time which one may be imprisoned.

See § 564, post, Provisions as to privilege from arrest.

h. A county clerk in making up a judgment roll in an action tried in a court of record has no right to insert in the judgment that the plaintiff is entitled to enforce the judgment by execution against the defendant's person and such statement will be stricken out on motion: Bacon v. Grosmann, 90 App. Div. 204; 86 N. Y. Supp. 66.

§ 549. When the right to arrest depends upon the nature of the action.

See § 1281, post, Order of arrest cannot be granted on submission of a controversy.

See § 720, post, Right of defendant interposing a counterclaim to an order of arrest.

See § 1940, post, Right to an order of arrest in a joint-debtor action.

i. **Fraud.**—The mere fact that it appears to have been alleged that money was obtained by fraud is not decisive that the action is not upon contract as subd. 4 of § 549 classifies an action to recover a debt induced by fraud as an action on contract: Frey v. Torrey, 70 App. Div. 166; 32 Civ. Pro. R. 386; 75 N. Y. Supp. 40, aff'g 175 N. Y. 501.

j. Where a debtor sells his entire stock of merchandise without the notice to creditors required by chap. 528 of 1903, providing that such a sale shall be fraudulent, yet such fact does not entitle a creditor of the seller to an order of arrest under § 549, subd. 4, as the fraud contemplated by the subdivision is one where there is an actual intent

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to defraud: Mann v. Chrestopulos, 87 App. Div. 222; 84 N. Y. Supp. 372.

a. Under § 549, subd. 4, an action on a contract may be maintained, and, as a collateral and further remedy where the facts warrant it, it is proper to allege and prove fraud in the inception of the contract and obtain an order of arrest and an execution against the person of the defendant: Citizens' National Bank v. Wetsel, 96 App. Div. 85; 86 N. Y. Supp. 1079.

b. Subd. 4 of § 549, providing that when in an action upon contract the complaint alleges fraud, the plaintiff cannot recover unless he proves the fraud on trial, does not apply in justices' courts but relates only to actions in the supreme court, the city court of the city of New York or to a county court: Connor v. Philo, 117 App. Div. 349.

c. **Separation.**—An order of arrest may be granted in an action by a wife for a separation on the ground of cruel and inhuman treatment as the action is one "to recover damages for a personal injury," within § 549, subd. 2: Schwartz v. Schwartz, 36 Misc. 487.

d. **Servant.**—§ 549 authorizing the arrest of a defendant in an action to recover damages for a "personal injury," contemplates an action in which the defendant himself is at fault, and which he personally did or omitted to do, and does not authorize the arrest of a defendant in an action for negligence or assault, where the act causing the injury is that of his servant but is imputed to him: Davids v. Brooklyn Heights R. R. Co., 45 Misc. 208; 92 N. Y. Supp.. 220.

e. **Replevin.**—When the complaint in an action brought to recover possession of chattels alleges that the defendant concealed, removed or disposed of such chattels so that they could not be found, and such allegations are proved upon an inquest and is incorporated in the decision, an execution against the person of the defendant may be issued in the event of the return unsatisfied of an execution against his property, although no order of arrest was granted in the action: Lehman v. Mayer, 68 App. Div. 12; 74 N. Y. Supp. 194.

f. **Statutory actions.**—There may be the right of arrest and consequently of body execution in actions purely statutory: Hutchinson v. Young, 93 App. Div. 407; 87 N. Y. Supp. 678.

g. **Penalty.**—In an action to recover a penalty the defendant is subject to arrest and imprisonment under § 549, although he may not have done anything worse than to remain silent or inactive not knowing what the legal consequences might be: Cox v. Paul, 175 N. Y. 328.

h. **Complaint.**—An order of arrest may be granted upon affidavits unaccompanied by a complaint, but if the complaint is served it must allege a sufficient cause of action specified in § 549, and if it does not, the order of arrest will be vacated under § 588: Lewis v. Pollack, 85 App. Div. 577.

i. **Decedent.**—An action to recover damages for death of a decedent is an action for a wrong done the property rights or interests of the decedent's next of kin, and a judgment in such an action may be enforced by an execution against the person under §§ 549 and 1487: People ex rel. Harris v. Gill, 85 App. Div. 192; 83 N. Y. Supp. 135.

j. **Factor.**—Where, after proper demands, factors refuse to surrender proceeds of a sale, they will not be permitted in action by principal to defeat or diminish recovery by purchasing claims of third persons against the principal because, under this section, the action is one of tort and secures to plaintiff certain remedies: Britton v. Ferrin, 171 N. Y. 235, aff'g 57 App. Div. 622; 67 N. Y. Supp. 1129.

§ 550. When the right to arrest depends partly upon extrinsic facts.

k. An order of arrest cannot be granted in an action for divorce upon an affidavit alone where no complaint is in existence, as § 550 requires proof of the judgment demanded, and is not satisfied because the summons states the action to be one for absolute divorce and the affidavit demands alimony: Lichstrahl v. Lichstrahl, 38 Misc. 331.

§ 551. Order when and where granted; when of right, and when discretionary.

l. Under § 551, an order of arrest, if none has been issued prior to the trial of the action, may properly be issued a year after a verdict provided that the final judgment has not been entered; the fact that ten days elapsed prior to the granting of the order of arrest during which time the plaintiff might have entered judgment does not entitle the defendant to be relieved from arrest under § 572, it is sufficient if the plaintiff enters judgment within ten days after either the granting of the order or the execution of the order of arrest: Wassermann v. Benjamin, 88 App. Div. 1; 84 N. Y. Supp. 489.

§ 556. Order required for arrest; how granted.

See § 772, post, When judge may make order out of court without notice.

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§ 557. Proof necessary to procure order.

a. **Amended pleading.**—An amended pleading supersedes the original pleading, and the action is thereafter to be treated as though the original pleading had never been served: Lewis v. Pollack, 85 App. Div. 577; 83 N. Y. Supp. 287.

b. **Order of publication.**—Though provisions of the Code permit provisional remedies to be granted to accompany the summons, yet so far as orders of publication and for substituted service are concerned, they must, in the very nature of the procedure, precede the service of the summons for which they provide: Long Island Bottlers v. Bottling Brewers, 65 App. Div. 459; 72 N. Y. Supp. 976.

c. **Malicious prosecution.**—The affidavit to obtain an order of arrest, in an action for malicious prosecution, must state the facts showing malice and absence of probable cause; a statement that the magistrate dismissed the criminal proceeding against the plaintiff is not, *per se, prima facie* evidence of want of probable cause; and, where no other facts to establish malice and absence of probable cause are stated, the order of arrest will be vacated: Diad v. Shibley, 49 Misc. 315.

d. **False representation.**—Where, in an action for goods obtained by false representation, the facts are set forth in the complaint and are also established by affidavits used on a motion to obtain the arrest of the defendant, such order of arrest will not be vacated, although the verification of the complaint be defective because taken by a notary in New Jersey, whereas the venue was laid in New York; such complaint is good as an unverified complaint, and § 557 allows the facts necessary to an arrest in such action to be shown by affidavit: Voorhees Rubber Mfg. Co. v. McEwen, 111 App. Div. 541.

e. **An affidavit is insufficient as the foundation for an order of arrest which designates the defendant by a fictitious name where the plaintiff knows his true name and where it omits to state any facts from which the alleged cause of action arises: Dadirrian v. Whitson, 54 Misc. 54.

f. In an action based on fraud in the sale of a picture, an arrest of the defendant will be vacated when the moving affidavit of the plaintiff states of his own knowledge that he purchased the picture of the defendant relying upon the representation that it was made by a certain well-known artist and that the defendant made such representation with knowledge of its falsity and with intent to deceive and defraud the plaintiff: Wilson v. Collins, 119 App. Div. 88.

§ 559. Security, upon order of arrest made by a judge.

See § 812, post, Form of bond or undertaking.

§ 561. Contents of the order; to whom directed; when to be executed.

See rule 13 (Sup. Ct.), Order of arrest shall briefly state the grounds upon which it is granted.

§ 562. Copies of papers to be delivered to defendant.

See § 577, post, Filing of papers, acceptance of bail.

§ 563. Arrest; how made.

See §§ 110-119, ante, Confinement of one arrested under civil process.

See §§ 145-159, ante, Jail liberties and escapes.

§ 566. Defendant arrested to have twenty days to answer.

See rule 36 (Sup. Ct.), Actions when party is arrested have preference.

§ 567. When application to be made to vacate order of arrest, etc.

g. In an action for the alienation of a wife's affection where plaintiff obtains an order of arrest, the defendant does not waive his right to move under § 567 to reduce the bail because he did not object to the amount of the bail when it was first fixed by the court, and the right to make such a motion is not restricted to a case in which the defendant is in actual custody: Sibley v. Smith, 67 App. Div. 514.

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§ 568. How and to whom motion must be made; opposing it with new proofs.

a. **Notice.**—§ 568 when read in connection with § 769 thereof, means that an application to vacate an order of arrest founded only upon the papers on which the order was granted must, when made to the court, be upon notice, but when made to the judge who granted the order, may be upon or without notice as he may deem proper: Skinner Manufacturing Co. v. Fagenson, 38 Misc. 121.

b. **False representation.**—Where, in an action for goods obtained by false representation, the facts are set forth in the complaint and are also established by affidavits used on a motion to obtain the arrest of the defendant, such order of arrest will not be vacated, although the verification of the complaint be defective because taken by a notary in New Jersey, whereas the venue was laid in New York; such complaint is good as an unverified complaint, and § 557 allows the facts necessary to an arrest in such action to be shown by affidavit: Voorhees Rubber Mfg. Co. v. McEwen, 111 App. Div. 541.

c. **Motion to vacate.**—Where a motion to vacate an order of arrest is founded upon the papers upon which the order was granted, it is immaterial whether the defendant was arrested or not: Dadirrian v. Whitson, 54 Misc. 54.

§ 572. Supersedeas, unless defendant is charged in execution, etc.

d. Under § 551, an order of arrest, if none has been issued prior to the trial of the action, may properly be issued a year after a verdict provided that the final judgment has not been entered; the fact that ten days elapsed prior to the granting of the order of arrest during which time the plaintiff might have entered judgment does not entitle the defendant to be relieved from arrest under § 572, it is sufficient if the plaintiff enters judgment within ten days after either the granting of the order or the execution of the order of arrest: Wassermann v. Benjamin, 88 App. Div. 1; 84 N. Y. Supp. 489.

e. It is incumbent upon the defendant, when seeking the aid of the provisions of § 572, to show himself within that section: Wassermann v. Benjamin, 91 App. Div. 547; 86 N. Y. Supp. 1022.

f. **Execution.**—§ 572, limiting the time in which an execution against the person may be issued relates only to causes in which the judgment debtor is in custody under an order of arrest or when he has given an undertaking to respond to any execution against his person: People ex rel. Harris v. Gill, 85 App. Div. 192; 83 N. Y. Supp. 135.

g. **Municipal Court.**—§ 572 does not apply to the municipal court and, therefore, its concluding provision that "A defendant discharged as prescribed in this section shall not be arrested upon an execution issued upon the judgment in the action" has no application to the matter: Rogow v. Clark, 40 Misc. 208.

§ 574. When defendant may elect to give bail, etc., or bond for liberties.

See § 150, ante, Undertaking for jail liberties.

§ 575. Undertaking of the bail; what to contain.

See §§ 810-816, post, General regulations respecting bonds and undertakings.

See rule 4 (Sup. Ct.), Bonds must be filed.

h. Where a defendant is imprisoned under an order of arrest he is entitled to jail liberties upon giving the undertaking prescribed by § 149 and is entitled to be completely discharged from arrest upon giving the undertaking prescribed by § 575. These sections of the Code do not conflict: Horowitz v. Olenick, 62 App. Div. 283.

i. **Surety.**—Where an order of arrest was issued in a case governed by § 575, subd. 3, but the undertaking was drawn under § 575, subd. 1, the surety's liability was contingent upon the defendants making default in obeying a direction of the court, and that, as the case was not one in which a direction could be given, the surety could not be held liable: Bristol v. Graff, 79 App. Div. 426; 80 N. Y. Supp. 39.

§ 577. Filing, etc., of papers; plaintiff's acceptance or rejection of bail.

See § 562, ante, Original papers to be filed.

See § 590, post, Filing of papers if bail not given.

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§ 578. Notice of justification; new undertaking, if other bail is given.

See rule 5 (Sup. Ct.), Justification of sureties.

§ 579. Qualifications of bail.

§ 1338 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

See rule 5 (Sup. Ct.), An attorney or counselor cannot be a surety.

§ 580. Justification of bail.

§ 1338 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 581. Allowance of bail.

See § 587, post, Sheriff when liable as bail.

§ 1338 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 582. Deposit of money with sheriff.

A defendant, or other person arrested or attached on civil process, who is entitled to release on bail, or to jail liberties on giving the undertaking required by § 150 of this act, may instead of giving bail, or such undertaking, deposit with the sheriff the sum specified in, or endorsed upon such process, or which might be required in such undertaking. The sheriff must thereupon give the prisoner a certificate of the deposit and discharge him from custody. A deposit so made in lieu of an undertaking for jail liberties must be applied, under direction of the court, in satisfaction of any judgment for escape of the prisoner from such liberties and in payment of any expense incurred in the defense of an action for such escape, and thereafter the surplus, if any, and in case there has been no such escape, the whole of such deposit must be refunded to the prisoner or his representative, and in case of a deposit in lieu of bail on attachment against the person, it shall abide the disposition of the court, or a judge thereof, or a county judge.

From Code Proc., § 197.

Amended by chap. 384 of 1904.

a. Money when deposited in lieu of bail is a substitute of bail and is subject to the same obligation: Finelite v. Sonberg, 75 App. Div. 455; 77 N. Y. Supp. 338.

§ 584. Substituting bail for deposit.

b. Attachment of money deposited as bail: Rallings v. McDonald, 76 App. Div. 112; 78 N. Y. Supp. 1040.

§ 586. When deposit to be paid to a third person.

c. Money when deposited in lieu of bail is a substitute of bail and is subject to the same obligation: Finelite v. Sonberg, 75 App. Div. 455; 77 N. Y. Supp. 338.

d. Attachment of money deposited as bail: Rallings v. McDonald, 76 App. Div. 112; 78 N. Y. Supp. 1040.

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§ 587. Sheriff, when liable as bail; his discharge from liability.

See § 158, ante, Sheriff's liability for escape.

See § 171, ante, Defense of sheriff in action for escape.

See § 155, ante, What deemed and what not deemed an escape.

§ 588. Proceedings on judgment against sheriff.

a. An order of arrest may be granted upon affidavits unaccompanied by a complaint, but, if the complaint is served, it must allege a sufficient cause of action specified in § 549 and, if it does not, the order of arrest will be vacated under § 588: Lewis v. Pollack, 85 App. Div. 577.

§ 590. Filing papers if bail not given.

See § 577, ante, Filing of papers, plaintiff's acceptance of bail.

§ 591. When defendant may be surrendered.

See § 153, ante, Surrender of prisoner by sureties.

See § 600, post, Surety may be relieved where defendant is imprisoned on criminal charge.

b. The bail may surrender the defendant in their own exoneration before the expiration of their time to answer, as a matter of right, but the surrender must be made as prescribed by §§ 591 and 592: Garofalo v. Prividi, 43 Misc. 359; 87 N. Y. Supp. 467.

c. **False return.**—In an action against sheriff for damages for a false return to an execution against the person, the answer, as a partial defense, set up that the sheriff advised the sureties, pursuant to §§ 591 and 592, to surrender their principal.

Held, a good partial defense in mitigation of damages and that a demurrer to said answer would not lie: Prividi v. O'Brien, 46 Misc. 56.

§ 592. How surrender to be made; exoneration of bail thereupon.

See § 780, post, Notice of motion.

See § 577, ante, Plaintiff's acceptance or rejection of bail.

d. The bail may surrender the defendant in their own exoneration before the expiration of their time to answer, as a matter of right, but the surrender must be made as prescribed by §§ 591 and 592: Garofalo v. Prividi, 43 Misc. 359; 87 N. Y. Supp. 467.

§ 595. Rights, etc., of sheriff who is liable as bail.

See § 587, ante, When sheriff is liable as bail and when discharged from liability.

See §§ 160-171, ante, Sheriff may bring action on bond for jail liberties.

§ 597. Certain executions necessary before action against bail.

e. A sheriff can execute a process, for an arrest in a civil action, only within his own county: Fisher v. Young, 41 Misc. 552; 85 N. Y. Supp. 115.

§ 599. Defenses in action against bail.

f. The bail may surrender a defendant in their own exoneration before the expiration of their time to answer, as a matter of right, but the surrender must be made as prescribed by §§ 591 and 592; but a surrender must be completed and then pleaded as a partial defense; the defenses available in an action against bail are now prescribed by § 599: Garofalo v. Prividi, 43 Misc. 359; 87 N. Y. Supp. 467.

§ 603. Injunction, when the right thereto depends upon the nature of the action.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

g. The inherent power of the court to stay proceedings or control the trial of an action is one which must be exercised in the action itself, and where it is sought to enjoin parties from proceeding in another action, such relief must be by injunction in an action where by formal prayer such relief is demanded; the practice of applying in one action to stay the trial of another

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action brought for an entirely different purpose, is unauthorized: Belasco Co. v. Klaw, 98 App. Div. 74; 90 N. Y. Supp. 593.

a. An individual's so-called right of privacy does not exist in the law and is not enforceable by a court of equity. An injunction will not be granted to restrain an unauthorized publication of lithographic prints of an individual as part of an advertisement, where there is no allegation that the picture is libelous, but, on the contrary, the allegation is that the likeness is good and attracts attention to the advertisement upon which it is placed: Roberson v. Rochester Folding Box Co., 171 N. Y. 538, rev'g 64 App. Div. 30; 71 N. Y. Supp. 876.

b. **Complaint.**—Where the right to a temporary injunction rests on the nature of the action, the plaintiff must stand by his complaint, and its supporting affidavits and the issues are limited to those raised by those papers together with the answering affidavits: LeRoy v. Chesebrough, 39 Misc. 285.

c. An injunction *pendente lite* should not be issued in an action governed by § 603, unless it appears from the complaint that the plaintiff is entitled to the relief demanded: Hudson Valley Railway Co. v. O'Connor, 95 App. Div. 6.

d. The right to a temporary injunction depends on the nature of the action and a complaint must state the facts entitling the plaintiffs to the injunction: Glascoe v. Williard, 44 Misc. 166; 89 N. Y. Supp. 791.

e. On a motion for an injunction *pendente lite* under § 603, where the right to the injunction depends upon the nature of the action, the plaintiff's right to the relief must appear in the complaint and cannot be established by affidavit: Loewenstein v. Loewenstein, 114 App. Div. 65.

f. Under § 603, where the right to an injunction depends upon the nature of the action, a motion for a temporary injunction can be based only upon the complaint and cannot be granted upon affidavits, although they state facts which, if properly set forth in a complaint, would be sufficient to support the order and under this § 603, it must appear from the complaint, not only that plaintiff's *demand*, but that they are entitled to the injunction: Huntington v. Cortland Home Tel. Co. 62 App. Div. 517.

g. **Public office.**—A court of equity will not entertain jurisdiction over contests to public office such as an action to prevent the removal of a keeper of a penitentiary from office, as the determination of the title to public office belongs to the courts of law and is to be by them exercised by mandamus, prohibition and quo warranto as the case may require: People ex rel. Corscadden, v. Howe, 177 N. Y. 499, rev'g 88 App. Div. 158; 84 N. Y. Supp. 597.

h. Under § 603, the supreme court has jurisdiction of an action brought by certain base ball clubs, members of a voluntary unincorporated association, to prevent one of the members from violating an agreement under which the association was formed, to avoid an alleged election by them of another as the treasurer of said association and to restrain the latter from taking possession of the funds of the association; the action is not one to determine the title to an office and therefore is not within §§ 1940 and 1984 providing that such actions be brought by the People, nor do the provisions of those sections apply to an unincorporated association: Boston B. B. Assn. v. Brooklyn B. B. Club, 37 Misc. 521; 75 N. Y. Supp. 1076.

i. **Municipality.**—Properly granted restraining municipality from polluting waters of streams where it has been suspended in order that defendant might obtain legislative relief: Sammons v. City of Gloversville, 175 N. Y. 346, aff'g 67 App. Div. 628; 74 N. Y. Supp. 1145.

j. **Railroad.**—Where a contract is made between a railroad corporation and commissioners under the Buffalo Grade Crossing Act containing certain conditions, the railroad is entitled to an injunction restraining erection of part of work until the commissioners have carried out the conditions precedent: Erie Railroad Co. v. City of Buffalo, 180 N. Y. 192, rev'g 96 App. Div. 458; 89 N. Y. Supp. 122.

k. An injunction will lie to restrain a railroad company from constructing additional switches and sidings where it has only the right to operate a single track and has not obtained the permission of the owner or acquired the right to make such additions: Stephens v. N. Y. O. & W. Ry. Co., 175 N. Y. 72, rev'g 61 App. Div. 612; 69 N. Y. Supp. 1146.

l. **Encroachment.**—Where there is an actual and substantial interference with the use of a street and the plaintiff has no erection upon the adjoining property extending into it, and there is a very substantial loss resulting from the encroachment, and there is no statute expressly or by a clear and unquestionable implication authorizing the encroachment, the plaintiff is entitled to relief by mandatory injunction: Sweet v. Henry, 175 N. Y. 268, rev'g 66 App. Div. 383; 72 N. Y. Supp. 868.

m. Equity will compel the removal of steps and areas which project into a city street and appropriate approximately one-half of the sidewalk: City of New York v. Knickerbocker Trust Co., 52 Misc. 222.

n. Injunction in action by abutting property owner to restrain adjoining owner from encroaching upon city street; to the fee of which he has no title, re-

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fused: Sautter v. Utica City Nat. Bank, 119 App. Div. 898.

a. When during the trial of an action for a mandatory injunction to compel an adjoining landowner to remove a structure encroaching upon the street the defendant conveys the premises, the court is without power to decree that the defendant abate the nuisance for that would require him to enter upon another man's property and destroy the building: Ackerman v. True, 120 App. Div. 172.

b. **Surety.**—A judgment debtor is not entitled to an injunction restraining surety from enforcing his agreement to pay part of the joint judgment: Kolb v. National Surety Co., 176 N. Y. 233, aff'g 73 App. Div. 619; 76 N. Y. Supp. 1018.

c. **Cause of action.**—An application for an injunction whether made under § 603 or 604 should not be granted except upon proof that the plaintiff has a cause of action; if the application be made under § 603, the omission of a necessary allegation from the complaint in the action is fatal and cannot be supplied even by affidavit; apparently it is different if the application is made under § 604: Werbelovsky v. Michael, 106 App. Div. 139.

d. **Jurisdiction.**—Jurisdiction under this section is made dependent upon the presentation to the court or judge of a complaint setting forth facts upon which the plaintiff claims to be entitled to, and upon which he demands equitable relief: Jacobs v. Mexican Sugar Refining Co., 44 Misc. 409; 89 N. Y. Supp. 1000.

e. **Parties.**—An injunction should not be granted to restrain the prosecution of actions against the plaintiff by persons not parties to the action in which it was granted: Marty v. Marty, 66 App. Div. 527; 73 N. Y. Supp. 369.

f. **Special damage.**—Though unjust and malicious criticisms of a manufactured article, for which the manufacturer has no adequate remedy at law because of his inability to prove special damage, are published yet they are not the subject of cognizance by the court of equity and their publication cannot be restrained by injunction: Marlin Fire Arms Co. v. Shields. 171 N. Y. 385, rev'g 68 App. Div. 88; 74 N. Y. Supp. 84.

g. **Right to use.**—An injunction will be granted restraining interference with right of use: Bliss v. Mayer, 54 Misc. 119.

h. **Creditor.**—In an action by a general creditor to recover a sum of money only, he cannot upon allegations that the defendant disposed of his merchandise to another defendant with a view to defraud his creditors and that the second defendant purchased with like intent, procure under § 603 a continuance of a temporary injunction restraining the transferee from disposing of the property as § 603 applies only to equitable actions or to actions triable by the court; the proper remedy is a receiver for the property: Veit v. Collins, 39 Misc. 39; 78 N. Y. Supp. 763.

i. **Discretion.**—While a temporary injunction involves discretion, a permanent injunction does not, when the facts conclusively show that it would be inequitable and unjust; if the facts found compel the conclusion, as a matter of law, that an injunction should be refused as inequitable, the court of appeals will reverse an order of the appellate division reversing a judgment of the special term which denied a permanent injunction and restore the judgment of the special term: McClure v. Leaycraft, 183 N. Y. 36, rev'g 97 App. Div. 518; 90 N. Y. Supp. 233.

j. Even though proposed improvements be without legal authority, and their erection be an evasion of the plaintiff's property rights, it may not be a proper exercise of the equitable power of the court to restrain the improvements: Mount Morris B. v. N. Y. & H. R. R. Co., 50 Misc. 417.

k. A court of equity is not bound to issue an injunction where it will produce a great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right: Knoth v. Manhattan Ry. Co., 187 N. Y. 243, aff'g 109 App. Div. 802.

l. **Mandatory injunctions.**—While it is within the power of a court of equity, in proper cases, to issue mandatory injunctions, such power is not unlimited, and when the exercise of such power exceeds the limit it is not mere error, but void as without jurisdiction; where the main object of an action by a suspended member of a voluntary association is to compel his reinstatement as a member in good standing, the court has no power to grant an interlocutory injunction requiring his reinstatement; and in a proceeding to punish as for a civil contempt the violation of such injunction, the lack of authority to grant it is a complete defense: Bachman v. Harrington, 184 N. Y. 458; 185 N. Y. 573.

m. A complaint alleging that a telephone corporation unjustly discriminates against the plaintiff on account of his profession and unjustly refuses to supply him with service at reasonable rates, and asking a mandatory injunction, states a cause of action and is not subject to demurrer: Wright v. Glen Telephone Co., 112 App. Div. 745.

n. The owner of adjacent premises is entitled to a mandatory injunction for the removal of a projecting front of a building and for the damages sustained by the owner of said adjacent property: Close v. Witbeck, 52 Misc. 224.

o. **Laches.**—A long delay by the plaintiff in bringing an action for injunction, while not conclusive against the right to the injunction, should be con-

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sidered when there are other strong equities against granting such injunction: Knoth v. Manhattan Railway Co., 109 App. Div. 802; 96 N. Y. Supp. 844, aff'd 187 N. Y. 243.

a. **Foreclosure.**—An injunction *pendente lite* should not be granted to restrain the foreclosure of a chattel mortgage pending the determination of an action for breach of covenant when neither the complaint nor the affidavit discloses any ground for injunctive relief: Leonard v. Schmidt, 109 App. Div. 549.

b. **Firm name.**—One partner is entitled to an injunction restraining the other partner from an unauthorized use of the firm name after the expiration of the partnership: Read v. Mackay, 47 Misc. 435.

c. **Criminal law.**—An injunction *pendente lite* to restrain the police commissioner and other police officials of the city of New York from maintaining a post of officers upon plaintiff's premises for the purpose of discovering or preventing gambling or pool selling therein will be vacated: McGorie v. McAdoo, 49 Misc. 601.

d. A suit in equity will not lie to restrain police officers from stationing patrolmen in front of premises where the occupant is suspected of conducting a pool-room in violation of law, and a temporary injunction in such an action will be vacated: Stevens v. McAdoo, 112 App. Div. 458; 98 N. Y. Supp. 553.

e. The keeper of a saloon is not entitled to a temporary injunction restraining the police from inspecting his premises, the duty of inspecting places where liquor is sold being imposed by § 315 of the Greater New York Charter: Craushaw v. McAdoo, 47 Misc. 420; 94 N. Y. Supp. 386.

f. The playing of games of baseball on Sunday, to which the public are invited and an admission fee charged, constitutes a violation of the law, and the duty of the police to prevent such games may not be restrained by injunction: Brighton Athletic Club v. McAdoo, 47 Misc. 432.

g. Equity will not intervene to restrain the police authorities of the city of New York from stationing officers outside of a place having a liquor tax certificate, when such authorities suspect that place of being conducted as a disorderly house, and from notifying customers who are in the place and those who are about to enter the same that it is a disorderly house which is likely to be raided at any moment, and that those who are on the premises at the time of such raid are liable to arrest: Delaney v. Flood, 183 N. Y. 323, rev'g 105 App. Div. 642; 94 N. Y. Supp. 1143.

h. **Police.**—A court of equity may restrain police officers from interfering with legitimate business when there is no claim that it is unlawful: McGorie v. McAdoo, 113 App. Div. 271; 99 N. Y. Supp. 47.

i. Equity will not interfere to prevent arrests or the execution and enforcement of the criminal law so long as the police authorities keep within the lines of duty, but when the courts are appealed to by a law-abiding citizen, conducting a lawful business which is injured by the police, who persist in remaining indefinitely on the premises and show no justification therefor, equity will issue an injunction in order to protect the individual rights guaranteed by the Constitution, and in the interests of law and order: Burns v. McAdoo, 113 App. Div. 165; 99 N. Y. Supp. 51.

j. Equity will not enjoin the police from watching premises where gambling is supposed to be carried on, when the police authorities show reasonable cause for believing that the law is being violated: Cleary v. McAdoo, 113 App. Div. 178.

k. **Labor.**—While the right of striking employees "to picket" their employer's place of business and to strive by reason, argument and proper appeal to win over those who have taken their places at work is well established, the striking employees and the local labor unions of which they are members may be restrained from resorting to any threats, intimidation, force or fraud in their relations with the employees who took their places: Butterick Pub. Co. v. Typographical Union No. 6, 50 Misc. 1.

l. **Landlord and tenant.**—The assignee of a lease not containing restrictions against assignment may have an injunction *pendente lite* to restrain the landlord from excluding such assignee from the premises if the complaint sets out facts showing that the remedy at law is not adequate; affidavits are not sufficient to show such facts as under § 603 the right to the injunction must appear upon the face of the complaint: Goldman v. Corn, 111 App. Div. 674; 97 N. Y. Supp. 926.

m. A temporary injunction may be granted to restrain a landlord from interfering with a furnace alleged to have been leased to the plaintiff, the tenant: Stevens v. Taylor, 111 App. Div. 561.

n. The complaint of a landlord which alleges that his tenant agreed not to sublet to tenants displaying signs, show-cases or articles of merchandise outside of the premises, but that the tenant threatens to let the premises to negroes and Chinamen or the most undesirable person he can find, does not entitle the plaintiff to an injunction *pendente lite* for the complaint does not show the plaintiff entitled to a final injunction restraining the defendant from subletting: Fleisch v. Schnaier, 119 App. Div. 815.

o. Equity will relieve a tenant from the consequences of his failure to comply with a condition requiring notice in a covenant for the renewal of his lease where it appears he has given a fair in-

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timation of his intention to renew and no injury has been done to the other party: Doepfner v. Bowers, 53 Misc. 7.

a. **Covenants.**—An owner of land will be restrained by injunction *pendente lite* from constructing a bay window extending over a street line in violation of covenants entered into by the predecessors of the parties, but the removal of structures already built should not be compelled by temporary injunction but should be left for the final decree: Williams v. Silverman Realty & Construction Co., 111 App. Div. 679.

b. An owner of land subject to a covenant not to erect, suffer or permit any "brewery, distillery, slaughter-house or any other dangerous, noxious or offensive establishment whatsoever," will not be restrained *pendente lite* from erecting a stable for veterinary purposes when it is shown that he has maintained a similar stable for five years, and that the new stable which he intends to erect will be an improvement upon the old: Grimm v. Krahmer, 112 App. Div. 489.

c. Where adjoining properties, upon which are private residences, are subject to the covenants in a deed, executed more than thirty years ago, not to permit any trade or business in any wise noxious or offensive, but to use the premises for private residences only, the owner of one of the properties, in an action to restrain the adjoining owner from making such alterations as will enable him to let his building for business purposes, is entitled to judgment, where the evidence fails to disclose any change in the immediate neighborhood which would defeat the object and purpose of the covenant: Korn v. Campbell, 52 Misc. 220.

d. An injunction will issue to restrain violations of a covenant not to carry on or conduct the business of selling ice in the city of New York on the sale of the business and good will: Am. Ice Co. v. Meckel, 109 App. Div. 93.

e. An injunction will lie to enforce a covenant that real estate is not to be used by the lessor or leased for certain purposes: Waldorf-Astoria Segar Co. v. Salomon, 109 App. Div. 65; 95 N. Y. Supp. 1053, aff'd 184 N. Y. 584.

f. **Taxpayer's action.**—A preliminary injunction will not issue in a taxpayer's action to annul a city contract unless the plaintiff shows clearly that, upon the law and the facts, the official action complained of is illegal: Stockton v. City of Buffalo, 108 App. Div. 170.

g. **Trespass.**—Where a trespass is of a continuous nature a person has a right to invoke the restraining order of a court of equity to prevent the same, and in an action for that purpose the court can and should grant all the relief that the nature of the action and the facts demand; but a judgment for past damages alone is not unauthorized and erroneous where, for reasons special and peculiar to the action, the court in its discretion or arbitrarily refrains from granting equitable relief: Sadler v. City of New York, 185 N. Y. 408, aff'g 104 App. Div. 82; 93 N. Y. Supp. 579.

h. Though the cutting of an arched opening through the wall of a building upon demised premises was unjustifiable and wanton waste, an injunction will not be granted, *pendente lite*, to compel the defendant to seal up the portions of the wall which he has cut, where the complaint is framed upon the theory of a continuing trespass, and no facts are alleged showing an impairment in the safety of the building, or from which an irreparable injury may flow to the plaintiff or that needless multiplicity of suits may be avoided: Chamberlain v. Child's Unique Dairy Co., 54 Misc. 56.

i. **Liquor tax certificate.**—The court has no power to grant a temporary injunction restraining a special deputy commissioner of excise from cancelling and taking possession of a liquor tax certificate pursuant to the Laws of 1905, chapter 697: Born v. Hopper, 110 App. Div. 218.

j. **Sale.**—When a contract to speculate in lands constitutes a partnership, and one party thereto holding title in his own name has entered into an executory contract to sell partnership lands at their fair market value, a temporary injunction restraining such sale will be refused in an action by the other partner brought to obtain a permanent injunction prohibiting such sale: Babcock v. Leonard, 111 App. Div. 294.

k. **Infant.**—An infant who, in consideration of employment, has made a written agreement not to solicit orders from his employer's customers within three years after leaving his employment will be enjoined from violating the same: Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652.

l. **Statute of limitations.**—A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain, as a cloud upon title, a sale under a power of sale contained in the mortgage, in the absence of any allegation in the complaint or finding by the court that the bond and mortgage have been paid: House v. Carr, 185 N. Y. 453, rev'g 105 App. Div. 625; 93 N. Y. Supp. 1135.

m. **Nuisance.**—When an injunction to restrain a nuisance will work great damage to the defendant and give comparatively little relief to the plaintiff, it should be denied: Bently v. Empire Portland Cement Co., 48 Misc. 457.

n. **Specific performance.**—Where the whole of the capital stock has been issued to the defendant with whom an agreement with the plaintiff was made and it appears that the defendant is of doubtful responsibility, an injunction will be granted restraining him from disposing of any of the stock during the pen-

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dency of an action for specific performance: Rau v. Seidenberg, 53 Misc. 386.

a. In an action to specifically enforce an agreement by the defendant to buy and sell only beer made by the plaintiff, the court should not grant a temporary injunction restraining the defendant from buying or selling other beer, as such sales will not work irreparable injury to the plaintiff, who may be compensated in damages: Ringler & Co. v. Mohl, 115 App. Div. 549.

b. **Partnership.**—When a covenant in a partnership agreement that upon withdrawing from the firm no partner shall thereafter carry on the same kind of business, etc., is indefinite as to what shall constitute a violation thereof, equity will enforce the same only so far as its meaning is not open to doubt: Sanford Dairy Co. v. Sanford, 114 App. Div. 862.

c. An appointment of a receiver in an action for an accounting, where there is neither a dissolution nor sale of property, is unauthorized, and there are no grounds for an injunction for restraining the defendant from carrying on the partnership business: Greenwald v. Gotham-Attucks Music Co., 118 App. Div. 29.

d. An injunction will not be granted to restrain the use of a firm name by defendant when the partnership agreement is silent as to the good will or use of the firm name: Lepow v. Kottler, 115 App. Div. 231.

e. **Separation.**—In an action for a separation brought by a wife against her husband, an order will not be made restraining and enjoining the defendant from living and cohabiting with another woman: Ellis v. Ellis, 55 Misc. 34.

f. **Easement.**—An injunction restraining the defendant from using the premises will be denied where defendant has an easement permitting him to maintain an engine room and boilers and is acting in strict conformity with its rights: Bachrach v. Seidenberg Stiefel & Co., 54 Misc. 59.

g. **Supplemental complaint.**—A plaintiff may not, by supplemental complaint, establish a cause of action where none existed at the time the action was brought, nor can a new injunction be granted after the filing of the bond since the supplemental complaint cannot be filed and the original complaint fails to show a cause of action; nor will an injunction be granted in another similar case where the complaint shows the filing of a bond but fails to show that the bond was approved: South Shore T. Co. v. Town of Brookhaven, 53 Misc. 392.

h. **Corporation.**—When a corporation sues a stockholder to rescind a sale of stock made to him because induced by fraud, the court may enjoin the defendant from assigning or transferring the stock *pendente lite*, but should not enjoin him from voting thereon or exercising other rights incident to ownership: Maine Products Co. v. Alexander, 115 App. Div. 113.

i. **Temporary injunction.**—A motion for a temporary injunction based upon allegations of improper conduct on the part of the defendant, an insurance company, made upon information and belief and denied by its answer, where there is no satisfactory proof of any act attempted or threatened on the part of the defendant which would entitle plaintiff to the relief asked for, will be denied: Farrelly v. N. Y. Life Ins. Co., 52 Misc. 202.

j. When in an action for a permanent injunction a preliminary injunction has been denied in the court below, the Appellate Division will usually leave the question of the right to an injunction to be determined on the trial. But where it is apparent that no facts substantially different will be developed on the trial, and there is little or no dispute as to any material fact, but merely as to the conclusions to be drawn therefrom, the Appellate Division will determine the right to a preliminary injunction on appeal from the order denying it: Dutton & Co. v. Cupples, 117 App. Div. 172.

k. Under a complaint alleging that the defendant was employed by the plaintiff, a corporation, as manager for a term of years, that the contract was obtained by fraud, the plaintiff rescinded it and discharged the defendant, the court, is not authorized to grant a temporary injunction under § 603, restraining the defendant from acting as general manager, when injunctive relief was not requested: Maine Products Co. v. Alexander, 115 App. Div. 109.

§ 604. Id.; when the right thereto depends upon extrinsic facts.

l. An application for an injunction whether made under § 603 or 604 should not be granted except upon proof that the plaintiff has a cause of action; if the application be made under § 603, the omission of a necessary allegation from the complaint in the action is fatal, and cannot be supplied even by affidavit; apparently it is different if the application is made under § 604: Werbelovsky v. Michael, 106 App. Div. 139.

m. A justice of the supreme court has no power to grant an injunction restraining a justice of the appellate division from appointing a commissioner of jurors as an injunction against such parties is forbidden by § 605 requiring the application to be made at a term in the department: Melody v. Goodrich, 35 Misc. 138; 70 N. Y. Supp. 568.

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a. **Parties.**—An injunction should not be granted to restrain the prosecution of actions against the plaintiff by persons not parties to the action in which it was granted: Marty v. Marty, 66 App. Div. 527; 73 N. Y. Supp. 369.

b. Parties in no way connected with defendants, who were restrained under § 604, subd. 1, from removing a side-walk fruit stand, are not guilty of a contempt of court for removing the stand, particularly where they were executing the process of another court in an action by a landlord to dispossess a defaulting tenant: Rigas v. Livingston, 178 N. Y. 20, rev'g 86 App. Div. 626; 83 N. Y. Supp. 116.

c. **Agricultural Law.**—A county judge has 'no power to grant an injunction under § 10 of the Agricultural Law to restrain the defendant from further violations of that law, as such injunction is within the exception in § 606 of the Code and must be granted by the supreme court or a justice thereof and, therefore, neither § 241, relating to the powers of county judges to grant injunctions, nor § 772 specifying who may grant orders when not specifically designated by law, do apply: People v. Windholz, 68 App. Div. 552; 74 N. Y. Supp. 241.

d. **Conversion.**—When the plaintiff has brought an action for conversion and for breach of contract, and the defendant has previously issued a summons in another court on an action arising out of the same transaction for work, labor and services, but only sets up a general denial to plaintiff's action for conversion and breach of said contract, the prosecution of the defendant's prior action should not be stayed because he has a right to prosecute his counterclaim as a separate action: Walkup v. Mesick, 110 App. Div. 326.

e. **Transfer of commercial paper.**—Injunction *pendente lite* granted to restrain the transfer of commercial paper pending an action to cancel the same: Detwiler v. Hirsch Co., 49 Misc. 311.

f. **Judgment debtor.**—In an action by the receiver of a judgment debtor to recover from an alleged fraudulent assignee judgments which the latter had recovered upon the assigned claims, where the validity of the assignment is in doubt, the defendant should be enjoined from collecting the judgments during the pendency of the action: Fine v. Rabinbauer, 49 Misc. 437.

g. **Foreclosure.**—An injunction *pendente lite* should not be granted to restrain the foreclosure of a chattel mortgage pending the determination of an action for breach of covenant when neither the complaint nor the affidavit discloses any ground for injunctive relief: Leonard v. Schmidt, 109 App. Div. 549.

h. **Mandatory injunctions.**—While it is within the power of a court of equity, in proper cases, to issue mandatory injunctions, such power is not unlimited, and when the exercise of such power exceeds the limit, it is not mere error, but void as without jurisdiction; where the main object of an action by a suspended member of a voluntary association is to compel his reinstatement as a member in good standing, the court has no power to grant an interlocutory injunction requiring his reinstatement; and in a proceeding to punish as for a civil contempt the violation of such injunction, a lack of authority to grant it is a complete defense: Bachman v. Harrington, 184 N. Y. 458; 185 N. Y. 573.

i. **Taxpayer's action.**—A preliminary injunction will not issue in a taxpayer's action to annul a city contract unless the plaintiff shows clearly that upon the law and the facts the official action complained of is illegal: Stockton v. City of Buffalo, 108 App. Div. 171.

j. **Sale.**—When a contract to speculate in lands constitutes a partnership, and one party thereto holding title in his own name has entered into an executory contract to sell partnership lands at their fair market value, a temporary injunction restraining such sale will be refused in an action by the other partner brought to obtain a permanent injunction prohibiting such sale: Babcock v. Leonard, 111 App. Div. 294.

k. **Accounting.**—In an action for an accounting, an injunction will be granted to restrain the defendant from negotiating or transferring its notes and from destroying the books and other records of the firm's business: The Lozier Motor Co. v. Ball, 53 Misc. 377.

l. **Contract.**— Under a complaint alleging that the defendant was employed by the plaintiff a corporation as manager for a term of years, that the contract was obtained by fraud, that the plaintiff rescinded it and discharged the defendant, the court, is not authorized to grant a temporary injunction under §§ 603 or 604, restraining the defendant from acting as general manager, when injunctive relief is not requested: Maine Products Co. v. Alexander, 115 App. Div. 109.

m. **Play.**—One who undertakes to produce a play written by another, under an agreement providing that no changes or. alterations in the play or additions thereto shall be made without the consent of the author, will be restrained by injunction from making unauthorized changes and modifications in the text and structural arrangement thereof: Royle v. Dillingham, 53 Misc. 383.

n. **Affidavit.**—Where an affidavit was not made by a plaintiff and no excuse

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shown and the affidavit alleges mere conclusions of the attorney, and the injunction was not founded upon the summons and complaint, it should be vacated upon the motion of the defendant: Terry v. Green, 53 Misc. 10.

§ 605. Restrictions upon injunction to restrain State officers.

a. The court has no power to grant a temporary injunction restraining a deputy commissioner of excise from canceling and taking possession of a liquor tax certificate pursuant to chap. 697 of the Laws of 1905: Born v. Hopper, 110 App. Div. 218.

§ 606. By whom injunction granted in other cases.

See § 1787, post, Where temporary injunction may be granted.

See § 1802, post, When injunction may issue in action to annul a corporation.

See § 1809, post, Requisites of injunction suspending business of a corporation.

§ 608. At what time the order may be granted.

b. **Taxpayer's action.**—In an action brought by a taxpayer to restrain the municipal authorities from paying a claim for compensation to such person for performing said duties, where the complaint alleges an intention so to do, an injunction *pendente lite* should be granted: Beresford v. Donaldson, 54 Misc. 138.

c. **A temporary injunction** will not be granted where the complaint set out a contract with the defendant whereby in consideration of her employment by the plaintiff she agreed not do divulge to any third person the secrets of the business of the plaintiff and not to engage in the same business or enter the employment of any other person so engaged. The answer alleged that the business of the plaintiff was unlawful, consisting of usurious transactions carried on in evasion of the law: Tolman v. Mulcahy, 119 App. Div. 42.

§ 609. When notice required or not required. Injunction pending an application.

See § 780, post, Length of notice required.

See rule 27 (Sup. Ct.), Order to show cause.

§ 610. Order must recite grounds; service of order.

See §§ 431, 432, ante, Service upon corporations, how made.

See rule 13 (Sup Ct.), Every injunction order shall briefly state the grounds upon which it is granted.

d. **Landlord and tenant.**—An order granting an injunction *pendente lite*, in an action brought by a landlord against a tenant to enjoin the latter from maintaining a sign, alleged to have been erected without the written consent of the landlord, as required by the lease, should be reversed, where the moving papers only allege the effect of the provisions of the lease and do not set forth such provisions, and where the order does not contain a recital of the grounds upon which it was granted, as required by § 610: Meyer v. Moress, 106 App. Div. 556.

e. **Affidavit.**—Where an affidavit was not made by a plaintiff and no excuse shown, and the affidavit alleges mere conclusions of the attorney, and the injunction was not founded upon the summons and complaint, it should be vacated upon the motion of the defendant: Terry v. Green, 53 Misc. 10.

§ 611. Security, on staying proceedings in an action before trial.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

§ 612. Id.; after trial, and before judgment.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

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§ 613. Id.; after judgment.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

a. **Deposit.**—A consumer who refuses to make a deposit as security for the payment of gas is not entitled to an injunction restraining the company from shutting off his supply: Pollitz v. Consolidated Gas Co., 118 App. Div. 92.

§ 614. Money deposited may be paid over.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

§ 615. Undertaking to be cancelled thereupon.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

§ 616. Security on staying proceedings after verdict, in enjectment or dower.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

§ 617. Id.; damages to include waste.

See § 8160, post, Certain sections not to apply to New York city court; who a non-resident.

b. **Counsel fees.**—When a motion for an injunction *pendente lite* has been denied and a preliminary injunction vacated and set aside, the defendant, on a reference to ascertain the damage sustained by reason of the injunction, is entitled to counsel fees incurred on the return to the order to show cause, if the injunction might have remained in force had the defendant failed to appear: Reeves v. Sullivan, 117 App. Div. 814.

§ 618. Deposit may be dispensed with.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

§ 619. Undertaking and deposit; when dispensed with.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

§ 620. Security in other cases.

c. **Foreclosure.**—In an action to restrain the foreclosure of a chattel mortgage, an injunction *pendente lite* should not be granted without requiring an undertaking by the plaintiff: Leonard v. Schmidt, 109 App. Div. 549.

d. **Permanent injunction.**—When an action brought to obtain a permanent injunction is pending, an order vacating a temporary injunction is not a final determination of the rights of the parties to an injunction within the meaning of § 620: Slingerland v. Albany Typographical Union, 115 App. Div. 15.

§ 621. Special cases excepted.

See §§ 810-816, post, General provisions concerning bonds and undertakings.

See rule 5 (Sup. Ct.), An attorney or counselor shall not be a surety on a bond or undertaking.

§ 623. Damages, how ascertained.

e. The costs and expenses of employing counsel to oppose a motion made upon an order to show cause why an injunction *pendente lite* should not be granted are not recoverable as damages on a refusal to grant the injunction, but other damages may be recovered on a denial of the injunction: Sargent v. St. Mary's Orphan Boys' Asylum, 112 App. Div. 674.

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a. **Referee.**—A motion for the appointment of a referee to ascertain the damages sustained by reason of an injunction granted in an action which was brought and prosecuted to final judgment in Queens county, must necessarily be made upon notice and be entitled in the action; under the provisions of § 769, such motion cannot be made in the first judicial district: Wilson v. Dreyer, 65 App. Div. 249; 72 N. Y. Supp. 578.

b. A reference to determine the damages sustained by a defendant by reason of an injunction should not be granted until it is finally determined that the plaintiff is not entitled to the injunction: Brown v. Utopia Land Co., 118 App. Div. 190.

c. When an action brought to obtain a permanent injunction is pending, an order vacating the temporary injunction is not a final determination of the rights of the parties to an injunction within the meaning of § 620, and a reference to ascertain the damages of the defendant is premature: Slingerland v. Albany Typographical Union, 115 App. Div. 15.

§ 625. Action on the undertaking.

d. A motion for the appointment of a referee to ascertain the damages sustained by reason of an injunction granted in an action which was brought and prosecuted to final judgment in Queens county, must necessarily be made upon notice and be entitled in the action; under the provisions of § 769 of the Code of Civil Procedure, such motion cannot be made in the first judicial district: Wilson v. Dreyer, 65 App. Div. 249; 72 N. Y. Supp. 578.

§ 626. Application to vacate or modify, without notice.

See §§ 767-779, post, Motions and orders generally.

e. **Appellate division.**—Where the special term refuses to modify or set aside an injunction, the appellate division has power under § 1340 to grant the desired relief: Marty v. Marty, 66 App. Div. 527; 73 N. Y. Supp. 369.

f. A judgment permanently restraining the burning of soft coal is too broad, being unlimited as to time and circumstances: McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, mod'y 114 App. Div. 908.

g. When an action brought to obtain a permanent injunction is pending, an order vacating a temporary injunction is not a final determination of the rights of the parties to an injunction within the meaning of § 620: Slingerland v. Albany Typographical Union, 115 App. Div. 15.

§ 627. Application to vacate or modify upon notice.

See § 630, post, Verified answer to have effect only of an affidavit.

h. An injunction should not be vacated on a motion to punish for a violation thereof when the dissolution is no part of the plaintiff's motion and defendant has not served a counter notice that such relief will be asked: Jones v. Burgess, 109 App. Div. 888.

i. **Police.**—When an injunction restraining police officers from trespassing upon private premises involves questions of public interest, the court will entertain an appeal by the defendants of new affidavits, although guilty of laches: Devlin v. McAdoo, 116 App. Div. 224.

§ 635. In what actions.

See § 2273, post, A warrant of attachment is a mandate, whereby an original special proceeding is instituted against the accused in behalf of the people on the relation of the complainant.

See §§ 2905-2918, post, Attachment of property in justice's court.

j. A warrant of attachment cannot be granted in an action to recover damages for the death of plaintiff's intestate, as it is not an action to recover damages for an injury to property within the meaning of § 635 as construed with § 3343, subd. 10: James v. Signell, 60 App. Div. 75; 69 N. Y. Supp. 680; 32 Civ. Pro. R. 38.

k. **Sum certain.**—The rule that in order to procure an attachment the plaintiffs must show by affidavit that they are entitled to recover a sum certain, over and above all counterclaims known to them, should not be so strictly held as to defeat the remedy, and an attachment may be allowed to stand for an amount reasonably justified by the papers upon which it was granted: Roth v. American Piano Mfg. Co., 35 Misc. 509; 71 N. Y. Supp. 1080.

l. **Bank.**—§ 5242 of the United States Revised Statutes, prohibiting the issuing of the attachments before judgment against national banking associations by any state, county or municipal court, applies to a solvent national bank; the act of Congress of July 12, 1822 (22 U. S. Stat. at Large, 162), did not repeal

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the earlier acts of Congress prohibiting attachments against national banking associations; construction of act of 1882: Van Reed v. People's Nat. Bank, 173 N. Y. 314, aff'g 67 App. Div. 75; 73 N. Y. Supp. 514.

a. **Contract.**—The court has power to issue an attachment on property within the state in an action on contract brought in this state by a non-resident plaintiff against a non-resident defendant; a levy on specific property under such attachment may be set aside and yet the attachment as a writ may stand: Bridges v. Wade, 110 App. Div. 106; 97 N. Y. Supp. 156.

b. **Charge a debt.**—An action against an heir to charge a debt of the decedent upon real estate is equitable in its nature and not being an action for the recovery of money only an attachment is not authorized: Avery v. Avery, 119 App. Div. 698.

§ 636. What must be shown to procure the warrant.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

c. A warrant of attachment which states that the grounds thereof are "that the defendant is a natural person, and that he has departed from place where he last resided, with intent to defraud his creditors and to avoid service of a summons; that he keeps himself concealed with like intent; that he has removed his property from the county of Kings, where he last resided, with intent to defraud his creditors, and has secreted his property with like intent," is not defective in form; a warrant of attachment will be vacated, where the affidavits on which it was issued consist almost wholly of statements of others and of the conclusions of the affiants founded thereon, and do not state on the knowledge of the affiants any facts establishing the existence of any one of the grounds stated in the warrant: Delaney v. Bouse, 91 App. Div. 437; 86 N. Y. Supp. 880.

d. A warrant of attachment, issued upon affidavits sufficient to give the justice who issued it jurisdiction to so do, cannot be questioned collaterally but may only be reviewed by a direct attack upon it: Rogers v. Ingersoll, 103 App. Div. 490; 93 N. Y. Supp. 140, aff'd 185 N. Y. 592.

e. **Affidavit insufficient.**—On application for attachment, affidavit held insufficient to show that defendant had ceased to be a resident of the state of New York, or being a resident, that he had departed from the state of New York with intent to defraud his creditors or to avoid service of a summons: Doheny v. Worden, 75 App. Div. 47; 77 N. Y. Supp. 959.

f. An affidavit of one of the plaintiff's attorneys alleging upon information and belief that the defendant obtained certain moneys by a forged draft and that the source of deponent's information was telegraphic communications from his partner is insufficient to authorize an attachment, but an affidavit of an employee of the attorney that he heard the defendant plead guilty is sufficient: Mexico City Banking Co. v. McIntyre, 105 App. Div. 492.

g. The affidavit of plaintiff, upon which a warrant of attachment was issued upon the ground that defendant had departed from the state, etc., did not state upon what his alleged belief was founded; *held*, that the affidavit was insufficient to confer jurisdiction to issue the warrant: Lassen v. Burt, 46 Misc. 582.

h. **Damages.**—The affidavit under § 636, by which plaintiff must show that he is entitled to recover over and above all counterclaims, must set out the evidence upon which plaintiff relies to prove his damages — office of complaint vs. affidavit discussed: Delafield v. Armsby Co., 62 App. Div. 262; 71 N. Y. Supp. 14; 32 Civ. Pro. R. 132.

i. An attachment granted in an action for false and fraudulent representations should be vacated where the complaint, made a part of the moving affidavit, does not set forth any legal measure of damages: Downing v. Nelson, 49 Misc. 446.

j. When an attachment against a foreign corporation will not be vacated because of allegations in the complaint upon information and belief: Lewis v. Tindel Morris Co., 109 App. Div. 509.

k. An affidavit that defendant is in custody in default of $2,000 to await the action of a magistrate and may be discharged at any time, in which event he will leave this state for the purpose of defrauding plaintiff, is insufficient to bring the case within the provisions of § 3169, and an attachment granted upon such affidavit will be vacated upon motion: Tocci v. Gianvecchio, 48 Misc. 351.

l. Upon an application for an attachment, in an action in which damages are unliquidated, the moving papers must allege the facts which the plaintiff claims show the damage, in order that the court may determine whether any damage has been sustained; on such an application an allegation of the defendant's non-residence made upon the plaintiff's knowledge is not sufficient where no facts are stated from which the court can see that the plaintiff has any knowledge on the sub-

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ject: James v. Signall, 60 App. Div. 75; 69 N. Y. Supp. 680.

a. In an action for breach of contract for the sale of certain merchandise, an attachment will be granted where unliquidated damages are claimed and evidence is produced showing that the plaintiff has sustained damages to the amount claimed: Chazy Marble Lime Co. v. Deely, 88 App. Div. 150; 84 N. Y. Supp. 396.

b. § 636 requires that the affidavit must show that the plaintiff is entitled to recover a sum stated therein, and this requirement is not satisfied by merely stating that an amount is due: McLoughlin v. Naugle, 34 Misc. 385.

c. **Conclusions.**—An attachment cannot be sustained unless the papers upon which it was granted show by competent evidence the facts required by the Code of Civil Procedure, and mere conclusions of belief, not founded on facts thus shown, are of no avail: Rallings v. McDonald, 76 App. Div. 112; 78 N. Y. Supp. 1040.

d. **Disjunctive.**—An attachment, the grounds of which are stated to be that the defendant has departed from the state of New York with intent to defraud his creditors, or keeps himself concealed therein with like intent, is not defective because the grounds therefor are stated in the disjunctive: Stewart v. Lyman, 62 App. Div. 182; 70 N. Y. Supp. 936.

e. **Agent.**—An affidavit on a motion to obtain a warrant of attachment, made by an agent of the plaintiff who has personal knowledge of the entire transaction, "that there are no counterclaims, discounts or set-offs existing in favor of the plaintiff, except as above stated, to his knowledge," is a sufficient compliance with § 636: Steele v. Gilmour Manufacturing Co., 77 App. Div. 199; 78 N. Y. Supp. 1078.

f. In an action for breach of contract where the liability of the defendant is based on the theory that the firm which executed the contract acted as agent for the defendant, an attachment will not be granted where all that appears on the subject of agency is an allegation of the complaint that the plaintiff is informed that the firm acted as the defendant's agent and no other fact is alleged from which agency can be inferred: Lizer v. Hampton, R. & L. Co., 67 App. Div. 547; 73 N. Y. Supp. 1019.

g. **Corporation.**—When plaintiff is not entitled to a warrant of attachment in an action by former stockholder against the defendant who is alleged to have wrecked the corporation: Dudley v. Armenia Ins. Co., 115 App. Div. 380.

h. **Counterclaim.**—A judgment previously obtained by defendants against the plaintiff is not a counterclaim as that term is used in § 636; there is nothing in § 1913 to prevent the owner of such judgment from asserting his cause of action by way of counterclaim: Brown v. English, 115 App. Div. 884.

i. **Certificate.**—Where an affidavit to procure a warrant of attachment under § 636, subd. 2, alleges on information and belief, that the defendant had been absent from the state for more than six months and had filed no designation, under § 430, of a person upon whom process could be served, as appeared by the certificate of the county clerk annexed to the affidavit, such certificate although not in form to be used in evidence is sufficient as a basis for affiant's information and belief; the failure of the warrant to state the grounds on which it is granted is merely an irregularity and must be specified in the notice of motion to vacate the attachment on that ground: Ennis v. Untermyer, 93 App. Div. 375.

j. **Contract.**—Sufficiency to papers on a motion for a warrant of attachment in an action to recover damages for breach of contract considered: Levenson v. Briggs, 95 App. Div. 94.

k. **Fraud.**—It would seem that the fraud which, under the Code, is a ground for granting an attachment is an actual fraud, and not one declared to be a fraud by statute because of the failure to comply with certain formalities: Mohlman Co. v. Landwehr, 87 App. Div. 83; 83 N. Y. Supp. 1073.

l. **Chattel mortgage.**—Where affidavits do not show that a chattel mortgage was not dishonestly given for a *bona fide* debt the court will vacate an attachment on the papers on which it was granted: Pfluke Co. v. Papulias, 42 Misc. 15.

m. **Non-residence.**—When a warrant of attachment based upon an affidavit of the plaintiff upon information and belief and upon two affidavits of positive allegations as to the non-residence of defendant, will be vacated: Beckermann v. Chambers, 47 Misc. 289.

n. **Merits.**—When an attachment has been issued in an action for the conversion of stock and the only doubt as to whether the complaint states a cause of action is as to whether a contract set out therein should be construed as a bailment of the stock or as an absolute transfer thereof, and the contract, on its face, is capable of the former construction, the attachment should not be vacated; the merits of the action will not be considered on a motion to vacate an attachment, and it is incumbent on the defendant to show that the plaintiff's papers are hopelessly bad: Jones v. Hygienic Soap Co., 110 App. Div. 331.

o. **Foreign corporation.**—When it is necessary to show that the defendant was a foreign corporation to obtain an attachment, such fact is shown, when

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the person alleging it is obviously in a position not to possess personal knowledge on the subject: Am. Trading Co. v. Bedouin Steamship Co., 48 Misc., 624.

a. Since an affirmative allegation that defendant is a foreign corporation would suffice to establish the fact upon a trial in the absence of an affirmative allegation that the defendant is not a corporation, such a positive and unqualified allegation in an affidavit to procure an attachment is a sufficient foundation therefor: Simons v. Lehigh Mills Co., Ltd., 53 Misc. 368.

b. **Affidavits.**—Where the affidavits upon which an attachment is granted in an action upon a judgment, do not show that ten years have elapsed since the judgment was docketed, the court will take judicial notice of the time of docketing the judgment, and when ten years have elapsed the attachment will be sustained; and defects in the complaint will not be considered upon a motion to vacate the attachment: Shepherd v. Shepherd, 51 Misc. 418.

c. When the moving affidavit upon which an attachment was granted was made by the plaintiff's attorney, who states that the defendant is a non-resident and is a resident of the state of New Jersey to deponent's personal knowledge, obtained while conducting the litigation referred to in the complaint, and the allegation of non-residence is not denied by the defendant, such non-residence is sufficiently established: Campbell v. Emslie, 115 App. Div. 385.

d. When the moving affidavit is made by the plaintiff's attorney who states that the matters alleged upon information and belief were made known to the deponent by telephone conversations with the non-resident plaintiff, which communications were confirmed by a letter subsequently received from the plaintiff, the letter is the better evidence, and the failure to produce it so that the court may determine whether the grounds of belief were well founded, is ground for vacating the attachment: Gumbes v. Hicks, 116 App. Div. 120.

§ 638. When and by whom the warrant may be granted.

e. § 638 which provides that the warrant may be granted "to accompany the summons or at any time after the commencement of the action," justifies the inference that no proof in the first instance of the issue of the summons is requisite: Belmont v. Sigua Iron Co., 80 App. Div. 537.

f. An attachment must be vacated where service of the summons made without the state of New York within thirty days after the granting of the attachment has been set aside by an order and an appeal has been taken therefrom and no stay has been granted and no other service of the summons has been made or begun within said thirty days: Martin v. Smith, 37 Misc. 425; 75 N. Y. Supp. 780.

g. **Affidavit.**—On application for attachment affidavit held insufficient to show that the defendant had ceased to be a resident of the state of New York, or being a resident that he had departed from the state of New York with intent to defraud his creditors or to avoid service of a summons: Doheny v. Worden, 75 App. Div. 47; 77 N. Y. Supp. 959.

h. **Extension.**—Under § 638, the court has no power to extend the thirty days allowed for the commencement of service of summons by publication: Jones v. Fuchs, 106 App. Div. 260.

§ 639. Affidavits to be filed.

See § 3343, subd. 4, post, "Clerk" defined.

§ 640. Security on obtaining warrant.

See §§ 729-730, post, Undertakings when deemed sufficient; amendment.

See § 810 et seq., post, General requisites respecting undertakings.

i. **Final determination.**—A discontinuance of an action in which an attachment was granted without the consent of the defendants is equivalent to a final determination that the plaintiff is not entitled to the attachment and gives the defendant an immediate right of action upon the undertaking given to secure the warrant of attachment: Straus v. Guilhou, 80 App. Div. 50; 80 N. Y. 180.

j. **Judgment.**—A judgment in favor of defendants should dispose of the attachment and all questions thereunder and should fix the liabilities of the sureties on the undertaking: Krall v. Howard, 37 Misc. 832; 76 N. Y. Supp. 972.

k. **Service.**—No statute or rule requires the service of a copy of the undertaking given upon the granting of the warant: Mazurette v. Cable Amusement Co., 49 Misc. 604.

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§ 641. Contents of warrant; to whom directed.

a. The failure of a warrant of attachment to recite the grounds on which it is granted is merely irregular and the omission is not available to the defendant on a motion to vacate the attachment unless it is specified in the notice of motion: Ennis v. Untermeyer, 93 App. Div. 375; 87 N. Y. Supp 695.

b. **Grounds.**—A warrant of attachment which states that the grounds thereof are "that the defendant is a natural person, and that he has departed from the place where he last resided, with intent to defraud his creditors and to avoid service of a summons; that he keeps himself concealed with like intent; that he has removed his property from the county of Kings, where he last resided, with intent to defraud his creditors, and has secreted his property with like intent," is not defective in form; a warrant of attachment will be vacated, where the affidavits on which it was issued consist wholly of statements of others and the conclusions of the affiants founded thereon, and do not state on the knowledge of the affiants any facts establishing the existence of any one of the grounds stated in the warrant: Delaney v. Bouse, 91 App. Div. 437; 86 N. Y. Supp. 880.

c. **Disjunctive.**—Where the grounds of granting the attachment are disjunctive, viz.: the removing of property with intent to defraud creditors and also keeping himself concealed with like intent, such grounds are sufficient: Stewart v. Lyman, 62 App. Div. 182; 70 N. Y. Supp. 936.

d. **Nunc pro tunc.**—Where the grounds of granting the warrant are omitted, they may be supplied by amendment, *nunc pro tunc:* King v. King, 68 App. Div. 189; 74 N. Y. Supp. 119.

e. **Mortgage.**—The only way in which a bond and mortgage can be levied upon under an attachment is by the sheriff's taking the instruments into his actual custody; the debt secured by a bond and mortgage cannot be levied upon as an existing obligation independent of the bond and mortgage: Fiske v. Parke, 77 App. Div. 422; 79 N. Y. Supp. 327.

f. **Signed.**—A warrant of attachment which is not signed by plaintiff's attorney, as required by § 641, is irregular and void: Lassen v. Burt, 46 Misc. 582.

§ 644. Sheriff must attach property of defendant.

See § 706, post, Execution to issue to sheriff who has levied.
See § 708, post, Judgment in principal action, how satisfied.

g. Where a bill of lading was indorsed by consignor to the agent of a ship owner as security for advances made by them, and assigned by said agents to the owner of the vessel, on which they were shipped, and all other papers described the property shipped as that of the consignor; *held*, that, in the absence of any other testimony, there was sufficient to support a finding that the surplus over the advances was the property of such consignor and subject to attachment: Westervelt v. Phelps, 171 N. Y. 212, aff'g 54 App. Div. 244; 66 N. Y. Supp. 517.

h. **Funds on deposit** with a trust company, to the credit of the estate of defendant's wife, of which defendant is administrator, cannot be attached though the funds might eventually go wholly to him: Gittings v. Russel, 49 Misc. 432; 99 N. Y. Supp. 853, aff'g 114 App. Div. 405.

i. **Foreign.**—When foreign plaintiff suing foreign defendant cannot attach debt due defendant from foreign corporation: Bridges v. Wade, 113 App. Div. 350.

§ 647. Id.; interest in corporation.

j. § 647 is a very exhaustive definition and covers certificates of stock: Matter of Jones, 172 N. Y. 585.

§ 648. Idem; bond, note, et cetera.

The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note, or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person, either within or without the state; which belongs to the defendant, and is found within the county. The levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment

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of, the debt represented thereby. The attachment may also be levied upon a right or interest, present or future, to any of the property or estate of a deceased person which may belong to the defendant and which could be legally assigned by him as legatee or distributee, whether the same exists by reason of the provisions of a last will and testament admitted to probate at the time the attachment is granted, or by operation of the law in case of the intestacy of the deceased. Levy of the attachment thereupon is deemed a levy upon, and a seizure and attachment of, the rights and interests of the defendant at the time of such levy, subject to the rights of the executor, administrator or trustee of such estate to administer the same according to law.

Amended by chap. 416 of 1877 and chap. 318 of 1907.

See § 708, post, Judgment in principal action, how satisfied.

a. *Quaere,* where a corporation and an individual enter into a contract, whereby the individual undertakes that the corporation shall acquire the entire capital stock less five shares, of another corporation and shall become the owner of a specified quantity of land in the Republic of Ecuador, in consideration of which the individual is to have certain interests in the corporation and in subsidiary companies, whether the contract comes within the provisions of § 648, making certain obligations attachable: Pruyn v. McCreary, 105 App. Div. 302; 93 N. Y. Supp. 995, aff'd 182 N. Y. 568.

b. Dividend.—That the right of election existing in the attachment debtor upon the completion of the tontine dividend period could not be levied upon as a cause of action arising upon contract under § 648, as such election must precede the existence of a cause of action against the insurance company: Columbia Bank v. Equitable Life Assur. Soc., 79 App. Div. 601; 80 N. Y. Supp. 428.

c. Foreign.—When foreign plaintiff suing foreign defendant cannot attach debt due defendant from foreign corporation: Bridges v. Wade, 113 App. Div. 350.

§ 649. How property to be attached.

A levy under a warrant of attachment must be made as follows:

1. Upon real property, by filing with the clerk of the county, where it is situated a notice of the attachment, stating the names of the parties to the action, the amount of the plaintiff's claim, as stated in the warrant, and a description of the particular property levied upon. The notice must be subscribed by the plaintiff's attorney, adding the office address; and must be recorded and indexed by the clerk, in the same book, in like manner, and with like effect, as a notice of the pendency of an action.

2. Upon the personal property, capable of manual delivery, including a bond, promissory note, or other instrument for the payment of money, by taking the same into the sheriff's actual custody. He must thereupon, without delay, deliver to the person from whose possession the property is taken, if any, a copy of the warrant, and of the affidavits upon which it was granted.

3. Upon other personal property, by leaving a certified copy of the warrant, and a notice showing the property attached, with the person holding the same; or, if it consists of a demand, other than as specified in the last subdivision, with the person against whom it exists; or, if it consists of a right or share in the stock of an association or corporation,

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or interest or profits thereon, with the president, or other head of the association or corporation, or the secretary, cashier, or managing agent thereof, or if it consists of a right or interest in an estate of a deceased person arising under the provisions of a will or under the provisions of law in case of intestacy, with the executor or trustee under the will, or the administrator of the estate.

4. Upon property discovered in any action brought as prescribed in subdivision two of section six hundred and fifty-five of this act, by entering in the proper clerk's office, the judgment rendered in said action, and thereafter levying on said property in the manner prescribed in subdivisions one, two and three of this section.

Amended by chap. 542 of 1879, chap. 504 of 1889 and chap. 318 of 1907.

See § 707, post, Enforcement of judgment only against attached property.

See § 708, post, Judgment in principal action, how satisfied.

See § 1370, post, Requisites of execution in attachment.

a. **Copy judgment.**—The failure to serve a certified copy of a judgment required by § 649 is a jurisdictional defect which renders the levy ineffectual; the irregularities mentioned in rule 37 of the general rules of practice seem to relate to irregularities of practice in the conduct of litigations: Weil v. Gallun, 75 App. Div. 439.

b. **Substantial compliance.**—A substantial compliance with the provisions of § 649 in regard to the method in which a levy under a warrant of attachment may be made, is absolutely essential to the validity of the levy: Barton v. Palmer Co., 87 App. Div. 35; 83 N. Y. Supp. 1041.

c. **Promissory note.**—Under § 649, subd. 2, providing that a warrant of attachment may be levied, if nothing intervenes to prevent the officer seeking to make the levy, on a promissory note by taking actual physical possession of it, the taking of actual physical possession is essential to the validity of the levy, but where, at the time of the levy, the note is in the possession of a party who is entitled to the custody thereof by virtue of a lien on such note, the officer need not take the note into his actual physical possession: Hardon v. Dixon, 91 App. Div. 109.

d. **Personal property.**—The words "other personal property" as used in § 649, subd. 3, apply to personal property not capable of manual delivery: Minor v. Gurley, 39 Misc. 662; 80 N. Y. Supp. 596, aff'd 81 App. Div. 586.

e. **Mortgage.**—The only way in which a bond and mortgage can be levied upon under an attachment is by the sheriff's taking the instruments into his actual custody; the debt secured by the bond and mortgage cannot be levied upon as an existing obligation independent of the bond and mortgage: Fiske v. Parke, 77 App. Div. 422; 79 N. Y. Supp. 327.

f. **Irregularities.**—That copies of the complaint and affidavit served upon the defendant with a warrant of attachment did not contain the name of the officer before whom they were verified is not a ground for vacating the attachment, as such defects are merely irregularities and not fatal; no statute or rule requires the service of a copy of the undertaking given upon the granting of a warrant of attachment: Mazurette v. Cable Amusement Co., 49 Misc. 604.

§ 650. Certificate of defendant's interest to be furnished.

g. Where a certificate is required by § 650 is given, the parties giving such certificate are thereafter estopped from denying that they held the goods for the plaintiff unless excusable error was made in giving the certificate: Gadski Tauscher v. Graff, 44 Misc. 418; 34 Civ. Pro. R. 25.

h. **Insufficient affidavit.**—An affidavit by the sheriff, that such a person failed to furnish a certificate to the effect that he did not hold any property belonging to the defendant or for the benefit of the defendant, is insufficient to warrant the granting of an order for his examination, as the affidavit would be true if the person sought to be examined had given a certificate specifying what property he held belonging to the defendant: Donner v. Mercy, 81 App. Div. 181; 80 N. Y. Supp. 1030.

i. **Foreign corporation.**—Where a foreign corporation refuses a certificate of property attached, an order should be made under § 651 to ascertain the existence of attachable property; as to property within this state owned by the debtor, whether the same is a debt due from the copper company or is represented by shares of stock therein, the court has jurisdiction under the provisions of §§ 650

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and 651 to grant an order requiring him to submit to an examination; §§ 650 and 651 were enacted to furnish a means to ascertain the existence of attachable property: Stine v. Greene, 65 App. Div. 221; 32 Civ. Pro. R. 222; 72 N. Y. Supp. 729.

§ 651. Person refusing certificate may be examined.

a. Where a foreign corporation refuses a certificate of property attached, an order should be made under § 651 to ascertain the existence of attachable property; as to property within this state owned by the debtor, whether the same is a debt due from the copper company or is represented by shares of stock therein, the court has jurisdiction under the provisions of §§ 650 and 651 to grant an order requiring him to submit to an examination; §§ 650 and 651 were enacted to furnish a means to ascertain the existence of attachable property: Stine v. Greene, 65 App. Div. 221; 32 Civ. Pro. R. 222; 72 N. Y. Supp. 729.

b. **Certificate.**—Where a person served with a warrant of attachment issued in an action against a third party refuses to give a certificate as to the property, if any, of the defendant in his hands, it is not necessary for the plaintiff, in order to secure an order for the examination of such person under § 651, to show that he has in his hands property belonging to the judgment debtor: Donner v. Mercy, 81 App. Div. 181; 80 N. Y. Supp. 1030.

§ 655. Sheriff may maintain actions.

See § 677, post, Action may be brought in name of sheriff and plaintiff.

c. **Joint action.**—§ 677 permits the attaching creditor and the sheriff to maintain any action which the sheriff could bring alone under § 655, subd. 2: Barton v. Palmer Co., 87 App. Div. 35; 83 N. Y. Supp. 1641.

d. A sheriff holding an attachment, either alone or jointly with the attaching creditors, is authorized to maintain an action to collect the demand attached, under §§ 655 and 677: Westervelt v. Phelps, 171 N. Y. 212.

e. **Poundage.**—Under § 655, the rights of the sheriff to collect and receive debts attached by him do not survive the attachment itself and cannot be invoked after the attachment is discharged and, though upon the discharge of an attachment, the sheriff may retain property "levied upon" until his fees and poundage are paid, yet such right exists only as to property actually reduced to possession by the sheriff and does not furnish grounds for an action for poundage against one indebted to an attachment debtor, when the sum due has not been turned over to the sheriff; after an attachment is vacated such debtor may pay to the former attachment debtor: O'Brien v. Manhattan Railway Co., 45 Misc. 643.

f. **Unliquidated.**—When the extent of a defendant's interest in his father's estate is unliquidated and cannot be ascertained until an accounting by the executor, a sheriff bringing an action in aid of an attachment under § 655 cannot have such unliquidated claim applied on the execution. He can only reach that part of the defendant's interest in the estate which has become fixed: Arkenburgh v. Arkenburgh, 114 App. Div. 436; 99 N. Y. Supp. 1127.

§ 656. Perishable goods and animals to be sold.

See § 676, post, Proceedings relating to surplus of proceeds of sale over the claim of plaintiff.

See § 3175, post, Sale of perishable property in city court of New York.

See § 3307, subd. 7, post, Sheriff's fees for levy and sale under an attachment.

g. **Statute of limitations.**—Where perishable property, upon which an attachment has been issued, is sold pursuant to § 656, and the deputy sheriff who conducts the sale accepts the purchaser's promissory note secured by a chattel mortgage on the property for part of the purchaser's price and the property is destroyed by fire before the note and mortgage mature, an action by the attachment creditor to secure the amount of the purchaser's note is governed by § 385 and must be brought within one year: Beyer v. Sigel, 75 App. Div. 83; 77 N. Y. Supp. 1018.

§ 657. Claim of property; how tried.

If goods or effects, other than a vessel, attached as the property of the defendant, are claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such goods or effects or the proceeds thereof are

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in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such value, which the claimant will suffer in case such levy is not released. In that case, the sheriff may, in his discretion, empanel a jury to try the validity of the claim.

2 R. S. 4 (Part 2, c. 5, tit. 1), § 10.

Amended by chap. 541 of 1904.

See § 108, ante, Trial of claim of title by third person, to property seized by sheriff.

See § 109, ante, Expenses of trial of title by third person, to property seized by sheriff.

a. Debt.—§ 657 is not limited to tangible property alone, but embraces a debt attached by the sheriff: Minor v. Gurley, 81 App. Div. 586.

b. A sheriff may impanel a jury to try the validity of a claim, made by a third party, that a debt which the sheriff has attached as belonging to the defendant in the action really belongs to the third party, and this because a debt, although incapable of manual delivery, must be deemed "goods or effects" within § 657, and the sheriff, as he holds his levy on the debt, is entitled to be given a bond by the plaintiff in the action: Minor v. Gurley, 39 Misc. 662; 80 N. Y. Supp. 596.

§ 658. Proceedings if claimant succeeds.

If, by their inquisition, the jury finds the property of the goods or effects to have been in the claimant, at the time of the levy, they must also determine its value, and the damages above such value as specified in the last section. Thereupon the officer must forthwith deliver such goods or effects to him or his agent; unless the plaintiff gives an undertaking with at least two sufficient sureties, to the effect that the sureties will indemnify him to the amount therein specified, not less than twice the value of the goods and effects and damages as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expenses, in an action to be brought against him by any person, by the claimant, his assignee, or other representative, by reason of the levy upon, detention, or sale of any of the goods or effects, by virtue of the attachment. If the undertaking is given, the officer must detain the goods or effects, as the property of the defendant. Where an undertaking is given to indemnify the sheriff, he must, within two days after the giving of said undertaking, cause the same to be filed in the office of the court out of which the attachment was issued, and serve upon the claimant or his agent, and the attaching creditor or attorney, whose name is subscribed to the warrant of attachment, a copy of said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the attachment was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after the serving of the said notice. For the purpose of justification, each of the sureties upon the undertaking must attend before the judge at the time and place mentioned in the notice, and be examined on oath on the part of the claimant, or his agent or attorney,

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touching his sufficiency, in such manner as the judge, in his discretion, thinks proper. The examination may be adjourned from day to day until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds the sureties sufficient he must annex the examination to the undertaking, endorse his allowance thereon, and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all liability, by reason of the taking and detention of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court in which the same shall be filed shall immediately index the same in the general index book in his office under the title of the suit in which the attachment is issued.

2 R. S. 4 (Part 2, c. 5, tit. 1), § 11.

Amended by chap. 416 of 1877, chap. 98 of 1888, chap. 662 of 1895 and chap. 541 of 1904.

See §§ 810-816, post, General regulations respecting bonds and undertakings.

See § 109, ante, Expenses of trial of title by third person, to property seized by sheriff.

§ 658a. Discharge of personal property from attachment.

If goods or effects, other than a vessel, attached as the property of the defendant, or any portion thereof, are claimed by or in behalf of another person, such claimant may, within five days after the levy of the attachment, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to the whole or a part of the property attached. Upon such an application the claimant must give to the sheriff an undertaking with at least two sufficient sureties who must justify in double the value of the property claimed, as appraised in the inventory of the property attached. The undertaking must be conditioned to the effect that in an action to be brought on the undertaking, the claimant will establish that he was the owner of such goods or effects at the time of the levy thereon; and that in case of his failure to do so, he will pay to the sheriff the full value of the property so claimed with interest from the date thereof together with the costs of the action. Sections 690 and 691 shall apply to an undertaking given as prescribed in this section. Upon such an undertaking being given and after justification of the sureties if required, the court or judge must make an order discharging the property so claimed from the attachment, upon payment by the claimant of the sheriff's fees and necessary disbursements. Thereupon and upon such payment, the sheriff must discharge the same accordingly, notwithstanding that the plaintiff may have given an undertaking as provided in section 658. The court or judge may, upon the application of the plaintiff or of the claimant at any time before the warrant is vacated or annulled, upon notice

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to all parties in interest, direct the sheriff to commence an action upon the undertaking, upon such terms and conditions and under such regulations as it or he deems just. In such an action, the claimant may show, in bar of a recovery, that he was the owner of the said property attached. If judgment passes against the claimant the plaintiff is entitled to recover the value of the said property with interest from the date of the undertaking with the costs of the action. Neither the giving of the undertaking as prescribed in this section, nor the recovery of any judgment thereon, shall affect in any manner, the right, if any, of the defendant in the attachment action in or to the property discharged from the attachment, nor shall this section be construed as affecting or impairing any other right or remedy which any person might otherwise have in respect to the property attached.

Added by chap. 293 of 1904.

§ 677. Plaintiff may bring action in name of himself and the sheriff.

a. The leave of the court, provided for by § 677, to bring the action evidently refers to the court in which the action is brought and not to the court of which the officer who issued the warrant of attachment is a member: Rogers v. Ingersoll, 103 App. Div. 490; 93 N. Y. Supp. 140, aff'd 185 N. Y. 592.

b. **Joint action.**—A sheriff holding an attachment, either alone or jointly with the attaching creditors, is authorized to maintain an action to collect the demand attached, under §§ 655 and 677: Westervelt v. Phelps, 171 N. Y. 212.

c. § 677 permits the attaching creditor and the sheriff to maintain any action which the sheriff should bring alone under § 655, subd. 2: Barton v. Palmer Co., 87 App. Div. 35; 83 N. Y. Supp. 1041.

d. **Insurance policy.**—Money due upon a matured insurance policy, written by an ordinary life insurance company upon the life of a husband, payable to his wife, is subject to a levy under a warrant of attachment issued against the property of the wife in an action brought to recover a debt owing by her: Amberg v. Manhattan Life Ins. Co., 171 N. Y. 314.

e. **Promissory note.**—A levy on a promissory note should be made by the sheriff by taking actual possession of such note and such actual possession is essential to the validity of the levy; where the note at the time of the levy is in the possession of a person who has a lien thereon, the officer need not take the note into his actual physical possession; in such a case it is sufficient for the officer to leave with the person having the custody of the note a certified copy of the warrant of attachment and a notice showing the property attached: Hardon v. Dixon, 91 App. Div. 109; 86 N. Y. Supp. 346.

f. **Foreign corporation.**—A debt due a foreign corporation from a limited partnership, both organized under the laws of another state, having a foreign situs, is not attachable in this state: National Broadway Bank v. Sampson, 179 N. Y. 213, aff'g 85 App. Div. 320; 83 N. Y. Supp. 426.

§ 678. How leave to bring such action procured.

See § 703, post, Rights of junior plaintiff in action by senior plaintiff and sheriff jointly.

See § 704, post, Junior plaintiff may be allowed to commence action jointly with sheriff.

§ 681. Return of inventory; how enforced.

See § 712, post, When sheriff to return warrant and his proceedings.

§ 682. Motion to vacate or modify warrant, or increase security.

See rule 4 (Sup. Ct.), In case of failure to file affidavits upon which it was granted, attachment order may be vacated.

See §§ 767-779, post, Motions and orders generally.

g. **Proof.**—In order to vacate a prior attachment, proof must be made of a subsequent valid levy upon the same property, and this is a necessary condition to the right of the subsequent creditor to take proceedings to vacate a prior attachment: Still Stove Works v. Scott, 62 App. Div. 566; 71 N. Y. Supp. 181.

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a. In an order to secure the benefit of the provisions of this section, the person who acquired a lien in the property after it was attached must show a valid lien upon or interest in the property acquired after the property was attached: Doheny v. Worden, 75 App. Div. 47; 77 N. Y. Supp. 959.

b. **Laches.**—Laches cannot be imputed to a defendant in having failed to move promptly to vacate an attachment, provided her motion is made "before the actual application of the attached property, or the proceeds thereof, to the payment of a judgment recovered in the action:" Story v. Arthur, 35 Misc. 244; 71 N. Y. Supp. 776.

c. § 682 limits the right to move to vacate an attachment to a time before actual application of the attached property, or its proceeds, to the judgment recovered in the attachment action, and therefore where that has been done before the judgment creditor's motion to vacate is heard, it must be denied: Pfluke Co. v. Papulias, 42 Misc. 18.

d. **Undertaking.**—A motion to increase the amount of the plaintiff's original undertaking may be made at any time before the application of the attached property, or its proceeds, to whatever judgment is recovered in the action: Ives v. Ellis, 35 Misc. 333; 71 N. Y. Supp. 971.

e. **Merits.**—The court will not grant a motion to vacate an attachment, made on grounds which involve the merits of the action, but will deny the motion and leave the questions involved for disposition at the trial: Norden v. Duke, 106 App. Div. 514.

f. **Omission.**—The omission of the warrant to state the grounds upon which it was issued is one which may be cured by amendment, even as against a person who acquired a lien after the attachment: King v. King, 68 App. Div. 189; 74 N. Y. Supp. 119.

g. **Non-resident.**—The court has power to issue an attachment on property within the state in an action on contract brought in this state by a non-resident plaintiff against a non-resident defendant; a levy on specific property under such attachment may be set aside and yet the attachment as a writ may stand: Bridges v. Wade, 110 App. Div. 106; 97 N. Y. Supp. 156.

h. When a warrant of attachment based upon an affidavit of the plaintiff upon information and belief and upon two affidavits of positive allegations as to the non-residence of the defendant, will be vacated: Beckermann v. Chambers, 47 Misc. 289.

i. **Damages.**—An attachment granted in an action for false and fraudulent representations should be vacated where the complaint, made a part of the moving papers, does not set forth any legal measure of damages: Downing v. Nelson, 49 Misc. 446.

j. **Stay of proceedings.**—The entry of an order vacating an attachment of the property of a foreign corporation does not annul the warrant of attachment and, upon an appeal from the order, a stay of proceedings is properly granted: Norden v. Duke, 47 Misc. 473; 95 N. Y. Supp. 940.

k. **Affidavit.**—An affidavit that defendant is in custody in default of $2,000 to await the action of magistrate and may be discharged at any time, in which event he will leave this state for the purpose of defrauding plaintiff, is insufficient to bring the case within the provisions of § 3169, and an attachment granted upon such affidavit will be vacated upon motion: Tocci v. Gianvecchio, 48 Misc. 351.

l. **Foreign corporation.**—When an attachment against a foreign corporation will not be vacated because of allegations in the complaint upon information and belief: Lewis v. Tindel Morris Co., 109 App. Div. 509.

m. **Merits.**—When an attachment has been issued in an action for the conveyance of stock and the only doubt as to whether the complaint states a cause of action is as to whether a contract set out therein should be construed as a bailment of the stock or as an absolute transfer thereof, and said contract, on its face, is capable of the former construction, the attachment should not be vacated; the merits of the action will not be considered on a motion to vacate an attachment, and it is incumbent upon the defendant to show that the plaintiff's papers are not hopelessly bad: Jones v. Hygienic Soap Co., 110 App. Div. 331.

§ 683. How motion must be made; opposing it by new proofs.

n. Assuming that a defendant who makes a motion to vacate an attachment, after a judgment has been rendered in the action, is obliged to establish that the attached property has not been applied on the judgment, still, if he makes his motion upon the papers upon which the attachment was granted and on the judgment and does not in the notice of motion limit the purposes for which the judgment may be used, the facts recited in the judgment are available to the plaintiff in support of the attachment: Belmont v. Sigua Iron Co., 80 App. Div. 537.

o. An affidavit, although not sufficiently authenticated to secure its admission in a court in evidence, may properly be considered on a motion to vacate an attachment on the papers upon which it was granted as constituting the source from which the plaintiff derived the information which she alleged in the affidavit: Mallon v. Rothschild, 38 Misc. 8; 76 N. Y. Supp. 710.

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§ 687. Defendant may apply for discharge of attachment.

The defendant may, at any time after he has appeared in the action, apply to the judge who granted the warrant, or to the court, for an order to discharge the attachment, as to a whole or a part of the property attached.

Co. Proc., § 240.
Amended by chap. 507 of 1906.

§ 688. Undertaking to be given.

Upon such an application, the defendant must give an undertaking, with at least two sufficient sureties, to the effect that he will, on demand, pay to the plaintiff the amount of any judgment which may be recovered in the action against him, not exceeding a sum specified in the undertaking, with interest. The sum so specified must be, at least equal to the amount of the plaintiff's demand, as specified in his affidavit; or, at the option of the defendant, equal to the appraised value, according to the inventory, of the property attached; or, if the application is to discharge the attachment, as to a part only of the property attached, to the appraised value of that portion. Upon such application being made after final judgment, the defendant must give the security required to perfect an appeal to the court of appeals from a final judgment, of the same amount or to the same effect, and to stay the execution thereof.

Co. Proc., § 241.
Amended by chap. 416 of 1877 and chap. 508 of 1906.
See §§ 810-816, post, General provisions relating to bonds and undertakings.

a. **Surety's liability.**—The surety upon an undertaking in an attachment is liable for costs and expenses of proceedings to vacate the attachment, including reasonable counsel fees: Tyng v. American Surety Co., 174 N. Y. 166, aff'g 69 App. Div. 137; 74 N. Y. Supp. 502.

§ 690. Sureties to justify if required.

See rule 5 (Sup. Ct.), Justification of sureties.

§ 697. Preferences of two or more warrants.

See §§ 1406-1408, post, Preference of two or more executions.

§ 706. Execution to issue to sheriff who has levied.

See § 1370, post, Requisites of the execution.

§ 708. Judgment in the principal action; how satisfied.

See § 1370, post, Requisites of execution, where a warrant of attachment has been levied by sheriff.

b. **Lien.**—When a judgment is obtained in an action and an execution issued, the effect of the attachment is spent; the sheriff can proceed only under the execution and his right to the possession of the property will depend upon the execution in his hands, the lien acquired by the attachment being preserved only to enable such lien to be enforced under the execution; after the return of the execution wholly unsatisfied, there is no lien upon the property by virtue either of the attachment or the execution: Barton v. Palmer Co., 87 App. Div. 35; 83 N. Y. Supp. 1041; 99 N. Y. Supp. 1127.

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a. **Unliquidated claim.**— § 708, subd. 1, does not authorize a sale by the sheriff of an unliquidated claim of the defendant against his father's estate; when the extent of a defendant's interest in his father's estate is unliquidated and cannot be ascertained until an accounting by the executor, a sheriff bringing an action in aid of an attachment under § 655 cannot have such unliquidated claim applied on the execution. He can only reach that part of the defendant's interest in the estate which has become fixed: Arkenburgh v. Arkenburgh, 114 App. Div. 436.

§ 709. When attachment discharged, etc., property to be restored to defendant.

See § 3307, post, Sheriff's fees.

See § 3342, subd. 12, post, When warrant of attachment is said to be annulled.

b. When a judgment is obtained in an action and an execution issued, the effect of the attachment is spent; the sheriff can proceed only under the execution and his right to the possession of the property will depend upon the execution in his hands, the lien acquired by the attachment being preserved only to enable such lien to be enforced under the execution; after the return of the execution wholly unsatisfied, there is no lien against the property by virtue either of the attachment or the execution: Barton v. Palmer Co., 87 App. Div. 35; 83 N. Y. Supp. 1041.

c. **Bankruptcy.**—The sheriff is entitled to his fees and expenses first, even as against a trustee in bankruptcy: Wilkinson v. Raymond, 80 App. Div. 378; 81 N. Y. Supp. 82.

d. **Poundage.**—Under that section the sheriff is entitled to his poundage and fees on the attachment where his full execution of the writ has been prevented by plaintiff's settlement of the action: O'Brien v. National Conduit & Cable Co., 43 Misc. 327; 87 N. Y. Supp. 131.

e. The sheriff is only entitled to demand poundage when the attachment has been vacated or discharged or the action terminated by settlement or judgment; he is not entitled to allowance of poundage piecemeal: Plummer v. International Power Co., 88 App. Div. 452; 85 N. Y. Supp. 107.

f. § 709 confers no authority upon the court after a discharge of a levy under a judgment to order either party to the action to pay the sheriff's poundage; the court has power to tax the sheriff's fees and the sheriff, if he wishes to collect his poundage, must either hold his levy until the poundage is paid or sue the party to the action for such poundage: Treadwell & Co. v. Mead Mfg. Co., 75 App. Div. 478; 78 N. Y. Supp. 283.

g. Where an attachment is vacated or discharged by order of the court and the service of the sheriff has been fully performed and ended and the whole process has performed its office, the statute gives the right to poundage irrespective of other conditions and then the jurisdiction of the court attaches to require the party liable for poundage to pay the same to the sheriff who has a right to look to the attorney as his immediate employer for his poundage: Gadski-Tauscher v. Graff, 44 Misc. 418; 34 Civ. Pro. R. 25.

h. Under chap. 523 of 1890, § 17, subd. 2, as amended by chap. 418 of 1892, the court has power to fix the sheriff's fees and to make an order requiring the defendant to pay them where the warrant is vacated: Esselstyn v. Union Surety & Guaranty Co., 82 App. Div. 474; 81 N. Y. Supp. 532.

i. **Sheriff's fees.**—After an attachment has been discharged and the attached property returned to the defendant, the court has no authority under this section to order either party to the action to pay the sheriff's fees: Miller v. Miller, 108 App. Div. 310; 95 N. Y. Supp. 763.

j. Although the discharge of an attachment is conditioned upon the payment of the sheriff's fees to be taxed, the sheriff is not entitled to an order under § 17 of chap. 523 of 1890, as amended, requiring the defendant to pay the fees until there has been a final determination as to which party is liable therefor: Jones v. Gould, 119 App. Div. 817.

§ 712. When sheriff to return warrant and his proceedings.

See § 14, subd. 1, ante, Failure of sheriff to make return is contempt of court.

See § 102, ante, Sheriff may make return by mail.

§ 713. Receiver; when appointed.

See § 827, post, A reference may be directed to ascertain facts on an application to appoint a receiver.

See § 1772, post, On failure of husband to pay alimony, etc., his property may be sequestered and a receiver appointed thereof.

See § 1788, post, Receiver may be appointed in an action to dissolve a corporation.

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See § 1801, post, Judgment in an action to annul a corporation must provide for the appointment of a receiver.

See § 1877, post, Receiver may be appointed in a judgment creditor's action.

See § 1947, post, Court may appoint a receiver in an action for an accounting between partners.

See § 2429, post, Receiver may be appointed in proceedings for the voluntary dissolution of a corporation.

See §§ 2464-2471, post, Provisions relating to receiver in supplementary proceedings.

a. In an action brought by a person who had in his possession a quantity of perishable personal property which he had received for storage, against the person who had placed the property in his custody and a firm which had brought an action against him for the conversion of such property, to secure a determination as to the party entitled to the possession thereof, the plaintiff is not entitled to have a receiver of the property appointed *pendente lite*, as under § 713, subd. 1, a receiver of property which is the subject of an action can only be appointed before final judgment when the property is in the possession of a party adverse to the one making the application: La Femina v. Arsene, 72 App. Div. 474; 76 N. Y. Supp. 576.

b. **Supplementary proceedings.**—The receiver appointed in supplementary proceedings is not entitled to notice of an application for the appointment in a foreclosure action of a receiver of the rents and profits, as he is not an adverse party within the meaning of §§ 713 and 714: Grover v. McNeely, 72 App. Div. 575; 76 N. Y. Supp. 559.

c. **Replevin.**—When receiver will not be appointed in an action to recover property alleged to have been taken by wife from her husband; assuming that the receiver may be appointed at some stage of a replevin action, the plaintiff must show first, clearly the necessity of receivership to preserve the property to answer the judgment and that he has exhausted all other available remedies or that they are inadequate: Libby v. Libby, 68 App. Div. 15; 74 N. Y. Supp. 57.

d. **Tort.**—A receiver will not be appointed under § 713 where the action is one in tort to recover damages for false representations as to certain stock, although defendants threaten to sell the stock unless certain conditions are complied with by the plaintiff: Mack v. Stanley, 74 App. Div. 145; 77 N. Y. Supp. 725, rev'd 175 N. Y. 504.

e. **Mortgage.**—When mortgagor, after foreclosure of mortgage, may compel holder of second mortgage, to whom the judgment of foreclosure has been transferred, to assign the judgment and the first bond and mortgage to him and when a receiver may be appointed: Howard v. Robbins, 170 N. Y. 498.

f. When a motion is made to vacate an order appointing a receiver in an action of foreclosure and asking that the moving parties be brought in to defend, the order denying the application should state that the motion was made on behalf of the moving parties, and should be resettled to show that fact: Dewsnap v. Matthews, 118 App. Div. 789.

g. **Stockholder's action.**—When the allegations of the complaint in an action by a stockholder to recover corporate assets alleged to have been fraudulently converted are all made upon information and belief, a receiver *pendente lite* should not be appointed when the answering affidavits specifically deny the allegations of the complaint and state facts which exculpate the defendants from misconduct: Weber v. Wallerstein, No. 2, 111 App. Div. 700.

h. **Postponement.**—Circumstances under which the appointment of a receiver will be postponed pending litigation: Sarasohn v. Kamaiky, 110 App. Div. 713.

i. **Bankruptcy.**—A receiver of the rents and profits of real estate should not be appointed in an action by a trustee in bankruptcy to set aside the conveyance thereof by the bankrupt as in fraud of creditors, when the only *prima facie* evidence of fraud is that the purchaser who has paid full value, was the lawyer of the bankrupt's husband who held her power of attorney, and the purchaser shows that he is financially able to respond to a judgment for the value of said rents and profits: Webb v. Manheim, 109 App. Div. 63.

j. **Dower.**—When a receiver has been appointed to collect and pay over dower and the widow assigns her dower to a third person for the alleged purpose of defeating the collection of a judgment obtained against her in another action, there is no authority for extending the receivership to a third action brought to set aside the assignment as fraudulent: Dolan v. Conlon, 114 App. Div. 570.

k. **Dissolution of partnership.**—A motion for a receiver will be denied under § 713 in an action for the dissolution of an alleged partnership where there is no allegation of fraud, mismanagement or dissipation of assets: Bimberg v. Wagenhals, 53 Misc. 13.

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§ 714. Appointment of receiver; notice of application.

Notice of an application, for the appointment of a receiver in an action, before judgment therein, must be given to the adverse party, unless he has failed to appear in the action, and the time limited for his appearance has expired. But where an order has been made, as prescribed in section 438 of this act, the court may, in its discretion, appoint a temporary receiver, to receive and preserve the property, without notice, or upon a notice given by publication or otherwise, as he thinks proper. But where the action is for the foreclosure of a mortgage, which mortgage provides that a receiver may be appointed without notice, notice shall not be required.

New.

Amended by chap. 416 of 1877, chap. 542 of 1879 and chap 217 of 1903.

See § 827, post, Order may also appoint referee, etc.

See § 1810, post, In an action against a corporation, in certain cases, notice must be given.

a. **Foreclosure.**—The owner of an equity of redemption is an adverse party and an appointment of a receiver of rents in an action to foreclose a mortgage without notice to him is void: Dazian v. Meyer, 66 App. Div. 575; 73 N. Y. Supp. 328.

b. A prior mortgagee is entitled to notice of appointment of receiver of rents in an action to foreclose a subsequent mortgage: Frankenstein v. Hamburger, 73 App. Div. 352; 76 N. Y. Supp. 818.

c. A receiver *pendente lite* cannot be appointed in foreclosure without notice to the owner of the equity of redemption, when not in default, except where an order has been made under § 438 relative to service of the summons by publication or without the state of New York: Coleman v. Goodman, 37 Misc. 517.

d. **Supplementary proceedings.**—The receiver appointed in supplementary proceedings is not entitled to notice of an application for the appointment in a foreclosure action of a receiver of the rents and profits, as he is not an adverse party within the meaning of §§ 713 and 714: Grover v. McNeely, 72 App. Div. 575; 76 N. Y. Supp. 559.

§ 715. Security.

See §§ 729-730, post, Undertakings, when deemed sufficient; amendment.

See § 810 et seq., post, General requisites respecting undertakings.

e. **Surety.**—When a receiver's accounts have been passed upon by the court, an action will not lie upon his bond if viewed simply as a statutory obligation, unless it appears that the surety was given notice of such accounting, as is required by § 715; if the surety did not receive such notice the complaint should be dismissed, but not upon the merits: Stratton v. City Trust, Safe Deposit & S. Co., 86 App. Div. 551.

f. **Matrimonial action.**—§ 715 in regard to the appointment of a receiver in an action or special proceeding applies to the receiver in a matrimonial action and an order appointing a receiver in such an action, which does not require him to give bond, is not void but merely voidable: Matter of Spies, 92 App. Div. 175.

§ 717. Court may order a deposit or delivery of property in certain cases.

See § 743 et seq., post, Payment of money into court.

§ 721. Defects cured by verdict, etc., and by judgment.

See § 783, post, Relief when the time in which a proceeding must be taken has expired.

g. The court may correct mistakes in judgments where the error is merely clerical or ministerial, and not judicial: Tilley v. Coykendall, 69 App. Div. 92; 74 N. Y. Supp. 631, aff'd 172 N. Y. 587.

h. **Title.**—Defects in the title of a petition for the appointment of a guardian *ad litem* and of the venue of an affidavit used therefor may be cured *nunc pro tunc:* Baumeister v. Demuth, 84 App. Div. 394; 82 N. Y. Supp. 831, aff'd 178 N. Y. 630.

i. **Order of reference.**—When an order of reference is a nullity by reason of the fact that it was made at special

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term by a justice, who, at the time, had been appointed to the appellate division, but such reference has been had on stipulation and without objection at the hearing, and the referee has ordered judgment, the court may make an order appointing such referee and enter the same *nunc pro tunc:* Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

a. **Condemnation proceedings.**—A petition in condemnation proceedings which wrongly describes property, may, under § 721, made applicable by § 3368, be amended so as to properly describe the premises: Matter of Lake Shore & Michigan S. R. R. Co., 53 Misc. 340.

§ 722. Such defects to be supplied.

b. When an order of reference is a nullity by reason of the fact that it was made at special term by a justice who, at the time, had been appointed to the appellate division, but such reference has been had on stipulation and without objection at the hearing, and the referee has ordered judgment, the court may make an order appointing such referee and entered the same *nunc pro tunc:* Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

§ 723. Amendments by the court; disregarding immaterial errors, etc.

See § 1018, post, The referee has the same powers in regard to amendments, etc., as the court has upon trial.

c. **Name.**—The court has power, and it is its duty under this section and § 723, to amend by an *ex parte* order the name of the owner of premises in the papers in an action to foreclose a mortgage on said premises, where the summons and complaint have been served on said owner even though said owner has not appeared and answered: Stuyvesant v. Weil, 167 N. Y., 421; 32 Civ. Pro. R. 127, rev'g 41 App. Div. 551; 58 N. Y. Supp. 697.

d. An amendment should be allowed to a summons and complaint to state the true name of the defendant corporation; in such a case the amendment should be permitted upon the payment of costs: Ward v. Terry & Tench Construction Co., 118 App. Div. 80.

e. An amendment at trial changing one letter of plaintiff's name as written in the summons and complaint, is merely formal to conform the pleadings to the proof, and does not change the cause of action: Mitterwallner v. Supreme Lodge, 109 App. Div. 70.

f. In an action upon an assigned claim for medical services rendered to dedefendant's mother at a sanatorium upon his request, the court may, under § 723, allow the plaintiff to amend by changing the name of his assignor: Thompson v. Young, 53 Misc. 250.

g. **Referee.**—The only limitation upon the authority of the referee to permit an amendment is that the amendment shall not change substantially the cause of action or embrace a new one: Perry v. Levenson, 82 App. Div. 94; 81 N. Y. Supp. 586.

h. A referee appointed to hear and determine, has, upon the trial of an action, power to permit amendments to the complaint provided the amendment does not substantially change the cause of action: Barnum v. Williams, No. 1, 91 App. Div. 464; 86 N. Y. Supp. 821.

i. The court has no power to direct a referee to decide a case one way or another or to change his report after it has been made; nor can it permit him to make a new report for the purpose of correcting a mistake inadvertently made therein unless the mistake is clearly and satisfactorily shown by competent evidence: Deagan v. King, 83 App. Div. 428; 82 N. Y. Supp. 817.

j. **Bond.**—Where a bond, served by the plaintiff in a taxpayer's action at the time of the commencement of the action, is defective, the court has power, after the trial and before the decision is signed, to make an order upon notice permitting the plaintiff to file a proper bond *nunc pro tunc:* O'Connor v. Walsh, 83 App. Div. 179; 82 N. Y. Supp. 499.

k. Where it appears that the order appointing a receiver in proceedings supplementary to execution erroneously provides that the receiver's bond shall be filed with the clerk of the county of New York, instead of with the clerk of the city court of New York, where the bond is actually filed, the court has power under § 723 during the trial of an action subsequently brought by the receiver, to amend the order for the filing of the bond *nunc pro tunc:* Boynton v. Sprague, 100 App. Div. 443; 91 N. Y. Supp. 839, aff'd 183 N. Y. 505.

l. **Affidavits.**—On the hearing of a motion to vacate a warrant of attachment, the court has no power under § 723 to amend the affidavits on which the warrant was procured, but the court on such a motion may amend the warrant to conform to the affidavits or allow the affidavits to be withdrawn and new ones substituted: Davis v. Reflex Camera Co., 97 App. Div. 73.

m. The fact that a certificate of authentication made by the clerk of a court of another state, attached to an

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affidavit used on a motion for a bill of particulars, described the affidavit or deposition as an acknowledgment, may be disregarded under § 723: Spencer v. Fort Orange Paper Co., 74 App. Div. 74; 77 N. Y. Supp. 251.

a. The court has power under § 723 to allow the omission of the venue from an affidavit upon which an attachment was granted to be supplied by amendment; in any event the venue of an affidavit is only *prima facie* evidence of the place where the affidavit was sworn to: Fisher v. Bloomberg, 74 App. Div. 368; 77 N. Y. Supp. 541.

b. **Decision.**—In an action in equity, after judgment has been entered on findings of fact and conclusions of law, the court has no power under § 723 to make amendments altering the decision on the merits and changing the substantial rights of the parties, as § 723 only gives the court the right to make such amendments as do not affect the merits: Dunscomb v. Poole, 41 Misc. 335; 84 N. Y. Supp. 749.

c. The court has power under § 723 to amend a decision and judgment by striking therefrom words used to describe real estate and inserting therein words properly describing such property: Morrison v. Metropolitan Elevated R. Co., 60 App. Div. 180.

d. **Verdict.**—The power of the court to amend a verdict in a substantial manner is limited to the term of the court at which the verdict was rendered; there is no express provision that gives the special term power to change the record of the trial term: Duerr v. Consolidated Gas Co., 104 App. Div. 465.

e. In an action for damages for injury to a scow by defendants who chartered and used it contrary to the provisions of the contract, the damages are unliquidated and the plaintiff is not entitled to amend a verdict, which is "for the full amount" by adding interest thereto: Bleakley v. Sheridan, 115 App. Div. 657.

f. **Pleading.**—A pleading will be deemed to have been amended in accordance with the facts for the purpose of appeal: Brighton v. Claflin Co., 84 App. Div. 557; 82 N. Y. Supp. 667.

g. The court is authorized to allow an amendment consisting of inserting "an allegation material to the case without materially changing the cause of action alleged:" Smith v. Donnelly, 93 App. Div. 569; 87 N. Y. Supp. 893.

h. The service of an amended pleading destroys the original issue and necessitates a new notice of trial and a new note of issue; this requirement cannot be annulled by a stipulation between the attorneys unless an order is entered in accordance with the provisions of § 723, allowing the amendment but dispensing with a new notice of trial and a new note of issue: Woollett v. Seamen's Bank for Savings, 36 Misc. 494; 73 N. Y. Supp. 1005.

i. Under § 723 the court is authorized to conform the pleading or other proceeding to the facts proved, and where the facts proved would justify a verdict for negligence or for an assault, the plaintiff is entitled to go to the jury upon the question thus presented: Willis v. Metropolitan Ry. Co., 76 App. Div. 340; 33 Civ. Pro. R. 199; 78 N. Y. Supp. 478.

j. Where there is a variance between the pleading and the proofs and the evidence was admitted without an objection the court may properly consider the pleading to have been amended in accordance with the proof as provided in § 723: Leiser v. McDowell, 69 App. Div. 444.

k. **Complaint.**—In an action for an accounting by an executor, the court may, under this section, permit the plaintiff to amend her complaint by alleging facts which she considers necessary under a recent decision of the court of appeals: Meeks v. Meeks, 79 App. Div. 49; 79 N. Y. Supp. 718.

l. Amendment of a complaint after a judgment absolute for the plaintiff, entered on an appeal to the court of appeals from an order granting a new trial should be on terms: Wood v. N. Y. C. & H. R. R. Co., 100 App. Div. 226.

m. It is improper for the court upon the trial to allow the plaintiff to amend his complaint in an action for negligence alleging negligence in the construction of a passageway particularly where the court refuses after such amendment to allow the defendant to withdraw a juror: McDonald v. Holbrook, Cabot & Daly Co., 105 App. Div. 90; 93 N. Y. Supp. 920.

n. The court has no power under § 723 after judgment to allow an amendment of the summons and complaint by designating the defendant in his representative rather than in his individual capacity: United Press v. Abell Co., 73 App. Div. 240; 76 N. Y. Supp. 692.

o. Complaint in an action, to recover damages for personal injuries amended under the provisions of § 723 to conform to the proof of plaintiff and her witness: Dorff v. Brooklyn Heights R. R. Co., 95 App. Div. 82; 88 N. Y. Supp. 463.

p. Under § 723 the court has power on a trial of the action to allow the complaint to be amended by inserting in the allegation all the terms of a contract sued upon and certain words which do not change the cause of action; an amendment of a complaint radically changing the cause of action will not be allowed at the trial: Rosseau v. Rouss, 91 App. Div. 230; 86 N. Y. Supp. 497.

q. The court has no power under § 723 to amend the complaint on the trial of an action so as to make it conform to the proof when such amendment would change the nature of the action from one for negligence to one for assault: Block v. Third Avenue R. R. Co., 60 App. Div. 191; 69 N. Y. Supp. 1107.

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a. A complaint may properly be amended by changing the date of the contract in question, and where such an amendment is allowed upon the trial of an action after defendant's counsel had stated that he did not know that he would be taken by surprise, a motion under § 724 to set aside the judgment on the ground of surprise is properly denied: Carlisle v. Barnes, No. 2, 102 App. Div. 582.

b. Under § 723 the court has no power to allow the plaintiff to amend his complaint for goods sold and delivered to conform to facts showing that the goods were sold and delivered to a third person, as such an amendment would change substantially the nature of the action: Cox v. Halloran, 64 App. Div. 550; 72 N. Y. Supp. 302.

c. In an action at law for a money judgment where a party elects to sue one only of parties jointly liable on a contract and the defendant demurs to the complaint upon the ground that the other parties liable have not been joined, the court has power to allow an amendment bringing in the other parties if the plaintiff show an adequate excuse for not joining them and the defendants will not be prejudiced especially when the plaintiff might not be entitled to sue the original defendant alone: Haskell v. Moran, 118 App. Div. 810.

d. In an action under § 1937 to charge a joint debtor not personally served in a prior action, a motion to amend the complaint at trial to show that the defendant was not served in the prior action should be granted when it is manifest that the plaintiff attempted to state a cause of action under the section. But a failure of the court to grant such proper amendment does not entitle the defendant to a reversal of judgment for the plaintiff: Hofferberth v. Nash, 117 App. Div. 284.

e. When a motion to amend a complaint by adding a party defendant has been denied without leave to renew the motion, a second motion brought without leave will be denied; however, when it appears that the defendant as administrator of a deceased partner, did not demur to the first complaint because of a failure to join the surviving partner as party defendant, but does demur to an amended complaint on the ground of defect of parties, the court should grant a further amendment bringing in the surviving partner as defendant: Haskell v. Moran, 117 App. Div. 251; 102 N. Y. Supp. 388.

f. An amendment of the complaint against a surety on the receiver's bond is properly allowed under § 723, such amendment consisting of an allegation that the receiver appropriated to his own use certain property of the firm of which he was appointed receiver: Stratton v. City Trust, etc., Co., 69 App. Div. 322; 74 N. Y. Supp. 670.

g. Where a complaint is defective upon its face and the defendant serves an answer denying plaintiff's right to recover upon the merits, the special term may, under § 723, even after the case has been placed on the day calendar for trial, permit the plaintiff to amend when it appears that the defendant will not be surprised by the amendment; the plaintiff should be required in such a case to pay ten dollars costs of the motion: Mooney v. Valentine, 79 App. Div. 41; 79 N. Y. Supp. 698.

h. The court at special term has power under § 723 to allow the summons and complaint to be amended before trial so as to designate a defendant in his representative instead of in his individual capacity: Alker v. Rhoads, 73 App. Div. 158; 33 Civ. Pro. R. 122.

i. **Answer.**—An answer cannot be amended by inserting for an allegation "that twenty years elapsed before the answer was served" the words "before the commencement of this action:" Seaman v. Clarke, 60 App. Div. 416; 69 N. Y. Supp. 1002.

j. Where an answer made upon information and belief was stricken out as sham and judgment entered thereon, the judgment should be opened and no terms should be imposed thereon: Hopkins v. Meyer, 76 App. Div. 365; 78 N. Y. Supp. 459.

k. A defendant on the substitution of attorneys should be allowed to amend his answer so as to show that the contract sued upon had been waived by the plaintiff, unless the amendment will work prejudice to the adverse party or the trial be delayed; as a general rule a party to an action ought to be permitted to put his pleading in such shape as will enable him to raise and have determined at the trial every question affecting his interest in the subject-matter of the litigation: Washington Life Ins. Co. v. Scott, 119 App. Div. 847.

l. When the amendment of an answer of a corporation merely enlarges the original defense and puts it in proper shape to present the questions raised, no affidavit by the officers of the company is required, as the necessity for the amendment is a question to be determined by counsel: Murtagh v. Kingsland Brick Co., 119 App. Div. 286.

m. When in an action there is a dispute as to the meaning of a contract involved, the defendant should be allowed to amend the answer so as to ask a reformation of the contract conforming it to the intention of the parties; when the effect of the granting of such amendment will be to take the case from the calendar and delay the trial, the amendment should be conditioned upon the payment of all costs to date: Nat. Gun & Mica Co. v. Century P. & W. P. Co., 117 App. Div. 267.

n. **Supplemental answer.**—A supplemental answer setting up justification should be allowed where the truth of the facts alleged is learned only after the

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original answer is served: Canale v. Press Pub. Co., 61 App. Div. 143; 70 N. Y. Supp. 450.

a. A defense arising after the service of the answer can only be interposed by leave of court and should be in the form of a supplemental answer. Such defense cannot be set up by an amendment as of course: Glam v. Sullivan, 117 App. Div. 235.

b. **Title.**—The special term has power to strike out from the title of an action the words "as substituted trustee under the will of ——": Boyd v. U. S. Mortgage & Trust Co., 84 App. Div. 466; 82 N. Y. Supp. 1001.

c. The fact that a defendant was named in the copy summons served upon him as Alfred R. Joslin instead of Alfred R. Goslin is not a ground for the vacation of a judgment entered in the action by default, where he is correctly named in the original summons, and in papers for his arrest served at the same time, and it is evident that the defendant was not misled by reason of the mistake: Holman v. Goslin, 63 App. Div. 204; 71 N. Y. Supp. 197.

d. The court has power and it is its duty under this section and § 721 to amend by an *ex parte* order the name of the owner of premises in the papers in an action to foreclose a mortgage on said premises, when the summons and complaint have been served on said owner even though said owner has not appeared and answered: Stuyvesant v. Weil, 167 N. Y. 421; 32 Civ. Pro. R. 127, rev'g 41 App. Div. 551; 58 N. Y. Supp. 697.

e. **Judgment.**—A judgment for the defendants for costs will not be vacated where the defendant's witnesses had scattered, the plaintiffs have become insolvent and the correspondence between the parties had been lost: Conant v. American Rubber Tire Co., 37 Misc. 129; 74 N. Y. Supp. 409.

f. When the court has not power to amend a judgment under this section: Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, mod'g 94 App. Div. 612; 88 N. Y. Supp. 1094.

g. The supreme court has power, in order to obviate possible difficulties arising from the birth of a child to one of the parties defendant pending the submission of an application for final judgment in an action, and the granting of such final judgment, to direct that such final judgment be entered *nunc pro tunc* as of the time of the submission of the application: Jewett v. Schmidt, 108 App. Div. 322; 95 N. Y. Supp. 631, aff'd 184 N. Y. 608.

h. A final judgment must follow the terms of an interlocutory judgment and should be amended to do so: Reilly v. Freeman, 109 App. Div. 4; 95 N. Y. Supp. 1069, aff'd 184 N. Y. 610.

i. The court has power, independent of statute, to modify its orders and judgments and may exercise it in behalf of one in whose favor an order or judgment was entered: Weston v. Citizens National Bank, 88 App. Div. 330; 84 N. Y. Supp. 743.

j. **Warrant of attachment.**—The court, where it has acquired jurisdiction and issued a warrant of attachment, has power under § 723 to amend the warrant *nunc pro tunc* so it will show the ground upon which it was granted: King v. King, 68 App. Div. 189; 74 N. Y. Supp. 119.

k. **Order.**—Under § 723 it is proper to amend a final order which overstates the amount of rent due, and the mere fact, that the final order overstates the amount due, does not entitle the injured party to have the order reversed on appeal where he did not offer to pay the amount due or give an undertaking to pay the same: Stelle v. Creamer, 69 App. Div. 296.

l. Where, in an action for a voluntary dissolution of a corporation, a return day is mentioned in the copies of an order to show cause, but no such return day is in the original order, the court has power under §§ 723 and 724 to allow an amendment *nunc pro tunc* by inserting the same return day in the original order: Matter of Quo Vadis Amusement Co., 82 App. Div. 240.

m. An order for the examination of a party before trial, which improperly provides that the defendant appear before a referee in Schuyler county, instead of New York county, in a part of the order relating to adjournments easily separable from the rest of the order and which may be expunged without impairing its validity and completeness, should be amended by striking out that part of the order upon the hearing of a motion to vacate it: Muller v. City of Philadelphia, 55 Misc. 30.

n. **Affidavit of service.**—The court may amend an affidavit of service of notice of trial which does not allege that it was enclosed in a wrapper: Goodwin v. Goodwin, 72 App. Div. 529; 76 N. Y. Supp. 661.

o. **Proofs.**—The pleadings will, for the purpose of sustaining judgment, be deemed to have been amended in harmony with the proofs: Liekens v. Staten Island Midland R. Co., 64 App. Div. 327; 72 N. Y. Supp. 162.

p. In an action upon a bank check, where the complaint does not contain allegation that payment was stopped, but the fact that the drawer stopped payment was proved without objection on the trial, the complaint should be made to conform to the proof: Scanlon v. Wallach, 53 Misc. 104.

q. When on a former trial the complaint is amended to conform to the proof by a formal amendment set out in the record changing the date of the execution of a contract, but no formal order is entered and no amended complaint is served, the plaintiff is entitled on another trial

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to have the benefit of the former amendment, although the record does not show that it was allowed to conform the complaint to the proof: Stannard v. Reid & Co., 118 App. Div. 304.

a. Under the provisions of this section, the court has power to amend a complaint, although it changes the cause of action and substitutes another belonging to the same class, where the result sought to be reached is the same and the amendment does not affect the substantial purpose of the action: Rubin v. Maine Steamship Co., 51 Misc. 655.

b. **Substitution.**—The court has no power under § 723 to make an order substituting a corporation as defendant in place of an individual, the president thereof, where the statute of limitations was a bar to the maintenance of an independent action against the corporation: Licausi v. Ashworth, 78 App. Div. 486; 79 N. Y. Supp. 631.

c. **Third party.**—The power of the supreme court to compel a plaintiff to bring into an action a third party upon his own application must be exercised only in the instances and subject to the requirements of the second sentence of § 452, the general powers conferred upon courts by § 723 being nothing more than a declaration of the inherent powers of the supreme court: Draper v. Pratt, 43 Misc. 406.

d. The court has power under § 723, even after an action is at issue and placed upon the calendar against two tort feasors, to grant on motion of the plaintiff to make a third joint tort feasor a party defendant and to compel the plaintiff to serve a supplemental summons and an amended complaint upon such additional defendant: Schun v. Brooklyn Heights R. R. Co., 82 App. Div. 560; 81 N. Y. Supp. 859.

e. Where several persons are jointly liable and a suit is brought against a part only of the persons so liable, the court has power under § 723 to amend the process, pleading or proceedings by bringing in the omitted parties: Boyd v. United States Mortgage & T. Co., 84 App. Div. 413 at 422.

f. An order bringing in a third party as an additional defendant in an action to recover money damages for personal injuries, which is made without notice to such party, is improper. Although § 723 gives to the court the power to amend pleadings by adding the name of a party, it does not authorize the above order and § 452 relates primarily to equitable actions: Horan v. Bruning, 116 App. Div. 482.

g. **Relief.**—The court should not permit one to set up a cause of action requiring equitable relief, and when he has failed to establish a right of such relief, to retain the case for the purpose of granting relief to which he is not entitled under his pleadings or his proof, either in law or equity: Bellinger v. German Ins. Co., 95 App. Div. 262; 88 N. Y. Supp. 1020.

h. **Mandamus.**—Amendments of a judgment cannot be required by mandamus as it is not within the purview of § 723: Matter of Kling, 60 App. Div. 512; 69 N. Y. Supp. 962.

i. Where mandamus proceedings have been instituted against the commissioners of a department of a municipal government to secure the reinstatement of the relator and the respondent ceases to be the commissioner of such department, the proceedings are abated; the relator is not entitled under §§ 723, 755, 756, 1930 or 1997 to have the respondent's successor substituted as respondent, but his remedy is to make a demand for reinstatement upon the successor and to institute a new mandamus proceeding if such successor refuses to reinstate him: People ex rel. Hatch v. Lantry, 88 App. Div. 583; 85 N. Y. Supp. 193.

j. **Appellate division.**—Where no application for an amendment of the complaint was made to the trial judge, although the question of the sufficiency of the complaint was seasonably raised, the appellate division will not exercise its power to amend the complaint in order to sustain judgment in favor of the plaintiff: Thrall v. Cuba Village, 88 App. Div. 410; 84 N. Y. Supp. 660.

k. The granting by the appellate division, upon payment of certain costs, of leave to apply to the court below to open a default, should not be taken by the court below as an intimation that the appellate division is of the opinion that the default should be opened: Csatlos v. Metropolitan St. R. Co., 67 App. Div. 459; 73 N. Y. Supp. 981.

l. **Conversion.**—Where a case is tried upon the theory of an action for conversion, the judgment in trover must be supported by the same proof that was necessary under common law: Wamsley v. Atlas Steamship Co., 168 N. Y. 533.

m. **Replevin.**—Where, at the commencement of a replevin action and the levy under the writ, a third party files a claim to the property with the sheriff, the plaintiff is not entitled to have, over the objection of the third party, the third party brought in as party defendant: Goldstein v. Shapiro, 85 App. Div. 83; 82 N. Y. Supp. 1038.

n. In an action of replevin, where the proof showed a joint ownership of the property in question in the plaintiff and defendants and judgment was rendered in conformity with such facts, upon appeal by plaintiff, the answer, which alleged individual ownership in the defendants, will be amended to conform to the proof, and the judgment will be affirmed: Alexander v. Harkin, 53 Misc. 317.

o. **Terms.**—An order should not be granted amending the complaint "without prejudice to the proceedings already had" — terms should be imposed on

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payment of all costs subsequent to the service of the complaint: Lindblad v. Lynde, 81 App. Div. 603; 81 N. Y. Supp. 351.

a. **Municipal court.**—§ 723, which, by subd. 6 of § 3347, is made applicable to all courts, was not intended to limit the broad powers of amendment of pleadings conferred upon municipal courts by § 2944, but, on the contrary, to make their powers of amendment more definite: Shirtcliffe v. Wall, 68 App. Div. 375; 74 N. Y. Supp. 189.

b. **Divorce.**—In an action for divorce where the evidence was received without objection, a pleading may for the purpose of supporting the judgment be deemed to have been amended: Harris v. Harris, 83 App. Div. 123; 82 N. Y. Supp. 568.

c. An interlocutory decree of divorce may not be filed *nunc pro tunc;* but sufficient cause being shown, it may be filed forthwith: Townsend v. Townsend, 50 Misc. 277.

d. **Attorney.**—In an action by an attorney against his client for services, it is proper to allow the attorney to prove services beyond the dates fixed in the complaint: Clifford v. Braun, 71 App. Div. 432; 75 N. Y. Supp. 856.

e. **Notice of intention to sue.**—The court should permit an amendment of the complaint to the effect that the notice of intention to sue was given the corporation counsel prior to the commencement of the action: Shaw v. City of New York, 83 App. Div. 212; 82 N. Y. Supp. 54.

f. **Negligence.**—In an action for negligence the plaintiff should be allowed to amend his complaint to show that the accident was the result of careless and negligent management of the car, where the complaint originally charged general negligence: Williams v. N. Y. & Queens Co. R. Co., 97 App. Div. 133; 89 N. Y. Supp. 669.

g. **Discretion.**—An allowance of an amendment to a pleading is generally a matter within the discretion of the special term and such discretion, while reviewable, will not be disturbed on appeal, unless it clearly appears that it has been improperly exercised: Sun Printing & Pub. Assn. v. Abbey Salt Co., 62 App. Div. 54; 70 N. Y. Supp. 871.

h. **Limitations.**—The only limitation upon the power of the court to allow an amendment of a pleading upon the trial by conforming it to the facts proved is that the amendment shall be in furtherance of justice and shall not change substantially the claim or defense: Boyee v. International Paper Co., 108 App. Div. 94.

i. **Unauthorized amendment.**—An order amending a complaint by inserting an allegation that defendants wrongfully discharged plaintiff's assignor, made by suggestion on the record without requiring plaintiff to serve any amended complaint, is unauthorized and erroneous: Abrahams v. Finkelstein, 49 Misc. 448.

j. The fact that the court has the power to change the issue by allowing an amendment to the answer, does not confer power upon it to authorize a withdrawal of the sum paid into court as an incident to its right to permit such amendment and necessary to make it effective: Mann v. Sprout, 185 N. Y. 109.

k. **Summons.**—Where an order cannot be made *nunc pro tunc* to supply a jurisdictional defect by requiring to be done something which has not been done, such order may be so corrected when the thing has in fact been done; the title of a purchaser of real estate on foreclosure is not unmarketable because the order of publication of the summons required "notice of the object of the action" to be served instead of the complaint as required by § 440, if in fact the complaint was served together with such notice of object of action and the order of publication was thereafter corrected and filed *nunc pro tunc:* Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578; 98 N. Y. Supp. 496.

l. A summons may be amended under this section: Jones v. Conlon, 48 Misc. 172.

m. **Supplemental summons.**—When a plaintiff sues to enjoin the defendant from operating an elevated railroad and for the damage to the plaintiff's premises caused thereby, and subsequent to the action the defendant leased its road to another company, a motion for leave to serve a supplemental summons bringing in the lessee should not be denied: Farley v. Manhattan Railway Co., 117 App. Div. 248.

n. **Costs.**—A motion by plaintiff a year and a half after the service of the answer to amend the complaint making the action against the defendant personally instead of as executor may properly be granted, but only upon payment of costs accruing up to the time of the amendment: Rankin v. Bush-Brown, 108 App. Div. 294.

o. Where an intervening plaintiff moves to bring in a new defendant, which motion is opposed by the original plaintiff, the court in its discretion may decide between the conflicting interests of the co-plaintiffs and bring in a new defendant if he is the property party; but the plaintiff who objects should be secured against costs if the defendant brought in be successful, and the moving party should be required to give a bond to indemnify him: Weed v. First National Bank, 117 App. Div. 340.

p. Leave to amend a complaint after the withdrawal of a juror should be conditioned on payment by the plaintiff of all taxable costs to the date of the motion to amend, with ten dollars costs of that motion: Palazzo v. Degnon-McLean Cont. Co., 115 App. Div. 172.

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a. It is proper for the court to allow the service of an amended complaint which changes the action from one to recover on a contract to one to recover for a breach thereof, but such amendment should be on the condition that plaintiff pay costs to date of the amendment: Dunham v. Hastings Pavement Co., 109 App. Div. 514.

b. When a defendant, as a condition for leave to amend his answer, has been ordered to pay plaintiff's costs and disbursements to date, and has paid the same, the plaintiff, though successful on the trial is not entitled again to tax the disbursements paid, nor is he entitled to tax the costs of prior appeals which have been paid, but he is entitled to tax the costs before and after notice of trial, with term fee and costs of all subsequent proceedings: Grant v. Pratt & Lambert, 110 App. Div. 149.

c. When the appellate division has reversed an order allowing costs out of the estate to unsuccessful contestants of a will in an action under this section, such costs should be stricken out of the judgment on a subsequent motion therefor; striking out such costs is not an amendment or correction of the judgment in a material matter which can only be affected by appeal: Carolan v. O'Connell, 109 App. Div. 700.

d. **Employers' Liability Act.**—A failure to plead and prove facts bringing a cause of action within the Employers' Liability Act bars a recovery thereunder, although it is alleged that the required notice was filed, and the complaint cannot be amended to show such recovery after a motion to dismiss has been granted: Sutherland v. Ammann, 112 App. Div. 332.

e. A complaint in an action under § 1902 may be amended so as to set out the fact that the notice required by the Employers' Liability Act was served on the defendant: Miller v. Erie R. R. Co., 109 App. Div. 612.

f. **Services.**—Where, in an action to recover for services rendered as attorneys, the answer sets up as a defense that the contract upon which the action was founded was intended to apply to certain transactions only and not to all future transactions, the defendant should be allowed to amend his answer by setting up substantially the same matter as a counterclaim, though the case has appeared on the day calendar, but upon conditions: Sackett v. Milholland, 49 Misc. 439; 99 N. Y. Supp. 948, aff'g 110 App. Div. 893.

g. **Trustee.**—The city court of the city of New York has power by amendment to turn an action against defendants as trustees to one against them as individuals, but both the summons and complaint should be amended; an amendment to the complaint alone is ineffectual: Southack v. Gleason, 49 Misc. 445.

h. The supreme court has power under this section to permit the amendment of the summons and complaint in an action of negligence by changing the designation of the defendant from trustee to that of an individual: Boyd v. U. S. Mortgage & T. Co., 187 N. Y. 262, aff'g 110 App. Div. 866.

i. **Service by publication.**—When an order for the service of a summons on a non-resident by publication with the papers on which it was granted has been delivered for the purpose of filing to a special deputy clerk appointed by the justices of the first department of the appellate division, under the authority of chapter 533 of 1895, such clerk's failure to file the same in the county clerk's office does not invalidate the service; such papers may be filed *nunc pro tunc* to correct the record: Fink v. Wallach, 109 App. Div. 718; 96 N. Y. Supp. 543.

j. **Reference.**—When an order of reference is a nullity by reason of the fact that it was made at special term by a justice who at the time had been appointed to the appellate division, but such reference has been had on stipulation and without objection at the hearing, and the referee has ordered judgment, the court may make an order appointing such referee and enter the same *nunc pro tunc:* Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

k. **Performance.**—When plaintiffs have been allowed to amend their complaint so as to set up a new cause, alleging substantial performance instead of complete performance of a building contract, and such amendment was conditioned on the payment of "all costs and disbursements subsequent to the service of the complaint herein," etc., they are not entitled to tax costs of the former action, although the judgment in their favor was reversed with "costs to abide the final award of costs:" Rowe v. Gerry, 109 App. Div. 156.

l. **Partnership.**—When a partnership has contracted to sell and deliver a certain quantity of coal at a stated price, and when at a time when said contract is partly performed the partnership is dissolved by the retirement of one partner and a new partnership is formed, which new partnership, after a few deliveries, refused to complete said deliveries as agreed in the original contract, there can be no recovery from the vendee by the new partnership on the original unperformed contract of the old firm, and in such an action it is error to refuse to allow the vendee to amend his answer so as to set up the breach of said contract: Piper v. Seager, 111 App. Div. 113.

m. **Specific performance.**—In an action for specific performance it is not error to refuse to allow an amendment to the complaint to enable the plaintiff to recover for the erection of a building as for a *quantum meruit* when no evidence has been introduced showing the

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value of the work done and materials furnished: Flanders v. Rosoff, 111 App. Div. 1.

a. **Director.**—Where, in an action against a director of a corporation based upon the failure of the defendant to file an annual report, the complaint states a cause of action for breach of contract and the proof shows a cause of action based on rescission of the contract, the pleadings cannot be conformed to the proof, even though the defendant was probably not misled: Hill v. Weidinger, 110 App. Div. 683.

b. **Variance.**—The trial court has no power to conform the pleadings to the proof where the variance was pointed out by motion to dismiss at the close of plaintiff's case; an earlier objection to the proof is unnecessary to protect the defendant's rights: Florito v. Interurban Street Ry. Co., 48 Misc. 614.

c. **Supplemental complaint.**—When, pending an appeal in an action brought to recover certain securities, they become valueless, the plaintiff should be allowed to serve a supplemental complaint alleging that fact and asking judgment for the value of the securities at the time the demand was made therefor: Central T. Co. v. W. India Co., 109 App. Div. 517.

d. **Mortgage.**—In an action in equity, a complaint setting out that a mortgage on defendant's premises which was an offset against plaintiff's claim was paid may be amended so as to set up the fact that the defendant was estopped from setting up the validity of the mortgage as against the plaintiff: Deering v. Schreyer, 110 App. Div. 200; 97 N. Y. Supp. 14, rev'd 185 N. Y. 560.

e. **Notice.**—An order allowing an amendment of a summons and complaint to bring in additional defendants, in an action to set aside a conveyance as in fraud of creditors, can only be made on notice to defendants who have already answered; an *ex parte* order is irregular and cannot be confirmed *nunc pro tunc:* Luckey v. Mockridge, 112 App. Div. 199; 98 N. Y. Supp. 335.

f. An amendment of a summons and complaint for misnomer of the defendant can only be made upon notice to the real defendant intended to be sued: Levick v. Niagara Home Tel. Co., 52 Misc. 290.

g. An error in a notice to a municipal corporation of an injury received by the plaintiff by a fall on an icy sidewalk cannot be amended upon the trial under this section: Kleyle v. City of Oswego, 109 App. Div. 330.

h. **Insertion.**—The power to amend a complaint given by the Code relates to the insertion of allegations of fact existing at the time of the commencement of the action: Harowitz v. Goodman, 112 App. Div. 13; 98 N. Y. Supp. 53.

i. Ordinarily a party will not be permitted to amend a pleading for the purpose of setting forth facts of which he had full knowledge when the pleading was drawn, unless the failure to set them forth is satisfactorily excused: Jacobs v. Mexican Ref. Co., 115 App. Div. 499.

j. **Breach of contract.**—A cause of action for "breach of contract" may be changed by amendment of the complaint to one for "moneys had and received:" Devery v. Winton Motor Car Co., 49 Misc. 626.

k. **Good faith.**—Motion to amend answer denied when in breach of good faith: Muller v. City of Philadelphia, 49 Misc. 323.

l. **Adjudication.**—The allowance of an amendment to a complaint is not an adjudication as to the materiality or effect of evidence that may be introduced thereunder, and thus the new allegations will not be stricken out as immaterial or irrelevant if they relate to the cause of action stated in the complaint: Michigan St. Co. v. Am. Bonding Co., 109 App. Div. 55.

m. **Verification.**—When, on motion of the plaintiff, a portion of the defendant's answer is stricken out and the defendant is allowed to serve an amended answer within ten days, but owing to the illness of the defendant his attorney is unable to secure verification of the amended answer in time, the plaintiff will be ordered to accept the amended pleading, although the ten days fixed for the service thereof have expired: Tracy v. Lightenstader, 113 App. Div. 754.

n. **Partition.**—When, in an action for partition, the defendant consents that the referee pass upon a motion to conform the complaint to the proof, he cannot on appeal contend that the referee had no power to entertain the motion. Moreover, a referee has that power under § 723 and § 1018: Perkins v. Storrs, 114 App. Div. 322.

o. **Technical rules.**—A party ought to be permitted to put his pleadings in form to enable him to raise and have determined every question affecting his interest, and to this end great power is conferred upon the court to allow amendments on trial, before or after judgment, or at any other stage of the action; technical rules no longer control and the merits of the action and the rights of the parties are now rarely determined upon affidavit: Muller v. City of New York, 113 App. Div. 92; 99 N. Y. Supp. 194.

p. **Clerical error.**—Where a complaint by reason of a clerical error alleges injury to the plaintiff instead of to the plaintiff's intestate, a demurrer thereto based on such clerical error is frivolous, and the defect is amendable at any time upon mere suggestion to the court: King v. Mail & Ex. Co., 113 App. Div. 90.

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a. **Improper parties.**—When in an action by towns in which commissioners of highways were joined as plaintiffs, a demurrer to the joinder of the commissioners has been sustained with leave to amend, and, without amendment, the plaintiff appealed to the court of appeals, where final judgment was given with "leave to apply to the supreme court for such relief as they may be advised," the supreme court has power to allow an amendment striking out the improper parties. Such amendment, however, should be conditioned on the payment by the towns of all taxable costs, including those rendered against the highway commissioners, for the latter were merely suing as agents of the towns. But payment of counsel fees incurred by defendants in respect to a temporary injunction should not be required: Town of Palatine v. Canajoharie Water Supply Co., 116 App. Div. 530.

b. **Laches.**—As a general rule a party should be permitted to put his pleading in such form as will satisfactorily present every question affecting his interests, and the court should be liberal to allow amendments to a pleading during the action; although laches may bar an amendment, the court should grant the amendment if the opposite party is not prejudiced thereby: Herbert v. DeMurian, 115 App. Div. 453.

c. **Consolidation.**—The court has power to allow an amendment to a complaint in an action by setting up additional causes of action, and may also consolidate two pending actions: Wilson v. Locke, 116 App. Div. 421.

d. **Prejudice.**—The special term in allowing an amendment to a complaint may require that the amendment be without prejudice to the position of the cause on the trial calendar and a subsequent notice of trial need not be served by the plaintiff: Mossein v. Empire State Surety Co., 117 App. Div. 820.

e. **Prayer for relief.**—Although the prayer for relief is not a part of the cause of action it is part of the complaint, and a motion to amend the prayer is a motion to amend the complaint; but upon such amendment not affecting the facts alleged, where it is merely sought to ask equitable relief instead of money damages, a plaintiff is not required to serve a copy of the proposed amended complaint with the motion papers; especially so, when the proposed prayer for relief is set out in the moving papers: McVey v. Security Mut. L. Ins. Co., 118 App. Div. 466.

f. **Tort-feasors.**—This section applies only to cases where the party is necessary or interested in the defense of the action which is not a case where two or more joint tort-feasors are severally reliable: Hinds, Noble & Eldredge v. Bonner, 52 Misc. 461.

§ 724. Relief against omissions, etc.; amendments to conform proceedings.

See §§ 781-785, post, When time in which a proceeding must be taken may be extended and when it cannot be extended.

See §§ 1282-1292, post, Vacating or setting aside a judgment for irregularity.

g. **Time.**—The court has inherent power to vacate a judgment at any time in furtherance of justice, and §§ 724 and 1282 are not effective to limit the exercise of this power to a period of one year subsequent to the entry of the judgment: Riley v. Ryan, 45 Misc. 151; 91 N. Y. Supp. 952.

h. The time given in § 724 in which a party may be relieved from a judgment is doubled by virtue of the provisions of § 798 where notice of entry of judgment was served by mail: Atkinson v. Abraham, 78 App. Div. 498.

i. **Surprise.**—A complaint may properly be amended by changing the date of the contract in question, and where such an amendment is allowed upon the trial of an action after defendant's counsel had stated that he did not know that he would be taken by surprise, a motion under § 724 to set aside the judgment on the ground of surprise is properly denied: Carlisle v. Barnes, No. 2, 102 App. Div. 582.

j. **Discretion.**—The discretion referred to in § 724 while it is to be exercised in the first instance at special term, is the discretion of the supreme court consisting of all the justices thereof, and is subject to review by the appellate division; in order to disturb such discretion of the special term, the appellate division may not necessarily determine that there was an abuse of discretion but may conclude that the discretion was wrongfully exercised: Lawson v. Hilton, 89 App. Div. 303.

k. **Return day.**—Where, in an action for a voluntary dissolution of a corporation, a return day is mentioned in the copies of an order to show cause, but no such return day is in the original order, the court has power under § 723 and § 724 to allow an amendment *nunc pro tunc* inserting the same return day in the original order: Matter of Quo Vadis Amusement Co., 82 App. Div. 240.

l. **Foreign laws.**—Although it is the established rule in this state that the law of another state cannot be proved unless pleaded, yet where the law of another state, though not pleaded, is proved over objection and exception, and where the

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pleadings had been regarded before the trial as raising the issue and it had been fully litigated by evidence taken on commission, the complaint may be amended to conform to the proof: Audley v. Townsend, 49 Misc. 23.

a. **Director.**—Where, in an action against a director of a corporation based upon the failure of the defendant to file an annual report, the complaint states a cause of action for breach of contract and the proof shows a cause of action based on rescission of the contract, the pleadings cannot be conformed to the proof, even though the defendant was probably not misled: Hill v. Weidinger, 110 App. Div. 683.

b. **Judgment.**—Relief cannot be had under this section against a judgment erroneously rendered when the recovery was less than a tender by the defendant: Lackner v. American Clothing Co., 112 App. Div. 438; 98 N. Y. Supp. 376.

c. The provisions of this section do not authorize relief to be granted from a judgment taken through the mistake or inadvertence of the court: Barron v. Feist, 51 Misc. 589.

d. A motion to set aside a judgment in a summary proceeding to compel an attorney to pay over moneys erroneously entered on the report of a referee without confirmation by the court is not governed by § 1282, nor are the provisions of § 1290 and § 724 applicable: Matter of Cartier v. Spooner, 118 App. Div. 342.

e. **Reference.**—When an order of reference is a nullity by reason of the fact that it was made at special term by a justice, who, at the time, had been appointed to the appellate division, but such reference has been had on stipulation and without objection at the hearing, and the referee has ordered judgment, the court may make an order appointing such referee and enter the same *nunc pro tunc:* Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

§ 725. Returns by officers, etc.

See § 721, ante, Defective return of officer cured by verdict.

§ 727. Order of court; when necessary to amend.

See §§ 542, 543, ante, Amendments of course.

See § 1018, post, Referee has the same power to amend as the court upon trial.

f. **Complaint.**—It is proper for the court to allow the service of an amended complaint which changes the action from one to recover on a contract to one to recover for a breach thereof, but such amendment should be on the condition that the plaintiff pay the costs to the date of the amendment: Dunham v. Hastings Pavement Co., 109 App. Div. 514.

§ 729. Certain bonds, etc., when sufficient.

See §§ 810-816, post, General provisions regulating bonds and undertakings.

g. **Enforcement.**—An undertaking on appeal which is not joint and several as required by the Code may be enforced against the sureties: Denike v. Denike, 61 App. Div. 492; 70 N. Y. Supp. 629.

h. **Taxpayer's action.**—Where the bond, served by the plaintiff in a taxpayer's action at the time of the commencement of the action, is defective, the court has power, after the trial and before the decision is signed, to make an order upon notice permitting the plaintiff to file a proper bond *nunc pro tunc:* O'Connor v. Walsh, 83 App. Div. 179; 82 N. Y. Supp. 499.

§ 731. Tender after suit.

See § 3347, subd., post, Application of this section limited to actions in county court, supreme court and city court of New York.

i. **Contract.**—A tender by the defendant in an action upon contract of a sum less than the amount due, and payment thereof into court pursuant to its order, is a conclusive admission of the indebtedness to the extent of the tender, regardless of the final result of the action, and vests the title thereto in the plaintiff: Mann v. Sprout, 185 N. Y. 109.

j. **Sale.**—When before action brought to recover the value of stock alleged to have been intrusted to defendant for sale, the defendant tenders the proceeds of the sale and on the refusal of the tender deposits the sum in court, the defendant is entitled to a verdict if the plaintiff fails to establish a right to more than the sum tendered; when the plaintiff fails to recover more than the tender, he is not entitled to costs: Goldman v. Swartout, 117 App. Div. 185.

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§ 732. Amount to be paid into court.

See §§ 743, 754, post, Care and disposition of money paid into court.

a. A tender by the defendant in an action upon contract of a sum less than the amount due, and payment thereof into court pursuant to its order, is a conclusive admission of the indebtedness to the extent of the tender, regardless of the final result of the action, and vests the title thereto in the plaintiff: Mann v. Sprout, 185 N. Y. 109.

§ 733. Effect of sufficient tender.

See § 738, post, Defendant's offer to compromise.

b. When before action brought to recover the value of stock alleged to have been intrusted to defendant for sale, the defendant tenders the proceeds of the sale and on the refusal of the tender deposits the sum in court, the defendant is entitled to a verdict if the plaintiff fails to establish a right to more than the sum tendered; when the plaintiff fails to recover more than the tender, he is not entitled to costs: Goldman v. Swartwout, 117 App. Div. 185.

§ 738. Defendant's offer to compromise; proceedings thereon.

See § 763, post, When party dies after accepting the offer.

c. An attempt on the part of one of the parties to an action, which is being tried before a jury to place before the jury the fact that his adversary has made an offer of judgment, will justify the trial justice in granting the adversary's motion to withdraw a juror, but the error, if any, involved in the denial of such motion, is cured where the trial justice, in his charge, positively and directly instructs the jury to disregard the alleged offer: Wager v. Corwin, 72 App. Div. 485; 76 N. Y. Supp. 513.

§ 740. Offer and acceptance, by whom subscribed.

See § 3070, post, Offer to compromise on appeal from justice's court.

d. **Affidavit.**—The failure to annex to the acceptance of an offer of judgment as affidavit of the authority of the attorney signing such acceptance, is a mere irregularity of which third parties cannot take advantage: St. John's Woodworking Co. v. Smith, 82 App. Div. 348; 82 N. Y. Supp. 1025, aff'g 177 N. Y. 543.

e. The provision of § 740 providing that an affidavit shall accompany an offer of judgment subscribed by an attorney only applies to an offer made as prescribed in the sections of the Code of Civil Procedure: Cutting v. Jessmer, 101 App. Div. 283.

§ 743. Party bringing money into court is discharged.

f. A **depositary,** holding money in dispute between two or more claimants, should be allowed to pay the money into court, while the claimants should properly be restrained from prosecuting actions against such depositary where the claims of the claimants rests on doubtful questions of law which the depositary could not himself determine: Mercantile T. Co. v. Calvert-Rogniat, 46 Misc. 16.

g. **Withdrawal.**—The fact that the court has power to change the issue by allowing an amendment to the answer, does not confer the power upon it to authorize a withdrawal of the sum paid into court as an incident to its right to permit such amendment and necessary to make it effective: Mann v. Sprout, 185 N. Y. 109.

§ 745. Money to be paid to county treasurer and securities taken in his name.

See rule 68 (Sup. Ct.), Designation of trust company for deposit of moneys.

§ 747. Power of each court to direct payment or reinvestment of its funds.

See § 753, post, Annual report by custodian of funds.

See § 1581, post, Shares of infants.

h. **Bond and mortgage.**—A county treasurer who, by direction of the surrogate's court, has invested in a bond and mortgage money paid into that court and deposited with him in accordance with the statute, may, without obtaining an order of the court authorizing him to do so, assign such bond

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and mortgage to a person who pays him the full value thereof: County of Tompkins v. Ingersoll, 81 App. Div. 344; 81 N. Y. Supp. 242.

a. **Withdrawal**—The fact that the court has power to change the issue by allowing an amendment to the answer, does not confer the power upon it to authorize a withdrawal of the sum paid into court as an incident to its right to permit such amendment and necessary to make it effective: Mann v. Sprout, 185 N. Y. 109.

§ 749. Powers of certain officers, touching securities, etc.

b. **Bond and mortgage.**—A county treasurer who, by direction of the surrogate's court, has invested in a bond and mortgage money paid into that court and deposited with him in accordance with the statute, may, without obtaining an order of the court authorizing him to do so, assign such bond and mortgage to a person who pays him the full value thereof: County of Tompkins v. Ingersoll, 81 App. Div. 344; 81 N. Y. Supp. 242.

§ 754. These provisions applicable in New York to the chamberlain.

c. The chamberlain of the city of New York is deemed the county treasurer for the purpose of receiving court funds: Matter of Gould, 75 App. Div. 576; 55 Civ. Pro. R. 192.

§ 755. Action, when not to abate.

See § 756, post, Proceedings upon transfer of interest, or devolution of liability.

See § 765, post, No verdict can be taken after a party's death.

See § 1736, post, Abatement and revival of action.

d. **Guardian's account.**—Where the general guardian of an infant, institutes a proceeding to compel a guardian *ad litem* of the infant to pay over certain moneys which he has collected for the infant, and, upon the proceedings before a referee appointed to take and state the guardian *ad litem's* account, it appears that the general guardian is dead and that the infant, at the time the order of reference was made, had attained her majority, it is only necessary that a suggestion of these facts be made upon the record, and the proceeding will thereafter be continued in the name of the former infant: Matter of Smith v. Mingey, 72 App. Div. 103; 76 N. Y. Supp. 194, aff'g 172 N. Y. 650.

e. **Deceit.**—A cause of action founded upon the deceit of the directors of an association does not abate by the death of the plaintiff: Squiers v. Thompson, 73 App. Div. 552; 76 N. Y. Supp. 734, aff'g 172 N. Y. 652.

f. **Mandamus.**—Where mandamus proceedings have been instituted against the commissioners of a department of a municipal government to secure the reinstatement of the relator and the respondent ceases to be the commissioner of such department, the proceedings are abated; the relator is not entitled under §§ 723, 755, 756, 1930 or 1997 to have the respondent's successor substituted as respondent, but his remedy is to make a demand for reinstatement upon the successor and to institute a new mandamus proceeding if such successor refuses to reinstate him: People ex rel. Hatch v. Lantry, 88 App. Div. 583; 85 N. Y. Supp. 193.

g. **Continuance of action.**—An action by a foreign corporation may be continued in its name even after the appointment of an ancillary receiver: Sigua Iron Co. v. Brown, 171 N. Y. 488, aff'g 58 App. Div. 436; 69 N. Y. Supp. 295.

h. **Executors.**—The executors of a deceased defendant, in order to become parties, must seek their rights under the provisions of the Code relating to proceedings in an action after the death of a party: Callanan v. Keeseville R. R. Co., 48 Misc. 476.

i. In an action at law there is no fixed time within which the action may be revived against the executor of a deceased defendant. The time within which an action in equity can be revived is ten years: Washington Trust Co. v. Baldwin, 118 App. Div. 186.

j. **Copartners.**—In an action against two copartners upon their copartnership contract, where the summons is served upon one of them and he dies before service on the other, the action does not abate, as the cause of action survives, and the plaintiff may proceed against the other, and no leave is necessary therefor: Latz v. Blumenthal, 50 Misc. 407.

k. **Tort.**—Causes of action for forcible entry and detainer and for assault and battery abate on the death of the defendant, but a cause of action for the conversion of personal property does not abate and may be continued against the personal representatives of the deceased defendant; where there are codefendants jointly and severally liable in tort and one of them dies, the plaintiff may proceed against the survivors and the representatives of the deceased defendant at the

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same time, but it must be by separate actions, and a prior action against all must be severed: Mulligan v. O'Brien, 119 App. Div. 355.

a. **Trustee.**—When trustee may continue action on death of beneficiary: Farmer's Loan & Trust Co., 115 App. Div. 506.

§ 756. Proceedings upon transfer of interest, or devolution of liability.

b. **Mandamus.**—Where mandamus proceedings have been instituted against the commissioners of a department of a municipal government to secure the reinstatement of the relator and the respondent ceases to be the commissioner of such department, the proceedings are abated; the relator is not entitled under §§ 723, 755, 756, 1930 or 1997 to have the respondent's successor substituted as respondent, but his remedy is to make a demand for reinstatement upon the successor and to institute a new mandamus proceeding if such successor refuses to reinstate him: People ex rel. Hatch v. Lantry, 88 App. Div. 583; 85 N. Y. Supp. 193.

c. **Action against receivers.**—Under section 756, providing that in case of a devolution of liability the court may substitute the party upon whom the liability is devolved but when it does not, the action is properly continued against the original party applied, and *held*, that an action against receivers appointed by a federal court brought in this state under the Revised Statutes is not terminated by their discharge and the transfer of the property in their hands under a decree by federal court: Baer v. McCullough, 176 N. Y. 97, aff'g 72 App. Div. 628; 76 N. Y. Supp. 1008.

d. **Insurance policy.**—In an action to recover an insurance policy the assignee of the beneficiary may be substituted as plaintiff after the death of the insured: Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. 338; 79 N. Y. Supp. 74.

e. **Mechanic's lien.**—An action brought under the provisions of the Code of Civil Procedure to foreclose a mechanic's lien does not abate by the death of the owner of the premises during the pendency thereof, but may be revived against the successors in interest of the deceased owner, without prejudice to proceedings already had therein: Perry v. Levenson, 82 App. Div. 94; 81 N. Y. Supp. 586, aff'd 178 N. Y. 559.

f. **Partition.**—Revivor of an action for the partition of real estate of copartners, in which an interlocutory judgment directing a reference has been made and the reference is pending undetermined: Jones v. Jones, 68 App. Div. 5; 74 N. Y. Supp. 297, aff'd 171 N. Y. 653.

g. A new board of education may proceed with an action brought in the name of the former board: Beck v. Kerr, 87 App. Div. 1; 83 N. Y. Supp. 1057.

h. An action by a foreign corporation may be continued in its name even after the appointment of an ancillary receiver: Sigua Iron Co. v. Brown, 171 N. Y. 488, aff'd 58 App. Div. 436; 69 N. Y. Supp. 295.

i. Where a contract for labor has been assigned and is to become absolute only upon certain contingencies which do not eventuate until after the assignor has commenced the action, such assignor may, under § 756, continue the action unless the court directs that the assignee be substituted as plaintiff or joined as a party to such action: Hawkins v. Mapes-Reeve Const. Co., 178 N. Y. 236, aff'g 82 App. Div. 72; 81 N. Y. Supp. 794.

j. **Bankruptcy.**—It is better practice for a trustee in bankruptcy to obtain the consent of the federal court before seeking to be substituted as plaintiff in a prior action brought by the creditors against the bankrupt: Hahlo v. Cole, 112 App. Div. 636.

k. **Trustee.**—When trustee may continue action on death of beneficiary: Farmer's Loan & Trust Co., 115 App. Div. 506.

§ 757. Id.; when sole party dies and action survives.

See § 784, post, Time in which to apply for continuance cannot be extended.
See §§ 1521-1523, post, Abatement in an action of ejectment.

l. **Insurance policy.**—In an action to recover an insurance policy the assignee of the beneficiary may be substituted as plaintiff after the death of the insured: Hunt v. Provident Sav. Life Assur. Soc., 77 App. Div. 338; 79 N. Y. Supp. 74.

m. **Mechanic's lien.**—An action brought under the provisions of the Code of Civil Procedure to foreclose a mechanic's lien does not abate by the death of the owner of the premises during the pendency thereof, but may be revived against the successors in interest of the deceased owner, without prejudice to proceedings already had therein: Perry v. Levenson, 82 App. Div. 94; 81 N. Y. Supp. 586, aff'd 178 N. Y. 559.

n. **Partition.**—Revivor of an action, for the partition of real estate of copartners, in which an interlocutory judgment directing a reference has been made and the reference is pending undetermined: Jones v. Jones, 68 App. Div. 5; 74 N. Y. Supp. 297, aff'd 171 N. Y. 653.

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a. **Foreign representatives.**—§ 757 providing for the continuance of an action by or against the representatives or successors in interest of a party who died, must be held to relate only to representatives and successors in interest over whom jurisdiction exists in the action and does not include foreign representatives in actions at law: McGrath v. Weiller, 98 App. Div. 291.

b. **Assignee.**—An assignee of a foreign executor or administrator of a deceased party plaintiff may recover and continue the action in his own name, and the order which revives and continues the action in the name of such assignee need not direct the administrator or executor of the original plaintiff to be brought in: McNulta v. Huntington, 62 App. Div. 257; 70 N. Y. Supp. 897.

c. When a person brings an action on a claim assigned to him by another, and during the pendency of the action the claim is reassigned, the court is authorized, under § 757, upon the death of the plaintiff, to allow the action to be continued in the name of the plaintiff's administrator: Betts v. De Selding, 81 App. Div. 161.

d. **Indorsers.**—When in an action against the indorsers of a promissory note one of the defendants dies, his executor may be substituted as defendant under § 760; such substituted defendant may be brought in by order under § 758, and it is not essential that an order be made requiring such defendant to be served with a supplemental summons and complaint under § 760: Citizens' Nat. Bank v. Bangs, 112 App. Div. 748.

§ 758. Id.; when one of several parties dies.

e. **Copartners.**—In an action against two copartners upon their copartnership contract, where the summons is served upon one of them and he dies before service on the other, the action does not abate, as the cause of action survives and the plaintiff may proceed against the other, and no leave is necessary therefor: Latz v. Blumenthal, 50 Misc. 407.

f. **Indorsers.**—When in an action against the indorsers of a promissory note one of the defendants dies, his executor may be substituted as defendant under § 760; such substituted defendant may be brought in by order under § 758, and it is not essential that an order be made requiring such defendant to be served with a supplemental summons and complaint under § 760: Citizens' Nat. Bank v. Bangs, 112 App. Div. 748.

g. **Tort.**—Where a complaint against three defendants sued jointly alleges a cause of action for unlawful entry and detainer, another for assault and battery and a third for conversion, the first two causes an action abate as to a defendant who dies before judgment but the third cause of action survives and may be continued separately against his executrix: Mulligan v. O'Brien, 53 Misc. 4.

h. **Contract.**—The fact that the personal representative of one of the original signers of a contract, who died before the action was commenced, was not made a party to the action, does not entitle the defendants to have the complaint dismissed upon their motion, as their remedy is to move to have the personal representative of the deceased signer brought in: O'Connor v. Green, 60 App. Div. 553; 69 N. Y. Supp. 1097.

i. This section does not dispense with the necessity of an allegation and proof of insolvency, or the inability to pay of the surviving joint debtors when joining the personal representatives of the decedent as defendants in an action upon the contract; the section creates the legal liability but does not change the rule of procedure, and the remedy to enforce the liability is to be pursued upon such pleadings and proofs as would show an equitable reason for joining the personal representatives of a deceased joint debtor as defendants in an action against the survivors: Potts v. Dounce, 173 N. Y. 335; 33 Civ. Pro. R. 303, aff'g 67 App. Div. 434; 74 N. Y. Supp. 655.

§ 759. Id.; when part of cause of action survives.

See § 452, ante, When court to decide controversy, or to order other parties to be brought in.

j. Upon the decease of one of several defendants jointly liable, an action can only be revived as a separate action against the representative of the deceased defendant; but an order may be made herein, severing the action with leave to continue two causes of action, separately, against the surviving defendants and with leave to continue a third cause of action, separately, against the executrix of the deceased defendant: Mulligan v. O'Brien, 53 Misc. 4.

§ 760. The same.

See § 452, ante, When the court to decide controversy, or to order other parties to be brought in.

k. An executor of a deceased defendant who has been substituted to defend the action has no right to require the service of supplementary summons and complaint with right to answer unless there are facts other than the succes-

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sion which should be alleged: Flannery v. Sahagian, 109 App. Div. 321.

a. When in an action against the indorsers of a promissory note one of the defendants dies, his executor may be substituted as defendant under § 760; such substituted defendant may be brought in by order under § 758, and it is not essential that an order be made requiring such defendant to be served with a supplemental summons and complaint under § 760: Citizens' Nat. Bank v. Bangs, 112 App. Div. 748.

§ 761. When court may order action abated.

See § 1736, post, Abatement of action.

See § 1920, post, Death of member of unincorporated association does not abate.

§ 763. Death of party after verdict.

See § 1021, post, Decision of court or report of referee, upon trial of demurrer.

See § 1200, post, Definition of judgment.

See § 1210, post, Entry of judgment after death of party.

See § 1237, post, Judgment-roll to be filed; of what it consists.

See § 1284, post, Motion to set aside judgment after death of party.

See § 1298, post, Death of party pending appeal.

b. **Referee's report.**—The report of a referee, which was signed but which was not filed or delivered to the attorney for one of the parties to the action as required by § 1019, is not rendered within the meaning of §§ 763 and 765 of the Code, providing that if either party dies after the report has been rendered the court may enter final judgment in the names of the original parties: Clark v. Pemberton, 64 App. Div. 416; 72 N. Y. Supp. 232.

c. **Verdict.**—Upon a verdict the plaintiff is entitled to immediate judgment, and if he dies before that judgment is entered, his right thereto will not have been in any wise affected: Matter of Workingmen's Pub. Assn., 62 App. Div. 604; 71 N. Y. Supp. 248.

§ 764. Abatement of actions; seduction; action for wrong not to abate after verdict, etc.

An action commenced by a father to recover damages for the seduction of his minor daughter does not abate by his death, but survives to the mother of such daughter, who may recover both actual and exemplary damages therein to the same extent as though the original party plaintiff had lived. After verdict, report or decision in an action to recover damages for a personal injury, the action does not abate by the death of a party, but the subsequent proceedings are the same as in a case where the cause of action survives. And in case said verdict, report or decision is reversed upon questions of law only, said action does not abate by the death of the party against whom the same was rendered.

Co. Proc., § 121, fourth sentence.

Amended by chap. 277 of 1881, chap. 379 of 1890 and chap. 379 of 1904.

d. **Verdict.**—Upon a verdict the plaintiff is entitled to immediate judgment, and if he dies before that judgment is entered his right thereto will not have been in any wise affected: Matter of Workingmen's Pub. Assn., 62 App. Div. 604; 71 N. Y. Supp. 248.

e. **Question of fact.** — § 764, as amended in 1890, should be construed to mean that a cause of action for personal injuries survives the death of a party only in case a verdict, report or decision is reversed, upon questions of law only, after the death of the party; that such action abates when the verdict of a jury is set aside or the judgment entered thereon is reversed, if the party against whom the same was rendered dies before another trial is had; such amendment preserves the action only when the judgment is reversed in questions of law only subsequent to the death of a party. If a reversal is upon questions of fact as well as of law the action abates at the death of a party before a new trial is had: Hughes v. Russell, 113 App. Div. 744.

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§ 765. No verdict, etc., can be taken after party's death.

a. **Supplementary proceedings.**—When a foreign corporation has been duly dissolved in the state of its incorporation, it ceases to exist anywhere as a legal entity, an action pending against it in this state falls, and the plaintiff or creditor cannot take supplementary proceedings or a judgment subsequently recovered against it here and examine a third party as to its property alleged to be in the third party's hands: Matter of Stewart, 39 Misc. 275; 79 N. Y. Supp. 525.

b. **Referee's report.**—The report of a referee which was signed, but which was not filed or delivered to the attorney for one of the parties to the action, as required by § 1019, is not rendered within the meaning of §§ 763 and 765 of the Code, providing that if either party dies after the report has been rendered the court may enter final judgment in the names of the original parties: Clark v. Pemberton, 64 App. Div. 416; 72 N. Y. Supp. 232.

§ 766. Death, etc., of public officer or trustee.

c. **Sheriff.**—An action by a sheriff for conversion of goods levied on does not abate by the death of the sheriff, but by virtue of this section may be continued by his successor in office: Dickinson v. Oliver, 112 App. Div. 806.

§ 767. Definition of an order.

See rule 3 (Sup. Ct.), Motion papers used on either side must be enumerated in the order.

See rule 19 (Sup. Ct.), Order must be folioed.

See rule 27 (Sup. Ct.), Orders granted on petitions shall refer to such petitions.

d. **Order.**—§ 872, subd. 5, relating to the examination of sick and infirm witnesses out of court, providing that subd. 5 does not apply where the person to be examined is a party, was enacted before the examination of a party at his own instance, was authorized and was intended to confine the provisions of subd. 5 to the examination of a witness, and to make it clear that where a party was examined at the instance of an adverse party it was not necessary to show that the party to be examined was about to depart from the state or was so sick he would not be able to attend the trial; under § 870, before it was amended by chapter 696 of 1904, the deposition of a party to an action might, at his own instance be taken out of court before the trial on the ground that he was sick and infirm, but prior to the amendment the deposition could only be taken before and not during the trial; the power granted by the amendment of 1904 to take a deposition during a trial should only be used where the necessity for taking the deposition arose after the trial commenced, and not where the necessity existed and was known to the counsel before the trial commenced; the application should not be granted unless made to the judge and not to the court, and unless an affidavit is presented alleging facts required by § 872, and the order should be made in writing, entered and served on the attorney for the other party: Hebron v. Work, 101 App. Div. 463; 34 Civ. Pro. R. 134.

e. An indorsement upon an order for the examination of a judgment debtor in proceedings supplementary to execution: "Proceedings dismissed upon objection made by judgment debtor that proceeding is entitled in an action . . . J. I. G. J. C. C." constitutes an order as defined by § 767: McAlpin v. Stoddard, 54 Misc. 647.

f. **Proper practice.**—Although improper recitals have been embodied in an order, a respondent who made default in appearing on the motion cannot raise the question by an appeal from the order. The proper practice is to move to resettle the order and to appeal from the order denying such motion: Matter of Radam Microbe Killer Co., 114 App. Div. 199.

§ 768. Id.; of a motion.

See rule 38 (Sup. Ct.), Enumerated and non-enumerated motions.

See rule 21 (Sup. Ct.), For what day non-enumerated motions may be noticed.

g. **Affidavit.**—Under § 249 of the Real Property Law, an affidavit, taken before a notary public in another state and authenticated as prescribed in § 260, may be used upon a motion in the courts of this state: Isman v. Wayburn, 54 Misc. 86.

§ 769. Motions in supreme court; where to be heard.

See rule 37 (Sup. Ct.), Notice required.

See rule 38 (Sup. Ct.), At what terms contested motions shall be heard.

h. **Notice.**—§ 568 when read in connection with § 769 thereof, means that an application to vacate an order of arrest founded only upon the papers on which the order was granted must, when made to the court, be upon notice, but when

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made to the judge who granted the order, may be upon or without notice, as he may deem proper: Skinner Manufacturing Co. v. Fagenson, 38 Misc. 121.

a. Where two actions, brought by the same plaintiff against the same defendant, are pending in the supreme court in the county of New York, the defendant cannot, upon an *ex parte* application, obtain at the Canastota special term an order staying all proceedings in one action until the determination of the other, is, under rule 37, such an order as can only be made on notice and, under § 769, it can only be made at special term at New York: Delahanty v. Canfield, 106 App. Div. 386.

b. **Venue.**—Where the place of trial named in the summons and that named in the complaint are different, the county named in the complaint determines the venue of the action, but the mere inadvertence of an attorney in naming a different place of trial in the complaint from that named in the summons (which was the place he intended to name) will not effect a change in the place of trial, provided he moves promptly to correct the error and does not permit his adversary to act upon the assumption that the change was intentional: Goldstein v. Marx, 73 App. Div. 545; 77 N. Y. Supp. 956.

c. **Supplementary proceedings.**—Where a judgment creditor, who obtained his judgment in the supreme court in the first judicial district, institutes supplementary proceedings against the judgment debtor before the county judge of Rensselaer county, an order to show cause why the judgment debtor should not be adjudged guilty of contempt for refusing to answer questions propounded to him by the referee appointed in the supplementary proceedings, cannot be issued by a justice, and be made returnable at a special term of the supreme court in the first judicial district; under § 2273 of the Code of Civil Procedure such an order to show cause is an application in supplementary proceedings, and must be made to the county judge of Rensselaer county or to the supreme court in the district in which Rensselaer county is located: Matter of Backus, 91 App. Div. 266; 86 N. Y. Supp. 638.

d. **Injunction.**—A motion for the appointment of a referee to ascertain the damages of defendant by reason of an injunction granted plaintiff is not properly made and entertained at special term in the first judicial district, the action being triable elsewhere: Wilson v. Dreyer, 65 App. Div. 249.

§ 770. Motions in New York city.

See rule 37 (Sup. Ct.), Motions in first judicial district.

See § 26, ante, When one judge may continue proceedings commenced before another.

e. **Certiorari.**—An application for a writ of certiorari may, in the first judicial district, be made to the justice of the supreme court at chambers, and the granting of such application is, nevertheless, the act of the court, and should be entered in the minutes of the clerk, but a failure to make such entry will not invalidate the writ: People ex rel. Grout v. Stillings, 76 App. Div. 143; 79 N. Y. Supp. 942.

f. **Entry of order.**—An order granted in a proceeding for the voluntary dissolution of a corporation by a justice of the supreme court at his private residence in the city of New York and signed " Enter, Wm. N. Cohen, J. S. C.," is an order of a court of record, and does not become operative so as to entitle the receivers appointed thereby to moneys of the corporation on deposit with a bank until it is entered in the county clerk's office: Wilcox v. National Shoe & Leather Bank, 67 App. Div. 466; 73 N. Y. Supp. 900.

§ 771. In absence of judge, motion may be transferred to another judge.

See § 26, ante, When one judge may continue proceedings commenced before another.

§ 772. What judges may make orders out of court, without notice.

See § 241, ante, What judges may perform duties of justice at chambers.

g. **Injunction.**—A county judge has no power to grant an injunction under § 10 of the Agricultural Law to restrain the defendant from further violations of that law, as such injunction is within the exception in § 606 of the Code and must be granted by the supreme court or a justice thereof, and therefore neither § 241, relating to the powers of county judges to grant injunctions, nor § 772, specifying who may grant orders when not specifically designated by law, do not apply: People v. Windholz, 68 App. Div. 552; 74 N. Y. Supp. 241.

h. **Stay.**—The power of a court to stay execution of its own judgments is recognized by §§ 772 and 1005 and made applicable to the city court by § 3343, subds. 4, 6 and 7: Margolies v. Ernst, 34 Misc. 405.

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a. **County court action.—**An *ex parte* order of a county court extending the time to answer is valid under § 354; an order made upon an order to show cause of a supreme court justice under the caption of the county court is invalid if made at the special term of the supreme court if the order to show cause was returnable at a special term of this court, which was the county court, and was further invalid because the special term of the supreme court had no jurisdiction under §§ 354 and 772 to make such an order in a county court action: Edwards v. Shreve, 83 App. Div. 165; 82 N. Y. Supp. 514.

§ 775. When stay of proceedings not to exceed twenty days.

See § 354, ante, Order to stay proceedings may be granted by county judge.

See § 406, ante, Time proceedings are stayed is not part of the time limited for the commencement of an action.

See rule 37 (Sup. Ct.), When order is made within ten days of trial term.

See § 611, ante, Injunction to stay proceedings.

See § 1310, post, When an appeal stays proceedings.

See § 1382, post, Effect of stay of proceedings on limitation of time for issuing an execution.

b. **Foreclosure.—**The court has power to enjoin the prosecution of an action to foreclose a mortgage given by a tenant in common of real property to his cotenant upon his undivided share, until the determination of an action to partition the property brought by the mortgagor prior to the commencement of the foreclosure action, where it appears that the mortgage security is ample: Post v. Banks, 67 App. Div. 187; 73 N. Y. Supp. 596.

§ 776. Subsequent application for order after denial, etc., of prior application.

c. **Re-application.—**§ 191 does not authorize a re-application for leave to appeal to the court of appeals after a denial of the first application by one of the judges: Carlisle v. Barnes, 183 N. Y. 272; 183 N. Y. Supp. 567.

d. **Order.—**Order authorizing the receiver of a railroad company to take possession with other property, of money earned before his appointment, are not void *ab initio* and can be corrected only by appeal or by motion and are not subject to collateral attack, and the receiver cannot be compelled by order of the special term to pay over such money to a receiver appointed in a sequestration action. The practice of moving before one judge at special term to declare void the order or judgment of another judge at special term is not sanctioned by any provision of the Code or by any controlling authority. It virtually amounts to an appeal from one special term to another special term for a review of the first order: Platt v. N. Y. & Sea Beach Ry. Co., 170 N. Y. 451, rev'g 63 App. Div. 40; 71 N. Y. Supp. 913.

§ 779. Costs of a motion; how collected.

Last two words "now exists" refer to April 22, 1884.

See § 14, subd. 3, ante, Punishment for non-payment of costs, as for contempt.

See § 3232, post, Interlocutory costs upon issue of law.

See §§ 3236, 3251, post, Motion costs.

e. § 779 is intended to prevent the party in default from taking any affirmative proceeding in the action, but was not intended and may not be used to prevent him from defending himself from attack: Goldberg v. Wood, 50 Misc. 618.

f. On motion at special term for leave to discontinue an action, an absolute order of discontinuance with full costs to the defendant is unauthorized; a judgment for such costs allowed on motion may not be entered: Hyde v. Anderson, 112 App. Div. 76.

g. **Costs.—**A motion by the defendant to compel the acceptance of an answer is not stayed by a failure on his part to pay costs of another motion granted subsequent to the time set for the service of the answer: Tracy v. Lightenstader, 113 App. Div. 754.

h. When costs are awarded upon an interlocutory judgment deciding a question of law, and an issue of fact remains undisposed of, all proceedings on the part of the parties required to pay the same are stayed except to review or vacate the judgment or order until payment; if an order dismissing the complaint upon default has been subsequently obtained by the party liable for the costs the default should be opened as a matter of right: Bigelow v. Drummond, 109 App. Div. 132.

i. **Stay.—**Stay granted because of non-payment of costs of a former action for the same cause in the city court of the city of New York: Ingrosso v. Baltimore

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& Ohio R. R. Co., 105 App. Div. 494; 94 N. Y. Supp. 177.

a. Where a county court, when reversing a judgment of a justice of the peace, awards costs against the respondent, but does not make the payment of the costs a condition of the granting of a new trial, the provisions of § 779, respecting a stay for non-payment of costs, do not apply: Smith v. Cayuga Lake Cement Co., 105 App. Div. 307; 93 N. Y. Supp. 959.

b. While the court has power, as a condition of granting a favor, to require the party seeking the favor to accept a short notice of trial, it has no power to require the acceptance of such a notice by a party who has returned a former notice of trial served in time on the ground that the party serving it was stayed because of non-payment of motion costs, and consequently has sought no favors from the court, but stood upon her strict statutory rights: Roberts v. Schaf, 76 App. Div. 433; 78 N. Y. Supp. 788.

c. Apart from the provisions of this section relating to a stay against a party required to pay costs of a motion or any other sum of money directed by an order to be paid, the court has power in regard thereto, by reason of its equitable cognizance over suitors, to prevent a multiplicity of actions and harassing and oppressive litigation, and having the power, it is for the court to determine the propriety of its exercise in a given case: Patchen v. D. & H. C. Co., 62 App. Div. 543; 71 N. Y. Supp. 122.

d. The stay of proceedings prescribed by § 779 in the event of a failure to pay the costs directed to be paid by an order, does not operate until after a copy of the order has been served upon the party required to pay the costs, whether or not the time for the payment of such costs is specified in the order: Sire v. Shubert, 93 App. Div. 324.

e. The cost and disbursements of an appeal to the appellate division from an order of the special term are "costs of a motion," as used in § 779, and unless paid, all proceedings on the part of the party required to pay such costs are stayed until they are paid; where the order does not fix the time when the costs are to be paid the stay does not operate until ten days after the service of the order: Wasserman v. Benjamin, 91 App. Div. 547; 86 N. Y. Supp. 1022.

f. A motion for a stay for non-payment of costs should be denied where the ground was that the plaintiff had not paid costs rendered against him in an action against a third party upon the same cause of action when the defendant had not acquired the title to the judgment in such action: Tanzsheim v. Brooklyn, Q. C. S. R. R. Co., 106 App. Div. 233.

g. § 779 providing that all proceedings are stayed, where motion costs are not paid, is not intended to prevent the party who is stayed from asserting his legal right of self-defense, but to prevent him from making any onward move in the action; the service by a plaintiff of a notice of trial when the defendant is stayed under the provisions of § 779 operates to waive the stay and allow the defendant to take part in the trial: Mattice v. Shelland, 76 App. Div. 236; 78 N. Y. Supp. 537.

h. **Appeal.**—§ 779 applies to costs awarded by the appellate division on the affirmance or reversal of an order granting or denying a motion for a new trial made on the minutes: Cohen v. Krulewitch, 81 App. Div. 147; 80 N. Y. Supp. 689.

i. The costs and disbursements of an appeal from an order made at special term are "costs of a motion" within the meaning of § 779; independently of the requirements of the Code a due exercise of the discretion vested in the court would dictate generally that a litigant should be required to pay the costs of an unsuccessful motion before being heard in renewal: Hunt v. Sullivan, 79 App. Div. 119; 79 N. Y. Supp. 708; 33 Civ. Pro. R. 294.

j. **Execution.**—Under § 779 costs are enforcible by execution granted by an interlocutory judgment sustaining demurrers to counterclaims; §§ 3232 and 3233 have changed the nature of costs and the manner of collecting them: Bernheimer v. Hartmayer, 34 Misc. 346; 69 N. Y. Supp. 816.

k. § 779 authorizing an execution for the enforcement of an order directing the payment of "costs of a motion" or any other sum of money, does not authorize an execution to enforce an order made under §§ 1769 and 1771 for the support of the wife and the care and maintenance of the children, pending a suit for separation or divorce, the enforcement of which, by sequestration or contempt proceedings, is provided by §§ 1772 and 1773: Weber v. Weber, 93 App. Div. 149.

l. As § 779 provides that an execution against the personal property of a party may be issued when an order directs the payment of a sum of money, it is doubtful whether the court has authority under § 14, subd. 3, to punish plaintiffs for contempt upon their failure to pay a sum of money found to be due their attorney on an application by them for a substitution of a new attorney and the determination of the amount due their original attorney: Kane v. Rose, 87 App. Div. 101; 84 N. Y. Supp. 111.

m. § 779 providing that where any sum of money directed to be paid by an order is not paid within the time fixed by such order, an execution may issue against the personal property of the delinquent party does not affect the right to maintain the contempt proceedings: New-

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ell v. Hall, 74 App. Div. 273; 77 N. Y. Supp. 610.

a. **Payment.**—The court has power to grant an order for the examination of a witness pursuant to §§ 871-876 after the service of the complaint, but before issue is joined; though proceedings were stayed under § 779 when the plaintiff obtained the order, yet it does not deprive the court of the power to issue the order, and the order will not be vacated if plaintiff pays the costs in arrears before the return day of the motion to vacate; it is sufficient if from the moving papers an inference may be drawn that plaintiff intends to read the testimony of the witness at the trial: Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56.

b. **Overruling demurrer.**—A judgment, overruling a demurrer to a reply to a second separate defense of an answer, dismissing that defense with costs and granting the plaintiff execution therefor, is interlocutory and not final, and therefore may properly be entered before all the issues in the action have been determined: Maeder v. Wexler, 43 Misc. 19; 87 N. Y. Supp. 402.

c. **Term costs.**—Costs of a term, if not paid immediately, the party desiring to proceed with the trial may do so at once, if the costs are not paid within the time specified, the complaint should be dismissed: Hewett v. Cook, 75 App. Div. 239; 78 N. Y. Supp. 2.

§ 780. Notice of motion, to be eight days.

d. § 780 authorizing the court, upon the presentation of an affidavit showing grounds therefor, to permit a motion to be made, through the medium of an order to show cause, on less than the eight days' notice ordinarily required, only applies to matters already pending and over which the court has acquired jurisdiction, and does not apply to any of those steps to be taken in order to inaugurate a new action or proceeding: Matter of Quick, 92 App. Div. 131; 87 N. Y. Supp. 316.

e. § 780 applies in cases in which notice is necessary and for which special provision has not otherwise been made by law or by the general rules of practice: Matter of Salmon, 34 Misc. 251; 69 N. Y. Supp. 215.

f. An order to show cause is irregular where there was sufficient time to notice the motion under rule 37 and § 780 of the Code of Civil Procedure: Conant v. American Rubber Tire Co., 37 Misc. 129; 74 N. Y. Supp. 409.

g. An order to show cause may be made returnable in more than eight days from the granting of the order: Matter of Ferris, 37 Misc. 606.

h. An order to show cause takes the place of a notice of motion, and cannot be substituted therefor, except in the manner particularly pointed out and authorized by § 780 and by rule 37 of the general rules of practice of the supreme court: Stryker v. Churchill, 39 Misc. 578; 80 N. Y. Supp. 588.

§ 781. How time enlarged, before its expiration.

i. A failure to serve notice of appearance does not entitle plaintiff to enter judgment by default where an order extending time to answer is served: Littauer v. Stern, 88 App. Div. 274; 85 N. Y. Supp. 71, aff'd 177 N. Y. 233.

§ 783. Relief after time has expired.

See § 721 et seq., ante, Mistakes, omissions, etc.

§ 784. When time cannot be extended.

j. **Appeal.**—The time fixed by law for an appeal cannot be extended by an order of the court: Klipstein & Co. v. Marchmedt, 39 Misc. 794; 81 N. Y. Supp. 317.

k. There is no power in the court to extend a party's time to appeal where it has once expired: Gabay v. Doane, 38 Misc. 661; 78 N. Y. Supp. 224.

§ 786. Orders in certain actions, how published.

l. The provisions of § 786 apply to an action brought under § 7 of the Personal Property Law (chap. 417 of 1897) to set aside an assignment as fraudulent, and unless the provisions of § 786 are complied with or some sufficient notice is given or the other creditors are in some manner given their day in court, such a proceeding does not bind them and they are not concluded by it: Matter of Thoesen & Brothers, 62 App. Div. 87.

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§ 791. Preference of certain actions by the people; among civil actions.

Civil causes are entitled to preference among themselves in the trial or hearing thereof, in the following order, next after the causes specified in the last section but one:

Subd. 1. An action or special proceeding brought by or against the people of the state, or brought by the people of the state on the relation of a party, or brought by or against any state officer or board of state officers as such; where the attorney of the said people, state officer or board of state officers, or attorney for the plaintiffs in such action or special proceeding has given notice, at the time of the service of the notice of trial or argument, of the particular day in the term at which he will move it. If the action or special proceeding is not moved by said attorney for trial or argument on that day, or as soon thereafter in the same term as the court can hear it, the other party may then move the trial or argument; otherwise it shall not be moved out of its order at that term except by the special order of the court.

Subd. 2. An action or special proceeding in which the city of New York, or a board of officers, exercising powers conferred by a statute for the protection of public health or public or private property, or for the prevention or punishment of violations of a statute relating to either of those subjects, or the commissioners of pilots in the city of New York, are parties: where a notice, similar to the notice prescribed in the last subdivision, has been served by their attorney, at the time of service of the notice of trial or argument. The provisions of the last subdivision, relating to moving the trial or argument, apply to a cause within this subdivision.

Subd. 3. In the court of appeals or the supreme court, an appeal taken by either party in an action or special proceeding other than as specified in subdivision first of this section, where the people of the state, or a board of state officers, are sole parties, or a state officer is sole party, plaintiff or defendant.

Subd. 3a. In the court of appeals or the supreme court, an appeal taken by either party in an action or special proceeding from a judgment or order declaring a legislative enactment unconstitutional, is entitled on motion of the appellant, to a preference over any business irrespective of its place on the calendar, except as to preferences provided for in sections 789, 790, and the preceding subdivisions of this section.

Subd. 4. In the court of appeals an action, a party to which has died pending the action, where the pendency of the action prevents a final settlement of the estate of the deceased party.

Subd. 5. In any court, an action or special proceeding in which an executor or an administrator, or testamentary trustee, or an infant, or a trustee of a fund for the support and maintenance of an infant, or a receiver appointed by the court, or by the comptroller of the currency of the United

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States, or a trustee in bankruptcy, or a general assignee for the benefit of creditors, or the committee of a lunatic or an idiot, or a creditor of a deceased insolvent debtor suing for the benefit of himself and other creditors interested in the estate or property of such deceased debtor where a right of action is given by express provision of law, is the sole plaintiff or sole defendant; an action or special proceeding for the construction of, or an adjudication upon or to determine the validity of the probate of a will, in which the administrator, with the will annexed, or the executor of the will is joined, as plaintiff or defendant, with one or more other parties, and an appeal from the judgments or decision in any of the foregoing actions or proceedings and in the court of appeals or the supreme court, an appeal from the decree or decision of a surrogate's court, determining a will to be valid and admitting it to probate, or determining an instrument offered for probate as a will to be invalid or not entitled to probate as such, or granting general letters of administration or directing the distribution of a fund or payment of money by an executor or an administrator in pursuance of an order or decree made on an intermediate, final or judicial accounting or otherwise by an administrator or an executor.

Subd. 6. An action for dower where the plaintiff makes proof by affidavit, to the satisfaction of the court, or a judge thereof, that she has no sufficient means of support aside from the estate in controversy; an action for the partition of real property.

Subd. 7. An action against a corporation or joint-stock association, issuing bank notes or any kind of paper credits, to circulate as money; or by or against a receiver of such corporation or association; an action in which a county or town is sole plaintiff or defendant.

Subd. 8. An action against a corporation, founded upon a note or other evidence of debt for the absolute payment of money. An action upon an undertaking given upon an appeal to the court of appeals.

Subd. 9. An action against a sheriff, in his official capacity, or an action by a sheriff or late sheriff, to recover for a breach of the obligation of a bond or bonds, or an instrument or instruments of indemnity, or an undertaking or undertakings given to him in his official capacity.

Subd. 10. A cause entitled to preference, by the general rules of practice, or by the special order of the court, in the particular case.

Subd. 11. In any court an action for libel or slander.

Subd. 12. In the court of appeals, all appeals from judgments or affirmance rendered by the appellate division of the supreme court in cases enumerated in subdivision two of section one hundred and ninety-one of this act, where the decision of the appellate division has been unanimous and an appeal has been taken or allowed as in said subdivision of said section provided.

Subd. 13. An action for absolute divorce in which an order has been made granting temporary alimony.

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Where an issue of law and an issue of fact, or two or more other questions of different natures, come before the same term of the court for trial or hearing, the preference given by this section affects only the order in which the issues or questions of the same nature are to be disposed of.

Amended by chap. 416 of 1877, chaps. 163 and 542 of 1879, chap. 397 of 1882, chap. 391 of 1883, chap. 402 of 1884, chap. 120 of 1887, chaps. 289 and 795 of 1895, chap. 136 of 1898, chaps. 355 and 585 of 1899, chap. 144 of 1900, chap. 357 of 1902 and chaps. 6 and 51 of 1906.

See rule 36 (Sup. Ct.), Causes where defendant is under arrest preferred.

See rule 39 (Sup. Ct.), Preferences on appellate division calendar.

See § 229, ante, An appeal in which title to public office is involved has preference.

See § 278, ante, An appeal from judgment of court of claims has preference.

a. Where two actions brought by the same plaintiff against different defendants are both on the trial term calendar of the supreme court, the court has no power to transfer the action last brought to the place on the calendar occupied by the action first brought upon the mere allegations of the plaintiff's attorney that the action first brought was begun by mistake; the age of the plaintiff standing alone is not a sufficient reason for according an action a preference on the trial calendar: Crawford v. N. Y. City R. R. Co., 108 App. Div. 190.

b. A husband who has failed to pay alimony and counsel fees after being ordered so to do is not entitled to move for a preference under this section: Fennessy v. Fennessy, 111 App. Div. 181.

c. **Executrix.**—A preference will not be granted when the title of an action alone shows the representative capacity of the party, but when the pleading or affidavits establishes such representative capacity, the preference should not be denied because of the mere omission of the words "as executrix, etc.," in the title: Chumar v. Melvin, 112 App. Div. 828.

d. **Second motion.**—A second motion for a preference should be denied where the first motion was denied and no permission to renew was granted: Kalichman v. Nadler, 34 Misc. 809; 68 N. Y. Supp. 396.

e. Where the plaintiff serves a notice of trial and also a notice that he will apply for a preference under § 791, and the motion for a preference does not appear on the calendar, it is the duty of the plaintiff's attorney to call the attention of the court to the omission before the calendar is called; if he leaves the court room and the calendar is called in his absence he loses his right to a preference and the court cannot grant one in a subsequent notice: Bazuro v. Johnson, 71 App. Div. 255; 75 N. Y. Supp. 822; 71 App. Div. 612; 75 Supp. 548.

f. An action by a creditor of an alleged deceased insolvent debtor on behalf of himself and others to set aside a transfer, made by the decedent to an individual on the grounds of undue influence and in fraud of creditors, is entitled to a preference under subd. 5 of § 791, and the denial of a motion for a preference by an individual defendant is not a bar to a subsequent application for such preference by a defendant insurance company: Rattle v. Mutual Life Insurance Co., 67 App. Div. 12.

g. **Notice of trial.**—A cause cannot, because of the defendant's being in actual imprisonment, be granted a preference under rule 36 of the general rules of practice, and be placed upon the day calendar for trial until fourteen days' notice of trial has been served, as required by the Code of Civil Procedure, and the cause has been placed upon the general calendar: Veinstok v. Veinstok, 63 App. Div. 16; 71 N. Y. Supp. 195.

h. **Waiver.**—Where a sole plaintiff suing as administratrix in an action triable in the county of New York, serves, for the April term, 1902, a notice of trial and a notice of motion for a preference on the calendar under § 791, and they are neither withdrawn nor acted upon at the commencement of that term, she cannot obtain a preference by serving similar papers for the May term, 1902, as her failure to make that motion at the commencement of the April term operated as waiver of her right to a preference: Emerick v. Metropolitan St. R. Co., 38 Misc. 45; 76 N. Y. Supp. 901.

i. In an action for a penalty for a violation of the Liquor Tax Law, the commissioner of excise is entitled to a preference under § 791, subd. 1, which preference is absolute; if the commissioner moves for an order directing the action a preferred cause, he waives his absolute right and the granting of the motion is discretionary: Clement v. Mast, 119 App. Div. 485.

j. **New York county.**—In New York county, the rule that some other fact than that the action is one specified under § 791 must be shown to justify a preference is satisfied where a sole plaintiff, suing as administratrix, alleges that she is left without any means except what she can obtain from charity: Dooley v. Paget, 38 Misc. 44; 76 N. Y. Supp. 906.

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a. The statutory preference gives an action brought by a trustee in bankruptcy as sole plaintiff will not, in the first judicial department, be permitted to advance such an action over issues noticed for trial at prior trial terms, and to secure such a result some additional reason must appear: Davis v. Westervelt, 38 Misc. 13; 76 N. Y. Supp. 695.

b. The statutory preference on the calendar given an action for libel will not, in the first judicial department, be permitted to advance such an action over issues noticed for trial at prior trial terms, and to secure such a result some additional reason must appear: Eising v. Young, 38 Misc. 12; 76 N. Y. Supp. 698.

c. On a motion by an administratrix under § 791, subd. 5, for a preference as being the sole party defendant on the papers and pleadings, and a copy of the pleadings are handed to the court, but not annexed to the moving papers, the court has before it unquestionable proof that the administratrix is the sole party defendant; it seems that the statutory preference given by said section cannot, without some additional reason, be permitted to advance an action on the trial term calendar of the first judicial department over issues noticed for trial at prior trial terms, does not apply to any extent to the special term calendar in that department, as the latter calendar is kept up to date, while the former is much behind in the disposition of actions pending: Jackson v. Jackson, 44 Misc. 44.

d. Under § 793 in the counties of New York, etc., it was the intention of the legislature that the granting of an application for a preference should be in the discretion of the court; the appellate division refused in this case to interfere with the discretion of the trial judge granting a preference, although his only reason was that actions for libel are preferred under § 791, subd. 11; the word "may" will ordinarily be construed to give discretionary action and will only give a mandatory sense when such construction is necessary to give effect to the clear intention of the legislature: Morse v. Press Publishing Co., 71 App. Div. 351; 75 N. Y. Supp. 976; 33 Civ. Pro. R. 59.

e. **Action by New York city.**—Under § 791, subd. 2, the court has power to place an action brought by the city of New York on the preferred calendar for a particular day whether the notice to prefer was sufficient or not: City of New York v. Shack, 81 App. Div. 575.

f. **Equitable action.**—An action at law becomes equitable and triable by the court where the sole original defendant, an insurance company holding a fund, all of which the plaintiff claims and none of which the insurance company claims, interpleads and makes defendant another claimant of the fund; and where the sole plaintiff is an administrator he is thereafter entitled to put the case on the special term calendar and have it preferred under § 791, subd. 5: Vandewater v. Mut. Reserve L. Ins. Co., 44 Misc. 316.

g. **Separation.**—The preference given by subd. 13 of this section to actions for divorce does not apply to an action for a separation: Seligman v. Seligman, 52 Misc. 9.

h. **Discretion of court.**—An application for a preference is one addressed to the discretion of the court, and the mere fact that the action is one which may be preferred under § 791 is not of itself, in the absence of any facts showing the necessity therefor, sufficient to authorize the court to exercise its discretion in favor of the motion: Carroll v. Pennsylvania Steel Co., 96 App. Div. 165.

i. In the cases specified in § 791 relating to the preference of civil actions, the party given the preference is entitled to have the case tried at the day of the term for which it has been noticed, without regard to its position on the calendar, while in the cases arising under subds. 5 to 11, inclusive, of that section, the power to direct that the case be tried at the term at which the application is made is discretionary with the court: Sheerin v. City of New York, 74 App. Div. 308.

j. **Affidavit.**—A motion to place an action on the preferred calendar should be denied where the affidavit of the physician is not corroborated: Ortner v. N. Y. C. Ry. Co., 54 Misc. 83.

k. **Corporation.**—Subd. 8 of § 791 giving preference to an action "against a corporation, founded upon a note or other evidence of debt for the absolute payment of money," applies to such an action brought by one foreign corporation against another foreign corporation: Martin's Bank (Ltd.) v. Amazonas Co., 98 App. Div. 146; 90 N. Y. Supp. 734.

l. **City court of New York.**—Under rule 14 of the city court of the city of New York the plaintiff cannot have an action against a corporation, founded upon a note, the trial of which is not likely to occupy more than one hour, placed on the short cause calendar in part 4, where his only claim for a preference has been based on § 791, subd. 8, that the action is against a corporation and founded on a note: Marsh v. Standard Structural Co., 35 Misc. 381.

m. Where a cause is entitled to preference under § 791 and also to be advanced to the special calendar under Rule 2 of the city court of the city of New York, the latter right is not lost by the exercise of the former right and a motion therefor should be granted: Ferraca v. Miller Realty Co., 54 Misc. 84.

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§ 793. Where an order is necessary.

Where the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the cause is to be tried or heard, the party desiring a preference must procure an order therefor from the court, or a judge thereof, upon notice to the adverse party. A copy of the order must be served with or before the notice of trial or argument. Such an order is not appealable, but it may be vacated by the judge or judges holding the term at which the preferred cause is noticed for trial or hearing, or by such other justice, or at such other term of court, or at such other time as shall be prescribed by the general or special rules of practice. But a preliminary order is not requisite in a case embraced within subdivision first or second of the last section but one, and the order in a case embraced within subdivision six thereof may be made ex parte, and is conclusive. Where no order is required, a claim for preference, specifying the provision of law under which the claim is made, may be inserted in the note of issue to be filed with the clerk, and it shall then be the duty of such clerk to place such cause in its proper place among the preferred causes at the head of the calendar; except that in the counties of New York, Kings, Queens and Erie, and the seventh judicial district, no action or special proceeding shall be placed as a preferred cause upon the calendar of any circuit court or trial term or special term of any court as herein provided, but the party desiring a preference of any cause shall serve upon the opposite party, with his notice of trial, a notice that an application will be made to the court at the opening thereof, or to such justice or other term of court or at such other time as shall be prescribed by the general or special rules of practice, for leave to move the same as a preferred cause, and if the right to a preference depends upon facts which do not appear in the pleadings or other papers upon which the case is to be tried the notice must be accompanied by an affidavit showing such facts. In said counties of New York, Kings, Queens and Erie and in the seventh judicial district, the application for a preference shall be made at the opening of the court, or to such justices or other term of court, or at such other time as shall be prescribed by the general or special rules of practice, and if it shall appear that the cause is entitled to a preference and is intended to be moved for trial at or for the term for which the application is made, the court or justice must designate a day certain, during that term, on which day the said cause shall then be heard; if there be two or more causes so designated for trial for the same day, the said causes shall be heard in the order of their date of issue.

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Amended by chap. 542 of 1879, chap. 497 of 1888, chaps. 410 and 946 of 1895, chap. 140 of 1896, chap. 172 of 1900 and chap. 173 of 1904.

a. Unconstitutional.—§ 793, as amended by chapter 173 of 1904, requiring the court to grant a preference to certain classes of actions and to set them down for trial upon a day certain, is unconstitutional; under such section, as it

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stood prior to the amendment, the preference could, in the absence of special facts or circumstances calling for the exercise of judicial discretion, be allowed only over non-preferred cases noticed for the same term: Martin's Bank (Ltd.) v. Amazonas Co., 98 App. Div. 146; 90 N. Y. Supp. 734; Riglander v Star Company, 98 App. Div. 101, aff'd 181 N. Y. 531; 90 N. Y. Supp. 772; 34 Civ. Pro. R. 92.

a. § 793, as amended by chap. 173 of 1904, is unconstitutional; an application for the preference of a libel action should only prevail as to other causes noticed for the same term and not to all causes upon the calendar of the court: Woerner v. Star Co., 107 App. Div. 248.

b. **New York county.**—Under § 793 in counties of New York, etc., it was the intention of the legislature that the granting of an application for a preference should be in the discretion of the court; the appellate division refused in this case to interfere with the discretion of the trial judge granting a preference although his only reason was that actions for libel are preferred under § 791, subd. 11; the word "may" will ordinarily be construed to give discretionary action and will only give a mandatory sense when such construction is necessary to give effect to the clear intention of the legislature: Morse v. Press Publishing Co., 71 App. Div. 351; 75 N. Y. Supp. 976; 33 Civ. Pro. R. 59.

c. According to the provisions of § 793, a motion to place a cause upon the preferred calendar in the county of New York must be made at the commencement of the term for which notice of trial is served; if a party entitled to such preference and having served notice of trial and notice of motion for a preference upon the ground that the plaintiff is an infant make default on the return day, the right to a preference is lost.

d. Under § 793, a cause which is entitled thereto, has preference for the term for which it is moved but not over issues upon preceding calendars awaiting trial unless good cause is shown: Schuman v. Brooklyn Heights Ry. Co., 71 N. Y. Supp. 1095; 32 Civ. Pro. R. 25.

e. **Alimony.**—A husband who has failed to pay alimony and counsel fees after being ordered so to do is not entitled to move for a preference under § 791: Fennessy v. Fennessy, 111 App. Div. 181.

§ 796. Paper may be served personally.

f. **Alimony.**—Notice of application to punish husband for non-payment of alimony must be given to him as service upon his attorney is insufficient: Goldie v. Goldie, 77 App. Div. 12; 79 N. Y. Supp. 268.

§ 797. Other modes of service.

See rule 18 (Sup. Ct.), Proof of service.

g. **Not valid.**—The attempted service of an answer and a demand for a bill of particulars upon the plaintiff's attorney, by depositing them in his letter box, without inclosing them in an envelope or sealed wrapper, and without addressing them to anyone, is not a valid service, and the plaintiff's attorney cannot, by an order of the court, be required to accept it as valid: Fitzgerald v. Dakin, 101 App. Div. 261.

h. **Immaterial defects.**—The test in determining whether in a specified instance the service of legal papers by mail was sufficient, is whether or not the papers came into the hands of the attorney for the adverse party; if by reason of the presence of a return card on the envelope in which the papers are mailed, or if by reason of a shortage of postage the papers do not actually come into the hands of the attorney for the adverse party, there is no service, but if such causes do not in effect operate to prevent the actual receipt of the papers they become immaterial defects and do not invalidate the service: Appeal Printing Co. v. Sherman, 99 App. Div. 533; 91 N. Y. Supp. 178.

i. **Disbursements.**—In the absence of any proof showing peculiar necessity for personal service of an answer, an amended answer and order upon the plaintiff's attorney, disbursements for such services should not be allowed: Fuller Buggy Co. v. Waldron, 49 Misc. 278.

j. **Order to show cause.**—An order to show cause in proceedings to punish a contempt of court may be served on the attorney for the defendant charged with the offense: Lederer v. Lederer, 47 Misc. 471.

k. An order to show cause why one should not be punished for contempt must be served personally, and service upon counsel is not sufficient: Matter of Weeks, 111 App. Div. 337.

l. **Notice of trial.**—The registry of the package containing the plaintiff's notice of trial, served by mail, does not invalidate such service: Sears v. Tenhagen, 50 Misc. 275.

m. **Postage.**—When legal papers are served by mail without postage being fully prepaid, the attorney to whom they are addressed is under no obligation to pay the postage due and may refuse to receive the package tendered by the postman; when after such attempted service of an answer, the plaintiff enters judgment by default, the court has no power to set aside the judgment as irregular. The remedy of the defendant is to apply to open the default and for leave to come in and defend: Kuh v. Goldman, 119 App. Div., 148.

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§ 798. Double time when served through the post-office.

a. **Mail.**—Where a pleading is served by mail, the time prescribed by rule 22 of the General Rules of Practice for the making of a motion to make it more definite and certain is doubled pursuant to section 798: Borsuk v. Blauner, 93 App. Div. 306.

b. Service by mail is complete when the paper served is deposited in the post office; and service of a demurrer, forty days after the answer and return to an alternative writ of mandamus was received by mail, the day following its service is too late: Matter of Werner v. W. S. B. L. C. & B. Soc., 51 Misc. 82.

c. Service of an original answer by mail does not entitle the defendant to double time within which to serve an amended answer: Seckel v. Tangemann, 53 Misc. 268.

d. Although a defendant who serves his answer by mail has forty days within which to amend it, his right is without prejudice to the proceedings already had; and where, in the meantime, the cause has been regularly noticed for trial and he has suffered default, his subsequent amendment of his answer will not render irregular the judgment against him, and his motion to set the same aside will be denied: Langer v. Swasey, 54 Misc. 301.

e. By virtue of §§ 542 and 798, a defendant who has served his original answer by mail has a right to amend the same once as of course, without costs, within forty days, if it be not done for the purpose of delay or to deprive the plaintiff of a term of court: Schlesinger v. Borough Bank, 112 App. Div. 121; 98 N. Y. Supp. 136.

f. **Change of venue.**—The ten days given by § 986 to a defendant, in which to move for a change of venue in case the plaintiff does not consent to such a change within five days after service of a demand for such change, is extended to twenty days by virtue of § 798 where the demand is served by mail: Binder v. Metropolitan Street R. Co., 68 App. Div. 281; 74 N. Y. Supp. 54.

g. **Relief from judgment.**—The time given in § 724 in which a party may be relieved from a judgment is doubled by virtue of the provisions of § 798 where notice of entry of judgment was served by mail: Atkinson v. Abraham, 78 App. Div. 498.

h. **Pleadings.**—Where a defendant serves by mail an answer to the complaint, the plaintiff has under § 798 forty days to serve by mail an amended complaint, as of course under § 542: Bucklin v. Buffalo, Attica & A. R. R. Co., 41 Misc. 557; 85 N. Y. Supp. 114.

§ 799. When paper to be served on attorney; when service not required.

i. Notice of application to punish husband for non-payment of alimony must be given to him as service upon his attorney is insufficient: Goldie v. Goldie, 77 App. Div. 12; 79 N. Y. Supp. 268.

§ 802. This article not applicable to service of summons.

See § 425, ante, Summons when and by whom served.

j. **Contempt.**—A third person ordered to testify as a witness in supplementary proceedings, who is not personally served with the order and tendered his legal fees, cannot be punished for contempt in failing to obey it: Matter of Depue, 185 N. Y. 60.

k. An order to show cause why one should not be punished for contempt must be served personally, and service upon counsel is not sufficient: Matter of Weeks, 111 App. Div. 337.

§ 803. Court may direct discovery of books, etc.

See rules 14-17 (Sup. Ct.), Discovery of books and papers.

l. A party cannot be compelled to produce books or papers for the examination by the adverse party before trial, except as prescribed by §§ 803-809: Romer v. Kensico Cemetery, 79 App. Div. 100; 80 N. Y. Supp. 38.

m. **Examination before trial.**—An examination before trial under § 873 is a proceeding entirely distinct from and cannot be joined with a proceeding for the discovery of papers under §§ 803 and 809 and so much of § 872, subd. 7, as relates to an examination and inspection of the books of a corporation is intended to compel production of them so that they may be used only and solely as an incident to and in connection with the examination of a witness who is able to testify from them: Hart v. American Cotton Co., 41 Misc. 436.

n. Whenever on the examination of a party before trial it appears that he cannot testify without reference to his books and papers, their production may be compelled by subpoena *duces tecum*. The subpoena may issue before examination if it

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is apparent that the party to be examined cannot answer the questions without reference to his books. A subpoena issued in the first instance should, however, be limited to the production of papers in the defendant's custody or control, showing the transactions set forth in the moving affidavit, etc.: Crompton v. Dobbs, 119 App. Div. 331.

a. Where an examination is ordered under §§ 870-873 of a party not a corporation, there is no authority for an inspection or for requiring the production of books or papers even for use upon the examination of the party, except by subpoena *duces tecum*, but in the case of a corporation, the court is now authorized by § 782, subd. 7, to order the production of books and papers for the use of the witness upon the examination and not for an inspection by the adverse party; in the case of a corporation if an inspection is desired it must be obtained as provided in §§ 803-809; what the affidavits upon an application made pursuant to §§ 870-873 must show: Matter of Sands, 98 App. Div. 148; 90 N. Y. Supp. 749.

b. § 872, subd. 7, authorizes the production of books only as an incident to and in connection with the examination of a witness but does not authorize the production of books of a corporation on an examination of an officer of said company where the officer knows nothing of the facts involved in the action and where the purpose of the proceeding is to inspect the books of the corporation; if an inspection of the books and papers is desired, the applicant should move to bring himself within §§ 803-809: Matter of Thompson, 95 App. Div. 542.

c. § 872, subd. 7, in regard to the taking of the deposition of a witness at the instance of an adverse party is not designed to afford the moving party such an inspection of the books of the corporation as he could obtain in a proceeding for the discovery of such books under §§ 803-806, but solely to enable such books to be used in connection with the oral examination: Mauthey v. Wyoming Co. Co-op. Fire Ins. Co., 76 App. Div. 579; 78 N. Y. Supp. 596.

d. **Safe deposit box.**—The court has no power under §§ 803-805 and rule 14 to order a discovery of the contents of a box in a safe deposit company to enable a person, who has commenced an action to recover the contents of such box, to describe the contents in his complaint: Hallenbeck v. Parr, 65 App. Div. 167.

e. **Rule 14.**—§ 804 specifying the case in which a discovery or inspection may be compelled does not authorize the adoption of a rule of practice which will authorize a discovery of property other than such as is specifically mentioned in § 803 and the amendment in 1895 of rule 14 of the General Rules of Practice authorizing the discovery of any article or property was one in which the judges exceeded their powers: Auerbach v. Delaware, L. & W. R. R. Co., 66 App. Div. 201.

f. **Judgment creditor's action.**—In an action by a judgment creditor to procure a dissolution of a corporation it is proper to grant an order for the examination of an officer and to require him to produce the records and books of the corporation where it appears that the production of the books is required simply as an incident to the examination of the witnesses: Matter of Sayre, 70 App. Div. 329; 75 N. Y. Supp. 286.

g. **Insurance.**—Application for discovery of book of accounts by fidelity and casualty company whose premiums depend on the amount paid to the employees of insured granted and laches on the part of insurance company disregarded: Fidelity and Casualty Co. v. Seagrist, Jr., Co., 79 App. Div. 614; 80 N. Y. Supp. 277.

h. **Libel.**—In an action for libel an inspection will be ordered of the books and records of the defendant showing the transmission of the libel and the order will be limited to such books mentioned by the plaintiff as are in the possession or under the control of the defendant or its assignee: Palmer v. United Press, 67 App. Div. 64; 73 N. Y. Supp. 456.

i. **Assignment.**—Where the plaintiff alleges in his complaint an assignment of the cause of action, the defendant is entitled to discovery and inspection of the assignment in order to properly prepare for trial: Bensinger v. Erhardt, 60 App. Div. 303; 70 N. Y. Supp. 24.

j. **Executor.**—Where executors and trustees begin an action in which they make the present condition of a great estate they represent an issue, the defendants, the beneficiaries of the estate, should be granted an inspection and discovery of the books and papers showing its condition: Muller v. City of Philadelphia, 55 Misc. 28.

k. **Foreign corporation.**—When a stockholder of a foreign corporation is entitled to an inspection of certain contracts transferring patent rights and the resolution of the directors relating thereto, plaintiff must show the specific books which contain material entries to his knowledge and the sources of that knowledge: Snyder v. De Forest Wireless Telegraph Co., 113 App. Div. 840.

l. An examination of the books and papers of a foreign corporation, which is a defendant in an action brought in the state of New York, will not be ordered for the purpose of enabling the plaintiff to frame its complaint in the absence of proof that such books and papers are within the state of New York, as the presumption is that they are at the home office of the foreign corporation in the state in which it was organized: Snow, Church & Co. v. Snow-Church Co., 80 App. Div. 40; 80 N. Y. Supp. 512.

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a. **Compensation.**—When the plaintiff's assignor under his contract with the defendant to receive as compensation a percentage of the net profits of the business, the plaintiff suing to recover percentage alleged to be due is entitled to an inspection of the defendant's books and papers in order to prepare for trial. When the interest of an employee partakes of the nature of the interest of a copartner a discovery of the employer's books is proper: Thomas v. Waite Co., 113 App. Div. 494.

b. A plaintiff who has been in the employ of a foreign corporation as manager under an alleged contract entitling him to receive certain proportions of certain net receipts, is not entitled to an order for a commission entitling him to a general investigation of the defendant's books in order to prepare for the trial of an action to recover compensation alleged to be due; but when it is necessary for the plaintiff to ascertain certain facts concerning the net receipts, in order to prepare for trial, he is entitled to an examination of the officers of such foreign corporation before trial, and on such examination the production of the books may be compelled on subpoena *duces tecum* to enable the officers examined to testify therefrom: Harbaugh v. Middlesex Securities Co., 110 App. Div. 633.

c. **Insurance company.**—An order for the inspection of the books and papers of an insurance company should not require the deposit thereof in the county clerk's office. Order allowing such inspection reversed on condition that the defendant stipulate to produce the books and papers on trial: Caldwell v. Mutual Reserve Life Ins. Co., Nos. 2, 4 and 5, 114 App. Div. 377.

d. **Copy affidavit.**—A defendant moving to obtain the inspection of an affidavit which appears to have been destroyed and which was the ground of the allegations of the complaint made on information, must show in his moving papers that a copy is in existence and that he asks for an inspection of such copy: Memphis Trotting Association v. Smathers, 114 App. Div. 376.

e. **Laches.**—Where a case, sent back for a new trial, is upon the call of the calendar marked "ready," a motion thereafter made for leave to inspect the plaintiff's book should be denied for laches: Ferguson v. Bien, 49 Misc. 450.

f. **Book of account.**—Where plaintiff is entitled to a discovery of defendant's book of account, he is entitled to inspect and copy it; and this right is not satisfied by requiring defendant to furnish him a sworn statement therefrom: Pfaelzer v. Gassner, 54 Misc. 579.

g. **Corporation.**—An order to examine a corporation before trial should require the examination of the corporation, and should not run against its officers individually. Nor should such order be made the means of obtaining an inspection of the defendant's books and papers under the guise of an examination of its officers, and when this appears to be the object, and the officers sought to be examined have no personal knowledge of the records and thus no memory to be refreshed thereby, the order for examination will be reversed on the merits: Shumaker v. Doubleday, Page & Co., 116 App. Div. 302.

h. Inspection of an alleged release and an alleged agreement of plaintiff to accept a certain corporation as debtor in place of defendant, which are set up by defendant as defenses to plaintiff's claim, will be granted to plaintiff though such documents are not required to enable him to make out his case: DeKoven v. Ziegfeld, 52 Misc. 93.

i. **Corporate books.**—A director's right to inspect the corporate books is absolute, it being necessary to enable him to perform the duties of his office: People ex rel. Leach v. Central Fish Co., 117 App. Div. 77.

j. **Gas company.**—When a gas company has furnished a city with gas at less than the maximum statutory rate, and sues to recover the contract price, the court will not grant an inspection of the plaintiff's books and plant in aid of allegations by the defendant that the rate charged by the plaintiff was excessive: Brooklyn Union Gas Co. v. City of New York, 115 App. Div. 69; 100 N. Y. Supp. 625, aff'd 188 N. Y. 334.

k. **Monopoly.**—In an action by the people, based upon the alleged maintenance of a monopoly in the sale of ice, the Attorney-General, having been given by law a drastic remedy for the examination of witnesses and books, papers and documents, stands upon an application in the action for inspection and discovery in an attitude analogous to that of one who had the right before the commencement of the action to an inspection of the papers sought and should not be subjected to the strict rules that might obtain where a different relationship between the parties existed: People v. American Ice Co., 54 App. Div. 67.

l. **Sales.**—In an action by a salesman to recover for his alleged wrongful discharge, where his compensation under the contract of employment was based on sales made by him personally, and that there is no allegation that he sold any goods or that he has not been paid for all services rendered, an inspection of defendant's books showing their sales is unnecessary and will not be required: Sivins v. Mooney, 54 Misc. 66.

m. In an action for failure to deliver goods where the defendant alleges delivery of goods in pursuance of a written order which plaintiff claims he never signed, plaintiff should be allowed to see and photograph such order: Kamber v.

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Franklin Transportation Co., 52 Misc. 640.

a. **Res adjudicata.**—When on a motion to obtain an inspection of an affidavit, it appeared that two affidavits have been made in different cities and contain different allegations, the granting of a motion for the inspection of one affidavit is not res adjudicata requiring that an inspection of the other affidavit should be denied: Memphis Ass'n v. Smathers, 118 App. Div. 362.

b. **Services.**—When in an action for services the defendant counterclaims fifty odd items of money misappropriated by the plaintiff at specific dates, which items are particularly set forth in the answer, the plaintiff should be allowed an inspection of the defendant's books in order that uncontested issues may be eliminated from the trial; under such circumstances an inspection is as much for the benefit of the court as for the party himself: Edmonds v. Attucks Music Publishing Co., 117 App. Div. 486.

c. **Wills.**—When trustees and executors, holding property in this State and in foreign jurisdictions, bring an action in the courts of this State asking a construction of a will and a compromise agreement made by the devisees, and pray for leave to sell real estate upon the ground that the sale is necessary for a proper distribution under the will, the court has jurisdiction to compel them to allow a discovery and inspection of the records of the estate on a motion of interested parties, in order that the exact situation may be made clear. The inspection may include an inspection of the books and papers in foreign countries pertaining to the estate: Muller v. City of Phil., 118 App. Div. 277.

§ 804. Rules to prescribe the cases.

d. **Rule 14.**—§ 804 specifying the case in which a discovery or inspection may be compelled does not authorize the adoption of a rule of practice which will authorize a discovery of property other than such as is specifically mentioned in § 803 and the amendment in 1905 of rule 14 of the General Rules of Practice authorizing the discovery of any article or property, was one in which the judges exceeded their powers: Auerbach v. Delaware, L. & W. R. R. Co., 66 App. Div. 201.

e. **How commenced.**—A proceeding for the inspection of books must be commenced by petition: Bloodgood v. Slayback, 62 App. Div. 315; 71 N. Y. Supp. 809.

f. **Libel.**—In an action for libel an inspection will be ordered of the books and records of the defendant showing the transmission of the libel and the order will be limited to such books mentioned by the plaintiff as are in the possession or under the control of the defendant or its assignee: Palmer v. United Press, 67 App. Div. 64; 73 N. Y. Supp. 456.

g. **Complaint.**—A plaintiff's ignorance of the exact amount which he claims to be entitled to recover, is not, where he is able to state such amount with approximate accuracy, a sufficient ground for the examination of the defendants in order to enable him to frame his complaint: Boeck v. Smith, 85 App. Div. 575; 83 N. Y. Supp. 428.

h. **Book of account.**—Where plaintiff is entitled to a discovery of defendant's book of account he is entitled to inspect and copy it; and this right is not satisfied by requiring defendant to furnish him a sworn statement therefrom: Pfaelzer v. Gassner, 54 Misc. 579.

§ 805. Petition for discovery, and order thereupon.

i. **Safe deposit box.**—The court has no power under §§ 803-805 and rule 14, to order a discovery of the contents of a box in a safe deposit company to enable a person, who has commenced an action to recover the contents of such box, to describe the contents in his complaint: Hallenbeck v. Parr, 65 App. Div. 167.

j. **Petition.**—Under § 805, an application by the defendant in an action for an inspection of the contract sued upon must be based upon a petition and cannot be based on an affidavit: Lee v. Winans, 99 App. Div. 297.

§ 807. Proceedings upon the return of the order.

k. **Foreign corporation.**—A plaintiff who has been in the employ of a foreign corporation as manager under an alleged contract entitling him to receive certain proportions of certain net receipts is not entitled to an order for a commission entitling him to a general investigation of the defendant's books in order to prepare for the trial of an action to recover compensation alleged to be due; but when it is necessary for the plaintiff to ascertain certain facts concerning the net receipts in order to prepare for trial, he is entitled to an examination of the officers of such foreign corporation before trial, and on such examination the production of the books may be compelled on subpoena *duces tecum* to enable the officers examined to testify therefrom: Harbaugh v. Middlesex Securities Co., 110 App. Div. 633.

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a. **Libel.**—In an action for libel an inspection will be ordered of the books and records of the defendant showing the transmission of the libel and the order will be limited to such books mentioned by the plaintiff as are in the possession or under the control of the defendant or its assignee: Palmer v. United Press, 67 App. Div. 64; 73 N. Y. Supp. 456.

§ 809. Effect of papers, etc., produced.

b. **Examination before trial.**—An examination before trial under § 873 is a proceeding entirely distinct from and cannot be joined with a proceeding for the discovery of papers under §§ 803 and 809 and so much of § 872, subd. 7, as relates to an examination and inspection of the books of a corporation, is intended to compel production of them so that they may be used only and solely as an incident to and in connection with the examination of a witness who is able to testify from them: Hart v. American Cotton Co., 41 Misc. 436.

c. § 872, subd. 7, authorizes the production of books only as an incident to and in connection with the examination of a witness but does not authorize the production of books of a corporation on an examination of an officer of said company where the officer knows nothing of the facts involved in the action and where the purpose of the proceeding is to inspect the books of the corporation; if an inspection of the books and papers is desired, the applicant should move to bring himself within §§ 803-809: Matter of Thompson, 95 App. Div. 542.

d. Where an examination is ordered under §§ 870-873 of a party not a corporation, there is no authority for an inspection or for requiring the production of books or papers even for use upon the examination of the party, except by subpoena *duces tecum*, but in the case of a corporation, the court is now authorized by § 782, subd. 7, to order the production of books and papers for the use of the witness upon the examination and not for an inspection by the adverse party; in the case of a corporation if an inspection is desired it must be obtained as provided in §§ 803-809; what the affidavits upon an application made pursuant to §§ 870-873 must show: Matter of Sands, 98 App. Div. 148; 90 N. Y. Supp. 749.

§ 811. Party need not join with his sureties, when one surety is sufficient.

e. What is insufficient as a justification of a security company: Haines v. Hein, 67 App. Div. 389; 73 N. Y. Supp. 293.

f. **Liability.**—A complaint in an action against a surety after he has been discharged from liability for future acts and omissions of his principal under § 812 is demurrable unless such complaint alleges that the default upon which his liability is predicated was prior to a new bond given by his principal, and in such a case the respective liabilities of the sureties on the old and new bonds are dependent on the question whether the act of the principal upon which the liability is predicated was before or after the date of the filing of the new bond: Siebert v. Milbank, 95 App. Div. 566; 88 N. Y. Supp. 993.

g. **Joint and several.**—Though § 812 provides that an undertaking executed by two or more persons must be joint and several, yet if the respondent accepts one which is not, that fact is not available as a defense to the sureties upon the undertaking: Denike v. Denike, 61 App. Div. 492.

h. **Surety company.**—Under the provisions of this section, a surety company is entitled to be released from the bond of a receiver, though the receiver had paid to the company a year's premium and the year has not expired; the unearned premium may be recovered back: Matter of U. S. Fidelity & Guar. Co., 50 Misc. 147.

§ 813. When several sureties may justify, each in a smaller sum.

i. **Trust funds.**—Unless it appears to the contrary, it will be presumed that an agreement pursuant to § 813 in regard to deposit of trust funds and their withdrawal contained a provision that they might be withdrawn by an order of the court without the consent of the surety; the surrogate is given jurisdiction by § 3347, subd. 6, to make orders for the payment of trust funds deposited with the trust company pursuant to an agreement made between trustees and their sureties under § 813 upon notice to the surety: Matter of Chesterman, 75 App. Div. 573.

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§ 814. Bonds, etc., to the people or a public officer for the benefit of a suitor.

a. §§ 814 and 2067 should be read and construed in connection with §§ 1909, 1910 and 449 for the purpose of determining their effect in respect to each other for they are deemed to have been enacted simultaneously: Bamberger v. Am. Surety Co., 48 Misc. 221; 96 N. Y. Supp. 671.

b. **Mechanic's lien.**—§ 814, requiring leave of court before bringing action for a breach of the condition of the bond, has no application to bonds given to discharge a mechanic's lien which merely take the place of the real estate upon which the lien was filed: Pierce, Butler & Pierce Mfg. Co. v. Wilson, 118 App. Div. 662.

c. **Replevin.**—In an action upon an undertaking given by the plaintiff in a replevin action, which was afterwards discontinued, the defendant's liability is limited to a return of the property replevied or the payment of its value; in order to establish such a liability it must be shown that the plaintiff in the replevin action took possession of the chattel by virtue of the writ of replevin: Pettit v. Allen, 64 App. Div. 579; 72 N. Y. Supp. 287.

§ 817. Consolidating causes in same court.

d. **City Court of New York.**—The city court of the city of New York has power to remove to itself and consolidate with an action pending in it, an action brought in the municipal court of said city, and should exercise the power where the parties in both actions are the same, the causes of action identical, arise out of the same transaction, are provable by the same evidence and are contested upon the same defenses: Curley v. F. & M. Schaefer Brewing Co., 35 Misc. 131.

e. **Terms.**—A motion to consolidate two actions by force of the provisions of § 817 is addressed to the sound discretion of the court which may impose such conditions as that plaintiff be permitted to elect with which action the other be consolidated and that defendant stipulate that he would not raise the question that the two causes of action were improperly joined: Mason v. Evening Star Newspaper Co., 35 Misc. 77; 71 N. Y. Supp. 203, aff'g 67 App. Div. 619.

§ 818. Consolidating causes in different courts.

f. **City Court of New York.**—The city court of the city of New York has power to remove to itself and consolidate with an action pending in it an action brought in the municipal court of said city, and should exercise the power where the parties in both actions are the same, the causes of action identical, arise out of the same transaction, are provable by the same evidence and are contested upon the same defenses: Curley v. F. & M. Schaefer Brewing Co., 35 Misc. 131.

§ 820. Interpleader by order in certain cases.

See § 281, ante, Interpleader in court of claims.

See § 452, ante, Court may order another party brought in.

Equitable Interpleader, see Crane v. McDonald, 118 N. Y. 648.

g. **Practice.**—After the entry of an order of interpleader under § 820, the action becomes an equitable one and the practice of courts of equity in cases of interpleader should be followed; the practice, after an order of interpleader has been made under § 820, is for the plaintiff to apply to the court under § 544 for leave to serve a supplemental complaint containing substantially the allegations of the former complaint and such further facts as may be necessary to show the facts preceding the making of the order of interpleader, etc.: Greenblatt v. Mendelsohn, 46 Misc. 554.

h. An action at law becomes equitable and triable by the court where the sole original defendant, an insurance company holding a fund all of which the plaintiff claims and none of which the insurance company claims, interpleads and makes defendant another claimant of the fund; and where the sole plaintiff is an administrator he is thereafter entitled to put the case on the special term calendar and have it preferred under § 791, subd. 5: Vandewater v. Mut. Reserve L. Ins. Co., 44 Misc. 316.

i. **Replevin.**—Where, in an action of replevin, the sheriff, after taking possession of the property, delivers it to the plaintiff, upon the latter giving the usual undertaking, if a third party interposes a claim to the possession of the property, under § 1709, and the defendant makes no claim whatever to the property, the court will make an order interpleading the third party in the place of the defendant, but will make no direction as to the disposition of the property pending the action: Wright St. M. Eng. Wks. v. N. Y. Eng. Co., 44 Misc. 580.

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a. **Depositary.**—A depositary, holding money in dispute between two or more claimants, should be allowed to pay the money into court, while the claimants should properly be restrained from prosecuting actions against such depositary where the claims of the claimants rests on doubtful questions of law which the depositary could not himself determine: Mercantile T. Co. v. Calvet-Rogniat, 46 Misc. 16.

b. **Under Banking Law.**—The discretion to grant interpleader under § 115 of the Banking Law, chapter 689 of 1892, should be more liberally exercised than under § 820 of the Code: McGuire v. Auburn Savings Bank, 78 App. Div. 22; 79 N. Y. Supp. 91.

c. While the city court of New York has no power to proceed with an action after the entry of an order of interpleader, granted under § 820, it has power to grant an order of interpleader and proceed with the action when the order of interpleader is granted under § 115 of the Banking Law in an action brought against a savings bank to recover money on deposit: Gottschall v. German Savings Bank, 45 Misc. 27.

d. **City Court of New York.**—The city court of New York has power to grant an order of interpleader as § 820, authorizing the granting of such an order, is expressly made applicable to the city court of New York by § 3347; consequently, the fact that after the granting of such an order the action becomes one of equitable cognizance is not fatal to the right of the city court of New York to grant such an order, as it is competent for the legislature to confer equitable jurisdiction on the city court of New York, either expressly or by necessary implication: Krugman v. Hanover Fire Ins. Co., 45 Misc. 346; 90 N. Y. Supp. 448.

e. **Insurance policy.**—In an action on an insurance policy issued to the plaintiff's husband and payable to his executors, a person who claims that the plaintiff gave him the policy should be interpleaded as a defendant in the action: Lateer v. Prudential Insurance Co., 64 App. Div. 423; 72 N. Y. Supp. 235.

f. In an action of interpleader to determine the plaintiff's right to a policy as against a rival claimant, such rival claimant is a proper party: Hasberg v. Moses, 81 App. Div. 199; 80 N. Y. Supp. 867.

g. **What must be shown.**—The court should not under the discretionary power granted by § 812 allow a person to interplead upon a mere statement that a demand has been made by the party sought to be interpleaded; it is necessary to show that the claim made by the party sought to be interpleaded has some reasonable foundation: Steiner v. East River Savings Inst., 60 App. Div. 232; 70 N. Y. Supp. 223; 32 Civ. Pro. R. 42.

h. The provisions of this section are a substitute for the common-law action of interpleader and apply where facts exist which would support such an action; it is necessary to show that two persons have preferred a claim against him, that he has no beneficial interest in the thing claimed and cannot determine without hazard to himself to whom it would be delivered and that there is no collusion with any party to the action: Helene v. Corn Exchange Bank, 96 App. Div. 392.

i. Where a person brings an action against a warehouse company to recover possession of goods, the fact that the warehouse company may have a good defense to the action under chap. 633 of 1895 does not deprive it of its right under § 812 to interplead and have rival claimants of the property substituted for it as defendants: Follett Wool Co. v. Albany T. W. Co., 61 App. Div. 296.

j. The claim contemplated by § 820 as the ground for an interpleader, must be based upon such facts and circumstances as will indicate, to the satisfaction of the court, that there exists a reasonable doubt as to which of two or more claimants of the property is entitled thereto: Michigan Sav. Bank v. Coy, Hunt & Co., 45 Misc. 40.

k. Where an action is brought against a bank and one of its depositors by a judgment creditor of the depositor, and subsequently an assignee of the depositor demands the deposit, the bank is entitled under § 820 to an order of interpleader: Wells v. Corn Exchange Bank, 43 Misc. 377; 87 N. Y. Supp. 480.

l. **Brokers.**—When two brokers each claim a right to commissions, and there is no pretense that the defendant is liable to both, he may, upon paying the amount into court, interplead the claimants to litigate the issues between themselves: Trembley v. Marshall, 118 App. Div. 839.

m. **When not granted.**—In an action by the holder of a certificate of deposit to recover the amount from the trust company issuing the same, the fact that the receiver of a corporation to which it was originally issued claimed that the amount was more than sufficient to cover the indebtedness for which it was transferred, and has protested to the trust company against payment, does not entitle the trust company to interplead where the plaintiff denies the contentions of the receiver: Hanna v. Manufacturers' Trust Co., 104 App. Div. 90.

n. In an action by a vendor against brokers who conducted a sale for him to recover part of the purchase price, an application under § 820 by said brokers will not be granted on affidavits showing that the purchaser repudiated the sale because of false representations made by the brokers where there is nothing to show that the vendor made or authorized such false representations: Sullivan v. Crowe, 72 App. Div. 5.

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a. An order of interpleader should not be granted releasing the defendant unless it provides that he pay into court that which is the subject of the action, particularly where the defendant does not admit liability to any one for the property which is the subject of the action: Mason v. Rice, 85 App. Div. 315.

b. A defendant cannot procure an order of interpleader upon allegations that another person claims the same money as the plaintiff unless he admits liability to one party, etc.: Cohen v. Cohen, 35 Misc. 206; 71 N. Y. Supp. 481.

c. **Municipal Court.**—Though § 820 allows interpleader only in actions upon contract, ejectment and replevin in the supreme court, yet the inability of a plaintiff to obtain an interpleader in an action in the municipal court is not sufficient ground for an injunction restraining the prosecution of the action: La Femina v. Arsene, 69 App. Div. 285; 74 N. Y. Supp. 749.

d. In proper cases the municipal court of the city of New York has authority to grant an order of interpleader: Englander v. Fleck, 51 Misc. 567.

§ 822. Dismissal of complaint for neglect to proceed.

See rule 36 (Sup. Ct.), Dismissal of complaint for failure to bring to trial.

e. **Mandamus.**—Where issue is joined upon an alternative writ of mandamus and the case is placed upon the calendar, if, upon a motion made by the respondent to dismiss the proceedings for lack of prosecution, it appears that younger issues upon the calendar have been tried in their regular order and no excuse is offered for the delay on the part of the relator in bringing the issue to trial, the respondent, under § 822 and rule 36 of the General Rules of Practice, is entitled to have his motion granted: People ex rel. Arfken v. York, 106 App. Div. 590.

f. **When granted.**—A motion to dismiss the complaint for failure to prosecute under § 822 of the Code and rule 36 of the General Rules of Practice will be granted, where it appears that issue was joined in August, 1900, that a note of issue was filed in August, 1902, but that no notice of trial was served until October, 1903: McMann v. Brown, 92 App. Div. 249; 87 N. Y. Supp. 38.

g. A motion should be granted under § 822 of the Code and rule 36 of the General Rules of Practice to dismiss the complaint for failure to prosecute the action where it appears that the issue was joined in August, 1900, and that no further steps were taken until after the motion to dismiss the complaint had been made: Fisher Malting Co. v. Brown, 92 App. Div. 251; 87 N. Y. Supp. 37.

h. A motion to dismiss an action for failure of the plaintiff to prosecute it will be granted where five years have elapsed without any excuse on behalf of the plaintiff: Zafarano v. Baird, 80 App. Div. 144; 80 N. Y. Supp. 510.

i. Under this section and rule No. 36, a complaint may be dismissed in an action after issue joined on the ground of unreasonable delay by the plaintiff in moving the cause for trial; when on such a motion it is shown that the younger issues have been tried in the regular order, the fact establishes a *prima facie* case of neglect, and the burden is upon the plaintiff to excuse: Mladinich v. Livingston, 112 App. Div. 181; 98 N. Y. Supp. 46.

j. When an action should be dismissed for failure to proceed after a delay of eight years: Watson v. Loomis, 51 Misc. 227.

k. **New trial.**—Where, in an action to recover damages for personal injuries, the plaintiff recovers a verdict for a large amount and the judgment thereon is afterwards reversed and a new trial ordered for reasons not necessarily fatal to recovery upon another trial, the court will, in a proper case, relieve plaintiff from an order dismissing her complaint for failure to prosecute her action: Gunn v. Metropolitan St. R. Co., 52 Misc. 108.

l. **Laches.**—Where all postponements of the trial of a case have been made with the defendant's consent, the defendant is not in a position to charge the plaintiff with laches in its prosecution, and defendant's motion to dismiss the complaint for want of prosecution will be denied: McHugh v. Metropolitan St. R. R. Co., 51 Misc. 588.

m. When a plaintiff has failed to bring a cause to trial for eleven years following the date of issue, the action will be dismissed for unreasonable neglect to prosecute unless the neglect be excused by the plaintiff; an affidavit by the plaintiff's attorney stating that the action was not brought to trial because he was under the impression that a practical adjustment of the controversy had been made, is insufficient as establishing an excuse, especially when there are counter affidavits stating that no attempt at compromise was ever made: St. Paul's Church v. Mt. Vernon Suburban Land Co., 119 App. Div. 45.

§ 823. Feigned issues abolished and order for trial substituted.

See § 968, *et seq*, post, When trial by jury may be had.

n. **Judgment.**—Where the issues have been tried under § 823 and the verdict certified to the special term, an application may be made upon such verdict for an interlocutory judgment as provided by § 1546 of the Code: Southack v. Central Trust Co., 62 App. Div. 260; 70 N. Y. Supp. 1122.

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§ 824. Summons and pleadings to be filed within ten days after service.

See § 1670, post, Notice of pendency of action.

§ 827. Special references in certain cases.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

a. **Accounting.**—In an action for an accounting on the breach of a contract by the defendant to pay royalties to the plaintiff for the manufacture and sale of a patented article, and for an injunction restraining the further manufacture of the article by the defendant, the court against objection has no power to establish the defendant's liability by an interlocutory judgment, appoint a referee to take proof upon the question of damage and direct final judgment upon the coming in of such report: Russell Hardware Co. v. Utica Drop Forge Co., 112 App. Div. 703.

§ 829. When party, etc., cannot be examined.

b. § 829 forbids not only direct testimony of personal transactions with a decedent, but also every attempt by indirection to prove the same thing; thus, when plaintiffs suing on a *quantum meruit* to recover for services in preparing plans for a house for the decedent are allowed over objection to testify to frequent interviews with the decedent respecting the plans while they were being prepared, and to a number of consultations and interviews when the plans were discussed, it is reversible error: Little v. Johnson, 117 App. Div. 500.

c. The object of this section was to so carefully balance rights that a survivor should not take advantage of a deceased person and the personal representative should not take advantage of a survivor; where, in proceedings to settle the accounts of an executor, a residuary legatee claiming that the executor had failed to recover moneys obtained by parties from the testatrix by undue influence and fraud, partially examine such party as to personal transactions with the deceased, and it being decided that the surrogate has no jurisdiction, and the proceeding having been suspended and such legatee having induced the executor to bring an action to recover the amount, and in such action he introduces in evidence the statement of defendant made in the former proceeding, he thereby waives his privilege in this action and the defendant may testify as to the whole of any transactions which she was examined upon the proceeding: Cole v. Sweet, 187 N. Y. 488, aff'g 112 App. Div. 777; 96 N. Y. Supp. 625.

d. **When allowed.**—Testimony otherwise competent should not be rejected because it cannot be contradicted as the contradictory evidence would be inadmissible under § 829: Matter of Burbank, 104 App Div. 312; 34 Civ. Pro. R. 247.

e. Where the probate of a will is contested on the ground that it was procured by the undue influence of a legatee named therein, and it is shown that such legatee visited the testatrix's house, testimony given by him in rebuttal to the effect that on such visits he saw the testatrix and another person, is not incompetent under § 829: Matter of Crane, 68 App. Div. 355.

f. Where, on the reference of a claim of a widow against the estate of her husband, she is allowed to testify without objection to personal communications with her husband to sustain the validity of her claim, the widow is a competent witness to testify to the same personal communications on the final accounting to which objections were filed that the payment of the said claim was fraudulent and collusive: Matter of Watson, 101 App. Div. 550; 34 Civ. Pro. R. 150.

g. The executor of one who left a trust fund is not incompetent under § 829 as against the executors of the trustee to testify to the securities and moneys turned over by him from the estate of which he was executor to the trustee as he was not in any legal sense interested in the event of the action, nor was he a party: Putnam v. Lincoln Safe Deposit Co., 87 App. Div. 13; 83 N. Y. Supp. 1091.

h. § 829 does not forbid certain brothers and sisters interested in the event, from testifying, on the final accounting of the executor of the mother as administratrix of the son, as to the action of a deceased brother in joining in a gift to the mother of the personal property of the son who died unmarried and intestate: Matter of Sproule, 42 Misc. 448.

i. It is to be presumed that services rendered by two daughters to their father, while living with him in the family relation, were gratuitous, and where they occupy the position of claimants against their father's estate independent of each other, each may, in order to rebut the above presumption, testify for the other that she heard her father say that "if we stayed there and worked we should have what he had left after his death:" Matter of Sworthout, 38 Misc. 56.

j. In an action to set aside a deed on the ground of fraud, where it appeared

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that the grantor in presence of grantee executed a lease of the premises eight months after he executed the deed, the grantee is not incompetent to testify her reasons for allowing the deceased grantor to make the lease: Burdick v. Burdick, 86 App. Div. 383; 83 N. Y. Supp. 704, rev'd 180 N. Y. 261.

a. In an action by an administrator to recover the amount of an alleged loan made by his intestate, the testimony of the plaintiff as to a conversation between the decedent and defendant at which he was present is competent to prove the fact of the loan: Wakefield v. Wakefield, 47 Misc. 87.

b. Testimony of a witness on a former trial does not involve a communication between him and the decedent or make the testimony incompetent: Stirling v. Kelly, 77 App. Div. 621; 79 N. Y. Supp. 250.

c. Proof of the intestate's declarations of her intent to give her property to the donee held competent and her declarations as to the contents of a package was competent as part of the *res gestae*: Matter of Swade, 65 App. Div. 592; 72 N. Y. Supp. 1030.

d. In an action by an administrator against a savings bank to recover the amount of certain funds withdrawn by one who had a power of attorney from plaintiff's intestate and who withdrew the funds after the death of such intestate, such a person is not incompetent under § 829 to testify as to declarations made by the plaintiff's intestate in regard to his own acts in relation to the intestate's property, as he was not a party to the action nor a party from whom the defendant derived its interest, and would not be bound by a judgment in such an action: Hoffman v. Union Dime Savings Inst., 95 App. Div. 329; 88 N. Y. Supp. 686.

e. The testimony of the husband's attorney and executor as to the facts of a transaction between the husband and the wife, when the latter reconveyed to him upon his promise to provide for her by will is not excluded by either § 829 or § 835, nor because the plaintiff in the action to foreclose the land in question, and to whom the wife assigned the mortgage, was not present at the transaction: Mertens v. Wakefield, 35 Misc. 501.

f. Where a witness has testified on his own behalf as to personal transactions with the plaintiff, and after such testimony the plaintiff dies, and the plaintiff's administrator is substituted, the testimony is not incompetent under § 829, as the competency depended entirely on the facts at the time the testimony was given: Collins v. McGuire, 76 App. Div. 443.

g. Although the testimony of a person that an alleged trustee had a certain conversation with another in his presence in which he did not take part is incompetent under this section, yet a judgment will not be reversed on that ground where the same fact appears by other evidence and the case was tried by the court without a jury: Hutton v. Smith, 175 N. Y. 375, aff'd 74 App. Div. 284; 77 N. Y. Supp. 523.

Testimony of plaintiff that he went with the alleged trustee when she withdrew money and when she received the deed and paid money is not incompetent under § 829. Id.

h. A person attempting to charge an administrator with moneys alleged to have been loaned him by the decedent is not prohibited by § 829 from testifying to a conversation between the administrator and the decedent, during which the former asked the latter if she kept an account of the money which she had loaned him, to which the decedent replied in the affirmative, where it does not appear that the witness took any part in the conversation by word or deed: Matter of Andrews, 97 App. Div. 429.

i. Where an administrator of a depositor sues a savings bank for the depositor's balance of account, and the bank answers that it has paid it to a third party as donee *causa mortis* of the depositor, the bank has a right to the testimony of the donee regarding the gift and its exclusion, under § 829, is erroneous: Podmore v. Seamen's Bank, 35 Misc. 379.

j. In an action against the heirs of the plaintiff's aunt to establish an equitable lien upon real estate, purchased by the aunt and held by her in trust for the plaintiff, the plaintiff's testimony as to the conversation which took place between his aunt and his uncle in relation to the money, and to the withdrawal of the money from the bank and the subsequent payment thereof to the grantor of the premises in question, is not incompetent under § 829: Hutton v. Smith, 74 App. Div. 284; 77 N. Y. Supp. 523.

k. Where a question arises whether a deceased life beneficiary had ever received a certain fund, in which five persons claimed to be entitled to distinct portions and the executors bring an action against the five claimants, one of the claimants is not incompetent, under § 829, to testify on behalf of the other claimants as to declarations made by the decedent that the fund had come into her possession: Jones v. Thomas, 76 App. Div. 596; 79 N. Y. Supp. 111.

l. When a night watchman may testify that he performed services as such before death of defendant's testator: Shedrick v. Young, 72 App. Div. 278.

m. Where an executor has been permitted without objection to testify that he had been operating in lands for his father, the testator, testimony given by him to the effect that when he made the purchase for his father the deeds were taken in the names of other members of the family, is not incompetent under § 829: Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755.

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a. In an action brought by a sister of a decedent to set aside the probate of the latter's will, on the ground of undue influence, the fact that, if the plaintiff is successful, her husband will have a tenancy by the curtesy initiate in the property passing to the plaintiff from the decedent, does not render the husband incompetent, under § 829, to testify to what occurred and what was said on an occasion when the decedent was sick; a witness whose interest is sufficient to disqualify him from testifying to any personal transaction or communication with the deceased, is not, however, to be excluded from testifying to a conversation between the deceased and another in his presence, but in which he took no part: Spindler v. Gibson, 75 App. Div. 444.

b. In an action against a husband and wife by the executor of a decedent to foreclose a mortgage given by the husband to secure part of purchase price, in which wife claimed as a defense that mortgage was to be her property after decedent's death, the husband may withdraw his answer and testify that at time of execution of mortgage decedent promised that mortgage should be property of the wife upon his death: Bouton v. Welsh, 170 N. Y. 554, aff'g 59 App. Div. 288; 69 N. Y. Supp. 407.

c. A person, seeking to re-establish that he rendered services to decedent, cannot testify that his books of account are correct as such books constitute a personal transaction between himself and the decedent: Wright v. Hicks, 61 App. Div. 489.

d. In an action against an executor to recover an interest in real estate, evidence of such executor as to conversations with the testatrix's husband, then deceased, as to whether he accepted the terms of the will are not incompetent, under § 829: Farrar v. Farmers' Loan & Trust Co., 85 App. Div. 478.

e. **When not competent.**—In an action under § 2653a to set aside the probate of a will which disinherited the testator's children on the ground that in making such will the testator was controlled by an insane delusion, the children are incompetent, under § 829, to testify to their father's wild and excited actions and speech and the widow is also incompetent to testify that she executed a mortgage which resulted in a separation agreement between herself and her husband: Holland v. Holland, 98 App. Div. 366.

f. The fact that a person has testified as to personal transactions with a decedent under the provisions of § 2709, does not permit such person to testify under this section: Killian v. Heinzerling, 47 Misc. 511; 95 N. Y. Supp. 969.

g. Where, in an action under § 2653a, the interests of certain defendants and the plaintiff are precisely the same so far as they can be affected by the action, the plaintiff is as incompetent, under § 829, to testify in their behalf in reference to any personal transaction between herself and the decedent, as she is to give such testimony in her own behalf: Pringle v. Burroughs, 185 N. Y. 375, aff'g 100 App. Div. 366; 91 N. Y. Supp. 750.

h. In an action to have a deed executed by the plaintiff's father and mother, to the defendant, declared a deed of trust for the benefit of the plaintiff, testimony given by the plaintiff that just before the deed was executed she was called into her mother's room, who told the agent of the grantee under the deed that this was the person she wanted the property held in trust for, is incompetent under § 829: Leary v. Corvin, 63 App. Div. 151; 71 N. Y. Supp. 335.

i. In an action by the widow of a former beneficiary against the estate of a depositor, evidence that she or her husband knew of the deposit is inadmissible, being immaterial unless the fact had been communicated by the depositor, and she was incompetent to testify to personal transactions with the deceased: Matter of United States Trust Co., 117 App. Div. 178, aff'g 189 N. Y. ——; 102 N. Y. Supp. 271.

j. The fact that an executor suing for the conversion of property belonging to an estate testifies that the defendant admitted to him that she held such property, does not permit the defendant to testify as to personal transactions with the deceased contrary to the prohibition of § 829. The testimony of the executor did not relate to a transaction with the deceased so as to waive the protection of the statute; the objection that such testimony calls for "personal communications, inadmissible under § 829 of the Code," is sufficiently specific to challenge the competency of the witness under that section: Morgan v. Foran, 120 App. Div. 185.

k. Where a husband on his promissory note borrows moneys and thereafter purchases real estate which is conveyed by the vendor directly to his wife, she takes the property "from, through or under" her husband, within the meaning of § 829, and therefore where the lender brings an action against her to impress a trust on the property to the amount unpaid, the lender cannot testify as to personal transactions with the husband tending to establish the agreement which he claims: Freygang v. Train, 42 Misc. 49.

l. In an action to set aside a deed as fraudulent and void as to plaintiff, where it appears that the money applied to the discharge of liens and incumbrances upon the premises was obtained by a fraudulent grantor from the plaintiff's decedent, the fraudulent grantor is incompetent, under § 829, to testify on behalf of the other defendants, who claimed through her as to the instructions given her by the decedent in reference to the

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use to be made of the money: Hall v. Bond, 68 App. Div. 293.

a. In an action by a client against the executrix of his deceased attorney to determine the validity of a lien for services, testimony of the plaintiff as to whether he knew of any lien which had been given to any one on the fund in suit is incompetent, under § 829, as it invokes a personal transaction with the deceased attorney: Boyd v. Daily, 85 App Div. 581; 83 N. Y. Supp. 539.

b. Where evidence, which is inadmissible, under § 829, is admitted without objection, it becomes proof in the case which the court is entitled to consider: Hickok v. Bunting, 67 App. Div. 560; 73 N. Y. Supp. 967.

c. Upon the hearing of a claim against a decedent's estate on a note alleged to have been delivered by the intestate to the claimant, he cannot testify that the note was in his safe on the day of the death of the decedent: Matter of Blair, 99 App. Div. 81.

d. In an action brought by a judgment creditor of a grantor of real property against the grantor and heirs and the executrix of the grantee to have the deed of conveyance set aside, on the ground of fraud, the grantor is incompetent, under § 829, to testify to conversations which took place between him and the deceased grantee: Roberts v. Mack, 98 App. Div. 485.

e. In an action brought against the widow and the son of a decedent to establish the existence, as a lien upon real estate of which the said decedent dies, seized intestate, of a mortgage which the plaintiff claims was executed to him by the decedent, the widow of the decedent, whose interests in the property in question is derived from her deceased husband, is incompetent, under § 829, to testify to conversations or transactions between herself and her husband tending to establish the invalidity of the alleged mortgage: Smith v. Smith, 100 App. Div. 1.

f. Upon a hearing on a claim against a decedent's estate, the plaintiff, in support of certain testimony, cannot testify that he went to a certain place with nine hundred dollars ($900) and came away with only a little change: Dougall v. Dougall, 61 App. Div. 282.

g. Testimony as to whether or not an interested adverse party had had a conversation with the defendant's testator, is incompetent under § 829: Healy v. Malcolm, 99 App. Div. 370; 91 N. Y. Supp. 207.

h. In an action by an administratrix for an accounting by the owner of an apartment house, erected under the superintendence of her intestate, testimony of the defendant, in effect denying that certain information had been given him by the deceased, is incompetent under § 829 of the Code of Civil Procedure: Komp v. Luria, 46 Misc. 339.

i. A legatee under a will, bringing an action under § 2653a to determine the validity of an alleged subsequent will, is interested within § 829 and cannot on the trial of the action testify to personal transactions with the deceased, nor can she testify on behalf of the testator's sisters, who are defendants and also legatees under the former will: Pringle v. Burroughs, 100 App. Div. 366; 91 N. Y. Supp. 750, aff'd 185 N. Y. 375.

j. In an action against the administrator of a deceased member of a firm, upon a promissory note made by the firm, the surviving partner is incompetent, under § 829, to testify, for the purpose of taking the note out of the statute of limitations, that some years after the dissolution of the firm he made, with the consent and by the direction of the deceased partner, a payment on the note from assets of the firm: Hixson v. Rodbourn, 67 App. Div. 424.

k. On the hearing of a disputed claim of a brother, the administrator of and against his sisters estate, such administrator is incompetent, under § 829, as to payments made by the intestate to him upon the claim: Matter of Neil, 35 Misc. 254.

l. The maker of a note is disqualified from testifying in his own behalf as to personal transactions and communications between himself and the deceased payee thereof as against one obtaining title to the note through such payee: Wangner v. Grim, 169 N. Y. 421, aff'g 53 App. Div. 626; 65 N. Y. Supp. 1145.

m. Testimony of an interested witness as to the execution of a deed (which was lost) by the decedent to a third person, who conveyed to the witness, is incompetent under § 829: Dolan v. Leary, 69 App. Div. 459; 74 N. Y. Supp. 981.

n. Upon a hearing of a disputed claim, the plaintiff cannot testify that she harnessed her team and drove to decedent's residence and then to cemetery, where the claim is for services in driving decedent and for materials furnished: Mitchell v. Hollands, 72 App. Div. 224.

o. The evidence of an executor as to declarations made by his testator, by which he seeks to justify himself in an extravagant expenditure for a monument, is incompetent under § 829, and its admission constitutes reversible error; the executor's verification of a claim for such monument is incompetent as evidence under § 829: Matter of Smith, 75 App. Div. 339; 78 N. Y. Supp. 130; 33 Civ. Pro. R. 115.

p. In an action by an administrator to recover moneys paid upon a contract for the sale of a farm, which moneys passed into defendant's possession, it was shown that the decedent executed and delivered a deed to the defendant, but that such deed was found in the private box of the decedent, evidence by the defendant that he placed the deed in dece-

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dent's private box is inadmissible under § 829: Parker v. Parsons, 79 App. Div. 310; 79 N. Y. Supp. 688.

a. One claiming title to railroad stock by gift from a deceased person is prohibited from testifying that for a certain period during decedent's life time and at his residence the certificates of stock were in her possession: Richardson v. Emmett, 170 N. Y. 412; 33 Civ. Pro. R. 50, rev'g 61 App. Div. 205; 70 N. Y. Supp. 546.

b. **Waiver.**—Where an administratrix brought an action on several promissory notes made by the defendant to the order of her intestate, and the defendant, to support his defense of payment, put in evidence a number of checks drawn by him to the order of the intestate, and the administratrix testified that the intestate had for a number of years been in the habit of cashing checks for the defendant, such testimony is to be deemed a waiver of her right under § 829, to object to the competency of the testimony of the defendant as to conversations with the intestate at the times checks were delivered: Flick v. Penfield, 82 App. Div. 610.

c. When evidence of transactions with decedent taken in other proceedings is given by the executor, there is a waiver of the provisions of § 829, and the defendant is entitled to give evidence of the whole of any transaction about which she was partially examined: Cole v. Sweet, 112 App. Div. 777; 98 N. Y. Supp. 625, aff'd 189 N. Y. 488.

d. When, in a proceeding by a representative to discover the property of an estate alleged to be withheld, the person is examined concerning personal communications or transactions with the deceased, all the objections under § 829 to his testimony to the same in future litigation is waived by virtue of the provisions of § 2709: Killian v. Heinzerling, 114 App. Div. 410.

e. In an action by an executrix to recover moneys alleged to have been loaned by the decedent to the defendant, the latter may testify to transactions between the decedent and himself which have been testified to by the executrix on her direct examination on behalf of herself, but not as to any such transactions as may have been elicited from her on cross-examination: Motz v. Motz, 85 App. Div. 4.

f. **No waiver.**—In an action upon a contract made by the plaintiff's assignor with the defendant's testator, the fact that a servant of the testator was called by the defendant to testify to an interview between the plaintiff's assignor and the testator, does not entitle the plaintiff's assignor to testify to what took place at such interview: Healy v. Malcolm, 66 App. Div. 501; 73 N. Y. Supp. 259.

g. **Attorney.**—It is improper for the court over the objection of the defendant to permit an attorney to testify as to professional transactions and communications with the deceased: Downey v. Owen, 98 App. Div. 411.

h. **Legatee.**—Where an objection is raised that the evidence of a witness is incompetent, under § 829, it is necessary for the party raising the objection to establish the disqualification, where the interest of the witness in the estate was to a specific legacy and it appeared that the estate was sufficient to pay such legacy, and as it did not appear that the witness took part in a conversation, the testimony did not relate to any personal transaction or communication between her and the deceased: Farrar v. Farmers' Loan & Trust Co., 85 App. Div. 367.

i. **Whole conversation.**—Where a party calls the adverse party and examines him as to a personal transaction with a deceased person, in reference to which he would be precluded from testifying in his own behalf under that section, the witness is entitled to state the whole transaction or conversation, and thereby explain or qualify the testimony called out by the other party: Matter of Cozine, 104 App. Div. 182; 93 N. Y. Supp. 1124.

j. Where the surviving executor of the estate of the testator calls and examines an alleged debtor of the testator in order to show the liability and surcharge the account of the administrator of the widow, his former co-executor, with the amount of the debt, the witness, although incompetent to testify to a personal transaction with the testator which would relieve the witness from liability, is entitled to give the whole transaction with the testator and show that he was not indebted to him: Matter of Woodbury, 40 Misc. 143.

k. Where a special guardian for infant legatees, seeking to surcharge the accounts of the executor by the amount of a bank deposit, cross-examines the executor as to the transaction of the gift, the executor is entitled to prove the whole transaction and conversation had by him with the testator: Matter of Rose, 35 Misc. 21; 71 N. Y. Supp. 172.

l. **Physician.**—An objection that a witness is not competent at all to testify under § 829 of the Code of Civil Procedure is not available because too general; the proper way of taking an objection under the section is, that the witness is incompetent to answer the question, because it involves a personal transaction between him and the deceased prohibited by said section; upon the trial of an action brought by a physician to recover for professional services rendered by the plaintiff to the decedent's intestate, the plaintiff is incompetent, under § 829, to testify, after having looked at his account book for the purpose of refreshing his recollection, that he saw the intestate on the several hundred dates therein specified and that all the visits therein charged against the intestate were made by him, and that he delivered annual statements of the account

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to the intestate and that she kept them without objection: Russell v. Hitchcock, 105 App. Div. 315.

a. "**Interested" defined.**—A person is not "interested" within § 829, unless some legal right of his would be affected by the event of the action or unless the judgment might be used to charge him with some legal liability: Lecour v. Importers & Traders' Nat. Bank, 61 App. Div. 163; 70 N. Y. Supp. 419.

b. The interest of a witness, if any, by reason of his having been the secretary and treasurer of the corporation before it ceased business, is too remote, to make him interested in the event within the meaning of the statute: Talbot v. Laubheim, 188 N. Y. 421, aff'g 111 App. Div. 915.

c. The plaintiff loaned money to a firm which dissolved and a new firm took over its assets and liabilities, the new firm composed of the defendant's intestate and the plaintiff's husband, in an action on a note it was competent for the husband to testify under § 829 to the making and delivery of the note and to a payment made thereon by him out of the firm assets, which saved it from the statute of limitations, as the husband was not interested in the event and was not testifying in his own behalf or interest, but against it: Hixson v. Rodbourn, 36 Misc. 19; 72 N. Y. Supp. 42.

d. **Correct form of objection.**—In an action brought by the son of a testatrix against the executors of the will upon promissory notes payable to the son, plaintiff was asked whether they were in his possession prior to the death of his mother, to which an objection was made that the question was incompetent, *Held* error to overrule such objection, as the witness was incompetent under this section and the objection did not challenge the competency of the witness, but the competency of the evidence: Hoag v. Wright, 174 N. Y. 36, rev'g 69 App. Div. 381; 74 N. Y. Supp. 1069.

Later the witness was asked if the signature to each was his mother's handwriting, to which an objection was interposed as to the competency of the witness, *Held* not error to overrule the objection and admit the answer, since his answer was an opinion and not a personal transaction. Id.

e. Evidence of transactions with one deceased, incompetent under § 829, must be objected to as inadmissible under the statute in order that the error may be available on appeal: Hamlin v. Hamlin, 117 App. Div. 493.

f. **Handwriting.**—In an action on a note, even though the administrator and grandson of the intestate testified that they were acquainted with the handwriting of the intestate, yet this does not permit the payee named in the note to testify that he saw the intestate sign the note and subsequently deliver the same to him: Hobart v. Verrault, 74 App. Div. 444; 77 N. Y. Supp. 483.

g. Testimony that entries in a book are in a decedent's handwriting does not relate to a personal transaction between the decedent and the witness: Goetting v. Weber, 71 App. Div. 503; 75 N. Y. Supp. 890.

h. In an action to recover upon promissory notes, in which the defense was forgery, evidence by the plaintiff that the signatures to the notes were those of the testatrix does not involve a personal transaction between the plaintiff and the testatrix and is not inadmissible under § 829: Hoag v. Wright, 69 App. Div. 381; 74 N. Y. Supp. 1069.

i. **Deed.**—In an action brought to set aside a deed executed by a decedent upon the ground of undue influence when the grantee has testified that she was present and heard the conversation between her grantor and the tenant in regard to the lands described in the deed, she is precluded under § 829 from giving any testimony in regard to the transaction as to the deed for the purpose of explaining the lease: Burdick v. Burdick, 180 N. Y. 261, rev'g 86 App. Div. 383; 83 N. Y. Supp. 704.

j. **Promise.**—Where, after the death of the alleged father in an action by a child to enforce an oral contract, it appears that the promise of the mother to the father, in consideration of his promise to pay the child alone furnished the consideration, the sole interest of the child is derived from the mother and she is disqualified to testify to the alleged agreement: Rosseau v. Rouss, 180 N. Y. 116, rev'g 91 App. Div. 230; 86 N. Y. Supp. 497.

k. **Appeal, no exception.**—In an action for personal services, where the plaintiff was allowed to testify to a conversation with plaintiff's testator as to her employment but no exception was taken to the ruling, the judgment on that ground will not be reversed on appeal: Ralley v. O'Connor, 71 App. Div. 328; 75 N. Y. Supp. 925.

l. When evidence erroneously admitted under this section is not a ground for reversal: Matter of King, 115 App. Div. 751; 100 N. Y. Supp. 1089.

m. Where the question whether the surrogate erred in receiving the testimony of witnesses over objection to their competency under § 829 and § 834 is raised, it cannot be intelligently determined whether the exceptant was prejudiced by the ruling, if erroneous, unless there is included in the case on appeal all the material evidence: Matter of Goldsticker, 54 Misc. 175.

n. **Personal transaction.**—Evidence is not incompetent under this section when it does not purport to ask the result of a personal transaction between a defendant and the plaintiff's intestate, but only denies a contract with a wit-

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ness who has testified that he was a party to the contract under the same conditions as the intestate: Lefevre v. Silo, 112 App. Div. 464; 98 N. Y. Supp. 371.

a. **Executrix.**—In an action by brokers against the executrix of the husband to recover damages for his alleged breach of implied warranty it is improper to receive the testimony of one of the plaintiffs, that he notified the deceased husband over the telephone that a purchaser had been found: Bloodgood v. Short, 50 Misc. 287.

b. **Husband.**—The husband of the holder of a note, purporting to have been indorsed by a deceased person, who manages his wife's business under a power of attorney as if it were his own, his wife paying no attention to it and knowing no more about it than if she had no interest in it, the title being in the name of the wife simply to enable the husband who had failed to evade payment of his creditors, is incompetent under this section to testify to the circumstances attending the alleged indorsement of the note in a proceeding for the sale of the decedent's real estate for the payment of his debts, including such note: Matter of Neufeld, 50 Misc. 215.

c. **Stockholder.**—A stockholder of a defendant business corporation is an interested party within the meaning of this section in an action brought by the representatives of a decedent to recover damages from the corporation for negligence causing the death of such decedent: Andrews v. Reiners, 112 App. Div. 378; 98 N. Y. Supp. 658.

d. **Administratrix.**—An administratrix with the will annexed, in her action to establish and enforce a trust in certain mortgages alleged to have been held in trust by defendant's testator for plaintiff's testator, is not a competent witness under § 829 as to her conversations with defendant's testator: Harvey v. Cullings, 48 Misc. 344.

e. **Messenger.**—In an action for conversion against certain stock brokers to whom a messenger of plaintiff's testatrix had wrongfully delivered stock belonging to said testatrix, the conversations of such messenger with the testatrix were held to be inadmissible under this section, as such messenger was an interested party under this section: Hall v. Wagner, 111 App. Div. 70.

f. **Agent.**—A party may testify to personal transactions and communications with an agent who makes or lawfully modifies a contract for his principal, although both the principal and agent are dead: Warth v. Kastriner, 114 App. Div. 766.

g. **Executor.**—Where, on an accounting by executors, one of whom was the testator's widow, objection is made to the allowance of a credit for moneys paid to the widow upon a note purporting to have been executed by the testator to the order of the widow, testimony by one of the executors that she had possession of the note is inadmissible under this section; evidence by one of the widow's co-executors as to conversations with the testator showing the note to be paid is inadmissible; a legatee whose legacy has been paid in full is not incompetent to testify in support of a credit claimed by the executors: Matter of Knibbs, 108 App. Div. 134.

h. Executors who, after rejecting a claim and having knowledge of facts which might constitute a defense, make no defense when the action is tried before a referee, but give evidence supporting the claim and suppress other facts and do not raise objections to testimony under this section, are not protected by a judgment so obtained: Matter of Watson, 115 App. Div. 310; 100 N. Y. Supp. 993, aff'd 187 N. Y. 541.

§ 830. When party, etc., cannot be examined. When party has died.

i. **Hearsay.**—Evidence of a statement by the plaintiff who died after the commencement of the action, made upon the taking of her deposition, that her husband did not support her, is inadmissible under § 830 or at common law: Young v. Valentine, 177 N. Y. 347, aff'g 78 App. Div. 633; 79 N. Y. Supp. 536.

j. Any person who is present at a trial and hears the evidence is competent to testify as to what was sworn to by the witnesses, and a ruling sustaining an objection to his testimony upon the sole ground that the stenographer's minutes were the best evidence is reversible error: Weinhandler v. Eastern Brewing Co., 46 Misc. 584; 92 N. Y. Supp. 792.

k. **Subsequent reference.**—Where the testimony of a deceased witness was taken before a referee, who died before the evidence was submitted to him, such testimony is admissible upon a subsequent hearing, as the former hearing was a trial within the meaning and spirit of § 830: Taft v. Little, 178 N. Y. 127, rev'g 78 App. Div. 74; 79 N. Y. Supp. 507.

l. **Jurisdiction.**—§ 830, as amended by chapter 352 of 1899, does not apply where everything done in the prior action or proceeding was absolutely void because of lack of jurisdiction in the court, and where the objection of want of jurisdiction was raised in such action: Deering v. Schreyer, 88 App. Div. 457.

m. **Expert.**—§ 830 applies to the testimony of a deceased expert witness; if the judge presiding at the trial refuses over the objection and exception of the party to allow the testimony of the deceased witness to be read, the excepting party

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does not waive such exception by calling another expert: Wallach v. Manhattan Ry. Co., 105 App. Div. 422.

a. **Not admissible.**—Where, pending an adjournment, one of the witnesses whose cross-examination had been interrupted and left incomplete, dies, the testimony of such witness given on the trial is not admissible under § 830: Morley v. Castor, 63 App. Div. 38; 71 N. Y. Supp. 363.

b. A transcript of a stenographer's minutes, unverified by him, is no evidence at all and is inadmissible to contradict a witness by proof that he testified differently upon a former trial: Jaffe v. Pennsylvania R. R. Co., 49 Misc. 520.

c. The right given by § 830 to read evidence of a witness given on a previous trial and who has since died should be carefully restricted to the extent to which, on the previous trial, a reasonable opportunity to cross-examine the witness was given: Willsen v. Metropolitan Street R. Co., 95 App. Div. 388; 88 N. Y. Supp. 652; 182 N. Y. 510.

d. **Criminal action.**—This section authorizes the reading on a second trial of the testimony of a deceased witness in a criminal action of the testimony taken at the first trial, since the word "action," as defined in § 3333, refers to both civil and criminal actions: People v. Elliott, 172 N. Y. 146, aff'g 66 App. Div. 179; 73 N. Y. Supp. 279.

e. **Relief from stipulation.**—Where, on the trial of an action involving an issue between two of the defendants, one of such defendants admits that the other defendant would, if sworn, testify to certain facts, and waives the personal production of such defendant, the admission operates as a stipulation, binding upon the party making it during the continuance of the litigation, and, in the event of the death of the defendant, to whose testimony the admission related, pending a new trial for the action, his executors are entitled, under the provisions of § 830, to read the testimony upon the new trial; if the defendant, making the stipulation, desires to be relieved therefrom upon the new trial, it is its duty to apply to the court for that relief and show equitable consideration authorizing the court to grant it: Fortunato v. The Mayor of New York, 74 App. Div. 441; 77 N. Y. Supp. 575.

f. **New trial.**—The evidence of a deceased witness given on the trial of an action for damages brought against the original company, may be read on a new trial of the action against the lessee brought in as defendant; it is unnecessary to determine whether this section, as amended by chap. 352 of 1899, would permit the same to be read against a lessee since the common-law rule permitting such evidence to be read as between the original parties or their privies stands in the absence of an express or necessarily implied repeal: Shaw v. N. Y. El. R. R. Co., 187 N. Y. 186, aff'g 110 App. Div. 892.

§ 831. When husband and wife not competent witnesses. When competent.

g. A letter by a husband addressed to his wife is competent evidence and is not a confidential communication between the husband and the wife, though written in the former's presence: Weston v. Weston, 86 App. Div. 159; 83 N. Y. Supp. 528.

h. **Alienation.**—In an action to recover damages for the intentional alienation of the affections of the plaintiff's wife, evidence of abusive language, unfounded charges of adultery and unreasonable reprimand are not confidential communications protected by § 831: Millspaugh v. Potter, 62 App. Div. 521.

i. **Admission.**—Where an admission is made upon the first trial, it remains binding upon the parties during the entire litigation, and may be read from the record of the first trial upon an appeal to the court of appeals, even though such admission is not in the record of the second trial: Stemmler v. Mayor, etc., of New York, 179 N. Y. 473, aff'g 87 App. Div. 631; 84 N. Y. Supp. 1147.

j. **Divorce.**—In an action for an absolute divorce it is error to permit the wife to testify concerning her husband's property and income, but the error is not available for the first time on appeal; it seems that the wife can only testify to such matters as are specifically mentioned in § 831: Valentine v. Valentine, 87 App. Div. 156.

§ 832. Conviction for crime not to include witness; how conviction proved.

See § 714, Penal Code, Convict as a witness.

See § 2008, post, Habeas corpus to testify; when allowed by court or judge.

§ 834. Physicians or professional or registered nurses not to disclose professional information.

A person duly authorized to practice physic or surgery, or a professional or registered nurse, shall not be allowed to disclose any information which

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he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity; unless, where the patient is a child under the age of sixteen, the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry.

Id., § 73.

Amended by chap. 331 of 1904 and 331 of 1905.

a. **Hospital books.**—In an action for damages for the death of plaintiff's intestate, it is improper to admit over the defendant's objection the books of a hospital, to which place plaintiff was taken when he was injured and on which books his name was entered; the plaintiff, however, by calling the assistant surgeon and interrogating him concerning the condition of the intestate after the accident, and by introducing in evidence the record that he made of the occurrence, waived the prohibition contained in § 834, relative to the disclosure by a physician of information received in his professional capacity; and it was consequently improper for the court to refuse to allow the assistant surgeon, when called by the defendant, to state what it was that the intestate said to him from which he made the record which had been admitted in evidence: Kemp v. Metropolitan Street R. Co., 94 App. Div. 322.

b. **Relation of § 955.**—Notwithstanding the provisions of § 955, making an official record of a department of the city of New York on file for twenty years presumptive evidence of its contents, § 834 forbids the admissibility of a physician's certificate, as to the cause of death of the applicant's father, on file in the city health department for more than twenty years: Robinson v. Supreme Commandery, 38 Misc. 97; 77 N. Y. Supp. 111.

c. **Insurance.**—The mere naming of a physician in an application for insurance, from whom the insurer might inquire of the insured's health, is not a waiver of § 834; Robinson v. Supreme Commandery, 38 Misc. 97; 77 N. Y. Supp. 111.

d. In an action on a life insurance policy, though the beneficiary may attack the certificate of a physician showing that he attended the insured for apoplexy by showing it was false, yet the physician cannot, under § 834, testify in support of such certificate: Becker v. Metropolitan L. Ins. Co., 43 Misc. 99; 87 N. Y. Supp. 980.

e. The provisions of §§ 834 and 836, prohibiting the disclosure by a physician of information obtained by him when acting in his professional capacity, unless expressly waived at the trial, apply to a contract in which the applicant expressly waived such limitations: Meyer v. Knights of Pythias, 178 N. Y. 63, aff'g 82 App. Div. 359; 81 N. Y. Supp. 813.

Where one is treated by a physician even against his will, he becomes the patient of that physician by operation of law, and any information obtained by such physician to enable him to act is prohibited by § 834. Id.

f. It is error to exclude the testimony of a physician who attended deceased as to certain dates when he made calls or visits to deceased, or when the latter called at the physician's office for medical attendance: Becker v. Metropolitan Life Ins. Co., 99 App. Div. 5.

g. Where, in an action upon a benefit certificate of life insurance, it is alleged as a defense that the insured made a false representation as to the cause of his father's death, the physician who attended the insured's father during his last illness is incompetent, under § 834, to testify in behalf of the defendant, an assessment beneficiary order, as to the cause of his patient's death: Robinson v. Supreme Commandery, 77 App. Div. 215; 79 N. Y. Supp. 13.

h. §§ 834 and 836, which forbid a physician to disclose any information which he acquired in attending a patient in a professional capacity which was necessary to enable him to act in that capacity, apply to cases where a physician attends in a professional capacity a patient who does not employ him or desires his services; declarations by a patient that he attempted to commit suicide "tend to disgrace the memory of the patient," within the meaning of § 836, and the clause in the application for a policy of life insurance waiving the provisions of §§ 834 and 836 is ineffective: Meyer v. Supreme Lodge, 82 App. Div. 359; 81 N. Y. Supp. 813.

i. **Burden of proof.**—In an action of negligence, where plaintiff seeks to exclude the testimony of a physician, the burden of proving that it comes within this section and the exclusion of such testimony is error unless the plaintiff has proven facts from which it might be proved that the relation of physician and patient existed: Griffiths v. Met. St. Ry. Co., 171 N. Y. 106; 33 Civ. Pro. R. 106, rev'g 63 App. Div. 86; 71 N. Y. Supp. 406.

j. The burden of showing the incompetency of the evidence of a physician

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rests on the party who interposes the objection: Van Bergen v. Catholic Relief Assn., 99 App. Div. 72.

a. **Reversible error.**—Testimony as to how an accident happened, although the witness acquired his information from the injured party while attending him in a professional capacity as a surgeon, does not come within the prohibition of § 834, unless it also appears that the information was "necessary to enable him to act in that capacity;" and, in the absence of evidence of that fact, the exclusion of such testimony, upon the ground that it is privileged, constitutes reversible error: Green v. Met. St. Ry. Co., 171 N. Y. 201, rev'g 65 App. Div. 54; 72 N. Y. Supp. 524.

b. **Parties.**—The fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, does not take it out of the prohibition of the statute: Matter of Myer, 184 N. Y. 54, rev'g 100 App. Div. 512; 91 N. Y. Supp. 1104.

c. **"First aid."**—A statement by a party to an action to a physician who only rendered "first aid" and did not thereafter attend him, is not within the prohibition of § 834: Griffiths v. Metropolitan Street R. Co., 63 App. Div. 86; 32 Civ. Pro. R. 184.

d. Information obtained by a surgeon of a hospital of a patient as to how an accident happened, in order that the surgeon might make a hospital record, is not admissible under § 834: Green v. Metropolitan Street R. Co., 65 App. Div. 54; 72 N. Y. Supp. 524, rev'g 171 N. Y. 201.

e. **Waiver.**—In an action for personal injuries, where the physician of the plaintiff was called by the defendant without objection and a nonsuit followed, the plaintiff is precluded from objecting that the physician is incompetent under §§ 834 and 836 to testify on behalf of the defendant on a new trial of the action, as the act of the plaintiff in permitting the physician to testify upon the first trial was a waiver of her right to object to his competency within § 836, as amended by chapter 53 of 1899: Schlotterer v. Brooklyn & N. Y. Ferry Co., 89 App. Div. 508; 85 N. Y. Supp. 847.

f. Where a husband sues to annul his marriage on the ground of the physical incapacity of his wife and moves for a physical examination before trial, and the defendant replies that she has been examined by three physicians whose privilege she will waive, the court in denying the motion should require a stipulation waiving the privilege to be signed by the attorneys of the parties: Geis v. Geis, 116 App. Div. 362.

g. In an action for assault, the fact that the plaintiff tells the character of the injury does not operate as a waiver of § 834 and entitle the defendant to call the plaintiff's physician to prove the cause of such injury: Dunkle v. McAllister, 70 App. Div. 273; 74 N. Y. Supp. 902.

h. The physician may testify as to the condition of a deceased person on the waiver by the executor of professional secrecy: Twaddell v. Weidler, 109 App. Div. 444; 96 N. Y. Supp. 90, aff'd 186 N. Y. 601.

i. Though the plaintiff in an action for personal injuries has taken the deposition of a physician who examined her, it does not constitute a waiver of the privilege secured to such communications, and when such deposition is not offered in evidence by the plaintiff it is error to allow the defendant to introduce it over the objection of the plaintiff; as § 834 now stands such privilege can only be waived in open court or by stipulation before trial; by virtue of § 911 the competency of the evidence in such deposition does not arise until the trial: Clifford v. Denver & Rio Grande Railroad Co., 111 App. Div. 513.

j. § 836, relating to waivers of the provisions of § 834 prohibiting the disclosure of the secrets of a patient, does not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; the limitation of waivers to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties, should be so construed as to promote its object, which was to prevent waivers by contract long before the commencement of the action: Clifford v. Denver & R. G. R. R. Co., 188 N. Y. 349, rev'g 111 App. Div. 513

k. The exclusion of evidence of a physician touching the condition of the patient, when there has been an express waiver of the provisions of this section, does not constitute reversible error, where it is manifest that the rulings could not have substantially harmed the party: Roche v. Nason, 185 N. Y. 128; 185 N. Y. Supp. 619.

l. Where one of the heirs-at-law of a decedent brings an action against the other heirs-at-law to set aside the probate of such will, on the ground that it was not the voluntary act of the decedent, and all of the defendant heirs-at-law and next of kin join in the prayer of the complaint, the act of the plaintiff in calling a physician who attended the decedent during the month in which he died to testify concerning the decedent's condition at the time he attended him, constitutes an express waiver under § 836: Pringle v. Burroughs, 70 App. Div. 12; 74 N. Y. Supp. 1055.

m. Although a party may call his physician to state his condition after he receives certain injuries and the treatment which was given by him, yet the party does not waive his right to object to the

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testimony of an ambulance surgeon who had charge of the party before he went under the care of the physician who testified: Duggan v. Phelps, 86 App. Div. 509.

a. Where the plaintiff in an action for personal injuries calls as a witness a surgeon connected with the hospital to which he was taken after the accident, and examines such surgeon as to the nature and extent of his injuries, he waives the statutory privilege: Powers v. Metropolitan Street Ry. Co., 105 App. Div. 358.

b. **Admission.**—Where the mother of the child claims that the illicit act took place in August, 1903, a practicing physician whom the mother consulted in September or October, 1903, is not precluded, by § 834, from answering the following question: "In that conversation did she make any charge against any person as being the cause of her condition at that time?" as the information sought to be elicited by the question was not information acquired by the doctor which was necessary to enable him to act as such: People ex rel. Mendelovich v. Abrahams, 96 App. Div. 27; 88 N. Y. Supp. 924.

c. Admissions made by the plaintiff to the physician who attended her as to the manner in which the accident happened are not within the protection of this section, where the information was not necessary to enable him to act in his professional capacity: Benjamin v. Village of Tupper Lake, 110 App. Div. 426.

d. **Form of objection.**—The testimony of a physician that he was acquainted with the plaintiff and attended her professionally at his office and in her house for a certain period is not incompetent under § 834; even if it was improper under § 834 to permit the physician to identify as being in his handwriting certain prescriptions which he had delivered to the plaintiff, the reception of the testimony did not constitute error where the objection of the plaintiff was that such testimony was incompetent, irrelevant and immaterial; the prohibition in § 834 does not prevent a druggist from identifying prescriptions filled by him and the person for whom he filled them; it is proper for the court to refuse to charge that no inference unfavorable to the plaintiff or her cause of action could be drawn because of her failure to waive her privilege under § 834: Deutschmann v. Third Avenue R. R. Co., 87 App. Div. 503; 84 N. Y. Supp. 887.

e. **Erroneous ruling.**—Where the question whether the surrogate erred in receiving the testimony of witnesses over objection to their competency under § 829 and § 834 is raised, it cannot be intelligently determined whether the exceptant was prejudiced by the ruling, if erroneous, unless there is included in the case on appeal all the material evidence: Matter of Goldsticker, 54 Misc. 175.

§ 835. Attorneys and counsellors not to disclose communications.

f. **Attorney in fact.**—Where, after the claim of a judgment creditor had accrued, the judgment debtor transferred his house, representing nearly all his property, to his wife for one dollar, and she borrowed money on the house and died and by her will made him her sole beneficiary for life, the court held that an attorney for the wife, who had received from her a considerable part of the money she borrowed on the house, must disclose to the unpaid judgment creditor why he received the money and what disposition had been made of it, and this because the attorney, upon receiving the money, became her agent or attorney in fact, and to that extent lost his privilege to refuse, under § 835, to disclose a communication by her: Phoebus v. Webster, 40 Misc. 528.

g. § 385 was enacted for the protection of the client and his property interest and does not authorize an attorney to refuse to disclose information imparted to him in his professional capacity by a client now deceased, where such information does not tend to disgrace the client's memory and would be a benefit to his estate: Matter of King v. Ashley, 96 App. Div. 143; 89 N. Y. Supp. 482.

h. The testimony of the husband's attorney and executor as to the facts of a transaction between the husband and the wife, when the latter reconveyed to him upon his promise to provide for her by will, is not excluded by either § 829 or § 835, nor because the plaintiff in the action to foreclose the land in question, and to whom the wife assigned the mortgage, was not present at the transaction: Mertens v. Wakefield, 35 Misc. 501.

i. An attorney should not be obliged to disclose the person whom he represented in a certain transaction, as such testimony would involve the disclosure of confidential communications made by clients in regard to their purposes as to which he was employed and retained: Matter of Shawmut Mining Co., 94 App. Div. 156; 87 N. Y. Supp. 1059.

j. The evidence of an attorney as to transactions and conversations between him and the decedent while the relation of attorney and client existed is inadmissible and should not be received over the defendant's objection: Downey v. Owen, 98 App. Div. 411; 90 N. Y. Supp. 280.

k. **Complaint.**—A complaint in an action is not a confidential communication between an attorney and his client, who was the plaintiff in the action: People v. Petersen, 60 App. Div. 118; 69 N. Y. Supp. 941.

l. **Managing clerk.**—§ 835 is broad enough to exclude the testimony of a managing clerk of an attorney as to confi-

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dential communications between the managing clerk of the attorney and a client, but it is otherwise where such communication was made openly, in the presence of two other persons and not secretly and confidentially: Lecour v. Importers & Traders' Nat. Bank, 61 App. Div. 163; 70 N. Y. Supp. 419.

a. **Presence of third person.**—The provision of § 835, forbidding an attorney from disclosing a communication made by his client to him in the course of his professional employment, does not apply to a communication made in the presence of a third person; and such a communication is not privileged: Matter of Simmons, 48 Misc. 484.

b. **Source of information.**—Where it appears that the evidence was derived by the attorney from outside sources and not from his deceased client, such is not privileged within § 835: Matter of King v. Ashley, 179 N. Y. 281, aff'g 96 App. Div. 143; 89 N. Y. Supp. 482.

c. **Two clients.**—An attorney who acted as counsel for a decedent and another person in preparing an agreement between them is not prohibited by this section from testifying in a subsequent litigation between the representatives of the decedent and the other party to communications made by the decedent and the advice he gave: Doheny v. Lacy, 168 N. Y. 213, aff'g 42 App. Div. 218; 59 N. Y. Supp. 724.

d. **Business agent.**—When it appears that an alleged contract of sale was made by the defendants' attorney in their absence, and that he was acting as their business agent rather than in his professional capacity, the privilege secrecy under § 835 does not obtain: Avery v. Lee, 117 App. Div. 244.

§ 836. Application of the last three sections.

The last three sections apply to any examination of a person as a witness unless the provisions thereof are expressly waived upon the trial or examination by the person confessing, the patient or the client. But a physician or surgeon or a professional or registered nurse, may upon a trial or examination disclose any information as to the mental or physical condition of a patient who is deceased, which he acquired in attending such patient professionally, except confidential communications and such facts as would tend to disgrace the memory of the patient, when the provisions of section 834 have been expressly waived on such trial or examination by the personal representatives of the deceased patient, or if the validity of the last will and testament of such deceased patient is in question, by the executor or executors named in said will, or the surviving husband, widow or any heir-at-law or any of the next-of-kin, of such deceased, or any other party in interest. But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness, as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. In an action for the recovery of damages for a personal injury the testimony of a physician or surgeon, or of a professional or registered nurse attached to any hospital, dispensary or other charitable institution as to information which he acquired in attending a patient in a professional capacity, at such hospital, dispensary, or other charitable institution shall be taken before a referee appointed by a judge of the court in which such action is pending; provided, however, that any judge of such court at any time in his discretion may, notwithstanding such deposition, order that a subpoena issue for the attendance and examination of such physician or surgeon or professional or registered nurse, upon the trial of the action. In such case a copy of the order shall be served, together with the subpoena. Sections 872, 873, 874, 875, 876, 879, 880, 884 and

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886 of this code apply to the examination of a physician or surgeon or a professional or registered nurse, as prescribed in this section. The waivers herein provided for must be made in open court, on the trial of the action, or proceeding, and a paper executed by a party prior to the trial, providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties, may prior to the trial, stipulate for such waiver, and the same shall be sufficient therefor.

New.

Amended by chap. 416 of 1877, chap. 381 of 1891, chap. 514 of 1892, chap. 295 of 1893, chap. 53 of 1899 and chap. 331 of 1904.

a. **Waiver.**—Under this section the privilege of the physician may be waived by the widow and heirs-at-law and executors, or either or any of them: Matter of Hopkins, 73 App. Div. 559; 77 N. Y. Supp. 178.

b. A waiver to be effective must be on the "trial or examination:" Scher v. Metropolitan Street R. Co., 71 App. Div. 28; 75 N. Y. Supp. 625.

c. Although a party may call his physician to state his condition after he receives certain injuries and the treatment which was given by him, yet the party does not waive his right to object to the testimony of an ambulance surgeon, who had charge of the party before he went under the care of the physician who testified: Duggan v. Phelps, 82 App. Div. 509.

d. In an action for personal injuries where the physician of the plaintiff was called by the defendant without objection and a nonsuit followed, the plaintiff is precluded from objecting that the physician is incompetent under §§ 834 and 836 to testify on behalf of the defendant on a new trial of the action, as the act of the plaintiff in permitting the physician to testify upon the first trial was a waiver of her right to object to his competency within § 836, as amended by chapter 53 of 1899: Schlotterer v. Brooklyn & N. Y. Ferry Co., 89 App. Div. 508; 85 N. Y. Supp. 847.

e. Where one of the heirs at law of a decedent brings an action against the other heirs at law to set aside the probate of such will on the ground that it was not the voluntary act of the decedent, and all of the defendant heirs at law and next of kin join in the prayer of the complaint, the act of the plaintiff in calling a physician who attended the decedent during the month in which he died to testify concerning the decedent's condition at the time he attended him, constitutes an express waiver under § 836: Pringle v. Burroughs, 70 App. Div. 12; 74 N. Y. Supp. 1055.

f. A physician may testify as to the condition of a deceased person on the waiver by the executor of professional secrecy: Twaddell v. Weidler, 109 App. Div. 444, aff'd 186 N. Y. 601.

g. As the privilege of a physician from testifying against a patient can be waived prior to trial only by a stipulation of the attorneys of the respective parties, as provided by § 836, an order denying a physical examination before trial on condition that the defendant waive the privilege of physicians who had already examined her, should provide that the stipulation for such waiver be signed by the attorneys for the parties: Geis v. Geis, 116 App. Div. 362.

h. § 836, relating to waivers of the provisions of § 834 prohibiting the disclosure of the secrets of a patient, does not permit the plaintiff in an action for damages for personal injuries to take, under a commission, the testimony of his physician as to confidential material facts, and then prevent such evidence from being read before the jury solely upon the ground that it would divulge private matters; the limitation of waivers to such as are made in open court on the trial, or by the stipulation of the attorneys for the respective parties, would be so construed as to promote its object, which was to prevent waivers by contract long before the commencement of the action: Clifford v. Denver & R. G. R. R. Co., 188 N. Y. 349, rev'g 111 App. Div. 513

i. **Contract.**—The provisions of §§ 834 and 836, prohibiting the disclosure by a physician of information obtained by him when acting in his professional capacity, unless expressly waived at the trial, apply to a contract in which the applicant expressly waived such limitations: Meyer v. Knights of Pythias, 178 N. Y. 63, aff'g 82 App. Div. 359; 81 N. Y. Supp. 813.

j. §§ 834 and 836 which forbid a physician to disclose any information which he acquired in attending a patient in a professional capacity, which was necessary to enable him to act in that capacity, apply to cases where the physician attends in a professional capacity a patient who does not employ him or desire his services; declarations by a patient that he attempted to commit suicide "tend to disgrace the memory of the patient," within the meaning of § 836, and the clause in the application for a policy of life insurance waiving the provisions of §§ 834 and 836 is ineffective: Meyer v. Supreme Lodge, 82 App. Div. 359; 81 N. Y. Supp. 813.

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a. **Insurance.**—The term "personal representatives," as used in § 836, applies only to the executors and administrators of the decedent and does not extend to a widow who brings an action individually against a benefit association to recover upon a benefit certificate issued to her husband of which she was the beneficiary: Bell v. Supreme Lodge, 80 App. Div. 609.

b. **Confidential communications.**—The rule as to confidential communications between physician and patient being for the protection of the patient in her subjective freedom of consultation, the patient when a witness can no more be compelled to disclose them than can the physician; the relation of physician and patient being established, it will be assumed that communications made by the patient to the physician were necessary to enable him to treat her in a professional capacity and will receive protection; where the testimony of a physician has been taken by deposition and part of the testimony is inadmissible, the objectionable portion is not therefore to be excluded: Dambmann v. Met. St. Ry. Co., 55 Misc. 60.

c. **Parties.**—The fact that the testimony of the physicians related to patients who were not parties to the proceeding or interested therein, and who were dead at that time, does not take it out of the prohibition of the statute: Matter of Myer, 184 N. Y. 54, rev'g 100 App. Div. 512; 91 N. Y. Supp. 1104.

d. **Deposition.**—Though the plaintiff in an action for personal injuries has taken the deposition of a physician who examined her, it does not constitute a waiver of the privilege secured to such communications, and when such deposition is not offered in evidence by the plaintiff it is not error to allow the defendant to introduce it over the objection of the plaintiff; as § 834 now stands such privilege can only be waived in open court or by stipulation before trial; by virtue of § 911 the competency of the evidence in such deposition does not arise until the trial: Clifford v. Denver & Rio Grande Railroad Co., 111 App. Div. 513.

e. **Reversible error.**—The exclusion of evidence of a physician touching the condition of the patient, when there has been an express waiver of the provisions of § 834, does not constitute reversible error, where it is manifest that the rulings could not have substantially harmed the party: Roche v. Nason, 185 N. Y. 128; 185 N. Y. 619.

§ 837. When witness not excused from testifying.

See Art. 1, § 6, N. Y. Const., Person not compelled in criminal cases to be a witness against himself.

f. **Incriminating answers.**—In an action by an administrator to recover property of the testator claimed to have been fraudulently obtained by the defendant and concealed, the latter cannot be compelled to answer questions as to whom the testator transferred the property if he asserts that the answer will tend to accuse him of a crime; an order of the court requiring the defendant to answer such questions is, under the circumstances, within the express condemnation of § 837 and violates the organic law insuring immunity to citizens from self-accusation. (U. S. Const., 5th amendt.; N. Y. Const., arts. 1, 6.) Answers to such questions cannot be compelled by virtue of § 143 of the Penal Code, providing that "no person shall be excused from testifying in any civil action showing that a thing in action has been bought, sold or received contrary to law upon the ground that his testimony might convict him of crime. Said section, which is derived from the Revised Statutes, refers only to particular crimes, *e. g.*, to buying demands in suit, duelling, etc., and has no general application: Chappell v. Chappell, 116 App. Div. 573.

§ 839. Admission by member of corporation.

The admission of a member of an aggregate corporation, who is not a party, shall not be received as evidence against the corporation unless it was made concerning and while engaged in a transaction in which he was the authorized agent of the corporation; or unless it was made while a member of such corporation and testifying as a witness concerning a transaction of the corporation, when the official record of such testimony shall be received.

2 R. S. 407 (Part 3, c. 7, tit. 3), § 80.
Amended by chap. 384 of 1903.

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§ 840. Seal, presumptive evidence of consideration.

a. **Will.**—*Held*, that a written agreement under seal between a husband and children of a decedent to carry into effect a letter written by her as if a valid will that the husband who has acted under it is estopped to repudiate it: Williams v. Whitteil, 69 App. Div. 340; 74 N. Y. Supp. 820.

b. **Release.**—A general release in writing and under seal to one of several obligors whether they are bound jointly or jointly and severally discharges the others, and may be pleaded in bar: Smith v. Simon, 61 App. Div. 137; 32 Civ. Pro. R. 56.

c. **Undertaking.**—It is not essential under the statute of frauds, for the maintenance of an action against the sureties on a statutory undertaking given on an appeal to the court of appeals, that the undertaking shall state the consideration for the sureties' obligation: Gein v. Little, 43 Misc. 421; 89 N. Y. Supp. 488.

d. **Policy.**—Where an assignment of a policy of insurance was made under sale and was acknowledged, a presumption arises that it was based on a valid consideration: Von Schuckmann v. Heindrich, 93 App. Div. 278; 87 N. Y. Supp. 673.

§ 841. Presumption of death in certain cases.

See § 2310, post, When life tenant deemed dead.

e. **Temporary administrator.**—A temporary administrator, whose function is only to collect and preserve the estate, may be appointed upon much weaker proof, raising a presumption of the death of the intestate, than a permanent administrator: Czech v. Bean, 35 Misc. 729; 75 N. Y. Supp. 1402.

f. **Owner.**—This section relates only to a case where the right to the possession of real property depends upon the life of a third person and does not apply to a person who is the owner of the property: Matter of Bd. of Education of New York, 173 N. Y. 321, dismissing appeal, 74 App. Div. 632; 77 N. Y. Supp. 1121.

§ 843. Id.; in special cases.

g. **Omission.**—The inadvertent omission of a deputy police commissioner of the city of New York to administer an oath to a witness, who testified against a patrolman upon one of three charges against him which were then being heard by the commissioner, such witness having been actually sworn and having testified as to one of the other charges, does not invalidate the proceedings where the patrolman, who must have known of the omission, made no objection and cross-examined the witness: People ex rel. Niebuhr v. McAdoo, 184 N. Y. 304.

§ 844. Id.; without the state.

h. **Motion.**—An affidavit although not sufficiently authenticated, to secure its admission in a court in evidence may properly be considered on a motion to vacate an attachment on the papers upon which it was granted as constituting the source from which the plaintiff derived the information which she alleged in the affidavit: Mallon v. Rothschild, 38 Misc. 8; 76 N. Y. Supp. 710.

i. **Notary.**—When the verification of a petition for the examination of a party before trial is taken before a notary of another state, the official character and signature of the notary must be certified as required in the case of an acknowledgment to entitle a deed to record: Miller v. Nevins, 115 App. Div. 139.

§ 851. Swearing falsely in any form, perjury.

See Penal Code, §§ 96-106, Perjury.

See § 334, ante, Interpreter.

See §§ 2159, 2186, 2214, Perjury in proceedings to discharge insolvent.

§ 852. Mode of serving subpoena issued out of a court.

See § 7, ante, Court of record has power to issue subpoena.

See §§ 2969-2979, post, Subpoenas in justice's court.

See §§ 3318-3319, post, Witnesses' fees.

j. **Order.**—An order adjudging a person guilty of contempt for failing to obey an order to appear and testify before a referee in supplementary proceedings, imposing as a fine the amount of the judgment sought to be recovered and directing it to be paid to the creditor, is without power where the creditor may maintain an action for damages for failure to obey any process issued with jurisdiction: Matter of Depue, 185 N. Y. 60.

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§ 853. Penalty for disobedience.

See § 8, ante, Unlawful refusal to be sworn as a witness is criminal contempt.

See § 607 et seq., Criminal Code, Compelling attendance of witnesses in criminal actions.

a. **New trial.**—A new trial of a criminal action should be granted when it is shown that the witness whose testimony would have been of value to the defendant were not produced because, though subpoenaed, the defendant's counsel, who had permitted them to depart on a postponement of the trial, was unable to communicate with them by telephone, as agreed, even though counsel did not call the attention of the court to the absence of the witnesses, nor move for a continuance or adjournment: People v. O'Brien, 110 App. Div. 26.

b. **Contempt.**—An order adjudging a person guilty of contempt for failing to obey an order to appear and testify before a referee in supplementary proceedings, imposing as a fine the amount of the judgment sought to be recovered and directing it to be paid to the creditor, is without power where the creditor may maintain an action for damages for failure to obey any process issued with jurisdiction: Matter of Depue, 185 N. Y. 60.

§ 854. Subpoena to be issued by judge, etc.

c. **Section is imperative.**—A subpoena in proceedings supplementary to execution must be issued under the hand of the judge or referee before whom the proceeding is pending; the issuance of such subpoena is governed by this section, which section is imperative; if signed by the attorney to said proceeding the subpoena is a nullity, and on motion will be set aside: Lowther v. Lowther, 115 App. Div. 307.

§ 856. When witness to be imprisoned.

d. **Unconstitutional.**—The provisions of § 856, which authorize any judge, upon proof by affidavit that a person subpoenaed and attending before the comptroller refuses, without reasonable cause, to answer legal and pertinent questions, by warrant, to commit the offender to jail, are unconstitutional in that they deprive a citizen of his liberty without due process of law: Grout v. Williams, 105 App. Div. 98; 34 Civ. Pro. R. 231.

§ 857. Contents of warrant.

See § 876, post, Deposition, when and where taken.

e. A sale by a debtor of his entire stock of merchandise in bulk without notice to his creditors required by chap. 528 of 1902, does not, of itself, entitle a creditor of the seller to an order of arrest pursuant to § 549, subd. 4: Mann v. Chrestopulos, 87 App. Div. 222; 84 N. Y. Supp. 372.

§ 858. To whom directed; how executed.

See § 876, post, Deposition, when and where taken.

§ 860. Witness exempt from arrest.

See § 564, ante, Discharge of privileged person from arrest.

§ 866. Records not to be removed by virtue of a subpoena.

The record of a conveyance of real property, or any other record or document, whereof a transcript duly certified may by law be read in evidence, shall not be removed, by virtue of a subpoena duces tecum, from the office in which it is kept, except temporarily, by the clerk having it in custody, to a term or a sitting of the court of which he is clerk, or by the officer, having it in custody, to a term or sitting of a court, or a trial before a referee, held in the city or town where the office is situated; but the records kept by the register of the county of New York and the register of the county of Kings shall not be removed except by an order of court made as in this

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section provided. Where any such record is required at any other place, or any record kept by the register of the county of New York or the register of the county of Kings, is required at a term or sitting of a court or a trial before a referee, it may be removed, by order of the supreme court, or a county court, made in court, and entered in the minutes; specifying that the production of the original instead of the transcript, is necessary.

L. 1838, c. 129.

Amended by chap. 946 of 1895 and chap. 84 of 1904.

See Penal Code, § 531, Unlawful removal of court records, etc., is grand larceny.

a. **Indictments** in a criminal action are the property of the state which no court could lawfully by order direct to be recorded for any purpose except as expressly provided by § 866: People v. Mills, 178 N. Y. 274, aff'g 91 App. Div. 331; 86 N. Y. Supp. 529.

§ 868. Books, etc., of corporation; how produced.

b. **Foreign corporation.**—A plaintiff who has been in the employ of a foreign corporation, as manager, under an alleged contract entitling him to receive certain proportions of certain net receipts, is not entitled to an order for a commission entitling him to a general investigation of the defendant's books in order to prepare for the trial of an action to recover compensation alleged to be due; but when it is necessary for the plaintiff to ascertain certain facts concerning the net receipts in order to prepare for trial, he is entitled to an examination of the officers of such foreign corporation before trial, and on such examination the production of the books may be compelled on subpoena *duces tecum* to enable the officers examined to testify therefrom: Harbaugh v. Middlesex Securities Co., 110 App. Div. 633.

c. **Directors.**—A director's right to inspect corporate books is absolute; it being necessary to enable him to perform the duties of his office: People ex rel. Leach v. Central Fish Co., 117 App. Div. 77.

d. **Subpoena duces tecum.**—Whenever on the examination of a party before trial it appears that he cannot testify without reference to his books and papers, their production may be compelled by subpoena *duces tecum*. The subpoena may issue before examination if it is apparent that the party to be examined cannot answer the questions without reference to his books. A subpoena issued in the first instance should, however, be limited to the production of papers in the defendant's custody or control, showing the transactions set forth in the moving affidavit, etc.: Crompton v. Dobbs, 119 App. Div. 331.

§ 870. Deposition of a party, etc.

The deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought in such a court, other than a court specified in subdivisions sixteenth, seventeenth, eighteenth or nineteenth, of section two of this act, may be taken at his own instance or at the instance of an adverse party, or by a co-plaintiff or co-defendant at any time before or during the trial as prescribed in this article.

Co. Pro., §§ 390, 391, 392, 397.

Amended by chap. 416 of 1877, chap. 299 of 1878 and chap. 696 of 1904.

See rule 14 et seq. (Sup. Ct.), Discovery of books, etc.

See § 803 et seq., ante, Court may direct discovery of books.

e. § 872, subd. 5, relating to the examination of sick and infirm witnesses out of court, providing that subd. 5, does not apply where the person to be examined is a party, was enacted before the examination of a party at his own instance was authorized and was intended to confine the provisions of subd. 5 to the examination of a witness and to make it clear that where a party was examined at the instance of an adverse party it was

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not necessary to show that the party to be examined was about to depart from the state or was so sick he would not be able to attend the trial; under § 870, before it was amended by chap. 696 of 1904, the deposition of a party to an action might, at his own instance, be taken out of court before the trial on the ground that he was sick and infirm, but prior to the amendment the deposition could only be taken before and not during the trial; the power granted by the amendment of 1904, to take a deposition during a trial should only be used where the necessity for taking the deposition arose after the trial commenced and not where the necessity existed and was known to the counsel before the trial commenced; the application should not be granted unless made to the judge and not to the court, and unless the affidavit is presented alleging facts required by § 872, and the order should be made in writing, entered and served on the attorney for the other party: Hebron v. Work, 101 App. Div. 463; 34 Civ. Pro. R. 134.

a. **Design.**—§§ 537, 538, 545 and 870 et seq., the first providing for an immediate application for judgment on a frivolous answer, demurrer or reply, the next for the striking out on motion of sham answers, the next for the striking out on motion of irrelevant or redundant matter in a pleading, and the others for the taking of the deposition of a party before trial to be used on the trial were designed to prevent delays by the device of pleadings which present no issue, to simplify pleadings so that the issue would be plain to the trial judge, instead of his having to puzzle over useless and perplexing verbiage to ascertain what it is, and to shorten the trial and lessen expense in the preparation therefor by ascertaining in advance, when necessary, what the opposite party would testify to; and they were apt and ample for the purposes: Doll v. Smith, 43 Misc. 417; 89 N. Y. Supp. 331.

b. This section allows a party to an action to take the deposition of any party to such action during as well as before trial: Goldmark v. U. S. Electro-Galvanizing Co., 111 App. Div. 526; 97 N. Y. Supp. 1078.

c. A defendant ordered to be examined before trial cannot refuse to answer questions necessary to enable the plaintiff to frame his complaint on the ground that the court in a former decision held that the plaintiff had no right to examine another corporation in order to discover whether he had a cause of action against it, even though such questions incidentally develop facts which show a cause of action against the other corporation, but said defendant cannot be ordered to answer the questions in writing and to verify and file the same: Matter of Sands, 112 App. Div. 649.

d. **Three classes.**—Three distinct classes of depositions are provided for: (1) Depositions to be taken within the state for use in our courts. (2) Depositions to be taken within the state for use in courts of other states. (3) Depositions to be taken out of the state for use within the state; the practice with respect to this three classes of depositions is regulated and it is important to avoid the error of confusing regulations that apply only to one of these classes with regulations which apply to some other class: Wanamaker v. McGraw, 168 N. Y. 125, rev'g 48 App. Div. 54; 62 N. Y. Supp. 692.

e. **Person expected to be a party.**—§ 872, subd. 6, read with §§ 870 and 876 limits the right to examine a person expected to be an adverse party to an action, which has not been commenced, to a case where proof is made by affidavit showing that it is necessary in order that the applicant's rights may be protected by the perpetuation of the testimony of the witness, an examination for the purpose of ascertaining whether the applicant has a cause of action is not contemplated by any provisions of the Code, nor does the Code authorize a person who has a cause of action for a breach of the contract made between him and another to examine the supposed principals in order to ascertain the parties liable to him under his contract with the person with whom he dealt: Matter of Ellett v. Young, 96 App. Div. 417.

f. § 870 et seq. do not authorize the examination of a proposed party to an action not already begun, except for the sole purpose of perpetuating the testimony of such proposed party. Such an examination cannot, therefore, be ordered for the purpose of enabling the applicant to frame the complaint in the proposed action. Where a judge, assuming to act under § 870 et seq., makes an order not authorized by those sections, the practice of moving on motion at special term to vacate such order is proper: Matter of Schlotterer, 105 App. Div. 115.

g. **To ascertain whether plaintiff has a cause of action.**—Examination of a party before trial will not be granted to ascertain whether the plaintiff has a cause of action: Knight v. Morgenroth, 93 App. Div. 424; 87 N. Y. Supp. 693.

h. It is well settled that an examination to ascertain whether the plaintiff has a cause of action cannot be had and there is no authority in the statute to take the deposition of a person not a party to an action or not expecting to be made a party to the action before the action is commenced: Matter of Schoeller, 74 App. Div. 347; 33 Civ. Pro. R. 152; 77 N. Y. Supp. 614.

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a. **Laches.**—Where much of the delay in making an application for a modification of an order for the examination before trial of a party was caused by defendant's appeal from an order denying a motion to vacate the order, the plaintiff is not chargeable with laches since § 870 provides that the examination may be had "at any time before or during the trial:" Boyle v. Consolidated Gas Co., 46 Misc. 191.

b. **Waiver.**—Where the plaintiff in an action obtains an order for the examination of a witness about to leave the state, the fact that the defendant, after a denial of his motion to vacate the order, appears upon the examination of the witness, interposes objections and conducts a cross-examination, does not constitute a waiver by the defendant of his right to appeal from the order denying his motion to vacate such order: Osborne v. Barber, 105 App. Div. 236; 93 N. Y. Supp. 833.

c. **Code of Procedure.**—§ 158 of the former Code of Procedure in relation to a bill of particulars and §§ 390 and 391 of said Code of Procedure in regard to the examination of a party to a pending action upon or before its trial were incorporated and continued in §§ 531, 870, 872 and 873 of the Code of Civil Procedure: Grout v. Williams, 105 App. Div. 98; 34 Civ. Pro. R. 231.

d. **Due process of law.**—The power of the legislature to thus subject a citizen to a searching examination in relation to his property, books and papers is sanctioned by long usage, with the approval of the courts, the bar and the public. It is not challenged as nonjudicial in character, or as in violation of due process of law. So, a party, or a prospective party, may be examined out of court and depositions of witnesses may be taken within or without the state, for use in courts of justice within or without the state: Matter of Davies, 168 N. Y. 89; 32 Civ. Pro. R. 163.

e. **Corporation.**—Where an examination is ordered under §§ 870-873 of a party not a corporation, there is no authority for an inspection or for requiring the production of books or papers even for use upon the examination of the party, except by subpoena *duces tecum* but in the case of a corporation the court is now authorized by § 782, subd. 7, to order the production of books and papers for the use of the witness upon the examination and not for an inspection by the adverse party; in the case of a corporation, if an inspection is desired, it must be obtained as provided in §§ 803-809; what the affidavits upon an application made pursuant to §§ 870-873 must show: Matter of Sands, 98 App. Div. 148; 90 N. Y. Supp. 749; 112 App. Div. 650.

f. There is no authority to examine an officer of a corporation, as such, before trial, apart from an examination of the corporation; the order of examination in form should authorize an examination of the corporation and provide that the information be elicited by an examination of certain of its officers: Jacobs v. Mexican Sugar Refining Co., No. 2, 112 App. Div. 657; 98 N. Y. Supp. 542.

g. An order to examine a corporation before trial should require the examination of the corporation, and should not run against its officers individually. Nor should such order be made the means of obtaining an inspection of the defendant's books and papers under the guise of an examination of its officers, and when this appears to be the object, and the officers sought to be examined have no personal knowledge of the records and thus no memory to be refreshed thereby, the order for examination will be reversed on the merits: Shumaker v. Doubleday, Page & Co., 116 App. Div. 302.

h. **Brokers.**—An order, requiring the defendants, stockbrokers, to submit to an examination by the plaintiff, their customers, in order that he may prepare his complaint, cannot properly require the defendants to produce all their ledgers and books which bear upon the transactions had between the parties, if, for the purpose of testifying, resort to the books is necessary, the defendants will be required to refer to the books for the purpose of giving the desired information: Clark v. Ennis, 35 Misc. 339; 71 N. Y. Supp. 943.

i. **Personal injuries.**—When, in an action to recover damages for personal injuries, the defendants deny that the car which injured the plaintiff was owned or operated by them, an order for the examination of such defendants before trial should be granted when the plaintiff shows that he has no information on the subject, and after diligent inquiry cannot learn where the same can be found: Watt v. Feltman, 111 App. Div. 314.

j. **Physical examination.**—Physical examination of the plaintiff, under the provisions of § 873, can only be ordered in connection with an oral examination of the plaintiff as a witness before trial; the oral examination may be limited; but the provision therefor cannot be stricken from the order leaving the provision for the physical examination only to stand: Landau v. Citron, 47 Misc. 355.

k. **Foreign corporation.**—A plaintiff who has been in the employ of a foreign corporation, as manager, under an alleged contract entitling him to receive certain proportions of certain net receipts, is not entitled to an order for a commission entitling him to a general investigation of the defendant's books in order to prepare for the trial of an action to recover compensation alleged to be due; but when it is necessary for the plaintiff to ascertain certain facts concerning the net receipts,

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in order to prepare for trial, he is entitled to an examination of the officers of such foreign corporation before trial, and on such examination the production of the books may be compelled on subpoena *duces tecum* to enable the officers examined to testify therefrom: Harbaugh v. Middlesex Securities Co., 110 App. Div. 633.

a. **Stockholder.**—In an action by a stockholder to have an agreement by a corporation canceling a lease declared to be void, an examination of the corporation before trial should be granted when to maintain the action it will be necessary to prove certain correspondence, agreements, etc., made by the corporation, which documents might be removed from the state: Jacobs v. Mexican Sugar Refining Co., No. 1, 112 App. Div. 655.

b. **Specific performance.**—In an action for specific performance of a contract to convey lands, when the plaintiff alleges conspiracy by the defendant to incumber the property by conveyances of mortgages thereon, an order should be granted allowing the plaintiff to examine the defendants before trial as to the transactions which uphold his cause of action: McKenna v. Tully, 109 App. Div. 598; 96 N. Y. Supp. 561.

c. **The appellate division** is committed to a construction of §§ 870 and 872 which will permit a party to an action to take the deposition of an adverse party where it is apparent that his evidence will be material at the trial of the action: Istok v. Senderling, 118 App. Div. 162.

d. **Appeal.**—An order allowing interrogatories is appealable. When they are clearly irrelevant or have some ulterior or improper purpose the appellate court may disallow them; while the court should be liberal in allowing interrogatories, and they should stand unless it be clear that they cannot be material, yet the appellate court will leave question of the admissibility of cross-interrogatories to be determined at the trial: Shafer v. McIntyre, 115 App. Div. 87.

e. **Limitations.**—An examination of defendant before trial and after issue joined should be limited to the purpose of proving the plaintiff's case as alleged in the complaint and will not be allowed where it is apparent that the only object is to obtain information concerning facts upon which the defense is based or merely for the purpose of enabling plaintiff to prepare for trial: Merrill & Baker v. Woolworth, 53 Misc. 253.

f. Although a party is entitled to examine his adversary before trial as to facts which are material and to take the deposition of his deponent for use on the trial, yet it must be shown that material issues are involved of which the party has knowledge and this must be established by allegations of facts from which the justice can draw his own conclusions; the affidavit may make reference to an unverified complaint which is attached to and made part thereof: Grant v. Greene, 118 App. Div. 850.

g. **When granted.**—The technical rules surrounding the practice of examining a party to an action before trial are abolished, and in the absence of bad faith or abuse of process, a party is entitled to examine his adversary before trial as to facts material to the issues and of which he has knowledge; it is no answer that the moving party can procure the evidence from other persons or subpoena his opponent on the trial: McKeand v. Locke, 115 App. Div. 174; 100 N. Y. Supp. 704.

h. In an action for rent of space in a department store, where defendant alleges that it rented the space relying upon plaintiff's false representations as to the number of his customers, the defendant should be entitled to examine the plaintiff concerning his business, accounts with his customers, etc.: Ehrich v. Winter & Co., 52 Misc. 641.

i. In an action against defendants for refusing to assign certain mining claims, the plaintiff is entitled to examine the defendant in order to frame his complaint: Hill v. McKane, 115 App. Div. 537.

j. Even if defendants might have procured the information asked for by a bill of particulars, they had a right to obtain it under an order for plaintiff's examination as a party before trial; where the requirements of §§ 870 and 873 and the general rules of practice have been complied with, a motion for an order for the examination of a party before trial must be granted unless made in bad faith: Tirpak v. Hoe, 53 Misc. 532.

k. An order should not be granted to examine a defendant to ascertain the names of other joint tort-feasors who would be severally liable to the plaintiff for the wrong complained of, and such an order will be reversed: Hinds et al. v. Bonner, 52 Misc. 461.

§ 871. Deposition of a witness not a party.

§ 1369 of the Consolidated Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

l. **Examination not allowed.**—It is well settled that an examination to ascertain whether the plaintiff has a cause of action cannot be had and there is no authority in the statute to take the deposition of a person not a party to

an action or not expecting to be made a party to the action before the action is commenced: Matter of Schoeller, 74 App. Div. 347; 33 Civ. Pro. R. 152; 77 N. Y. Supp. 614.

a. A witness cannot be examined under §§ 871-876 to enable a plaintiff to frame a complaint in an action which is not yet commenced: Long Island Bottlers v. Bottling Brewers, 65 App. Div. 459; 72 N. Y. Supp. 976.

b. Examination before suit is refused in the first department where the purpose is merely to discover someone to sue: Matter of Singer, 40 Misc. 561; 82 N. Y. Supp. 870.

c. In an action to recover for personal injuries, an examination should not be ordered upon an affidavit by plaintiff's attorney alleging that the witness is the physician who attended the plaintiff at his illness consequent upon the injuries in question, and that such witness is about to leave the state, where such averments are made upon information and belief: Vincent v. Kilmer, 107 App. Div. 499.

d. A plaintiff who has been in the employ of a foreign corporation, as manager, under an alleged contract entitling him to receive certain proportions of certain net receipts, is not entitled to an order for a commission entitling him to a general investigation of the defendant's books in order to prepare for the trial of an action to recover compensation alleged to be due; but when it is necessary for the plaintiff to ascertain certain facts concerning the net receipts in order to prepare for trial, he is entitled to an examination of the officers of such foreign corporation before trial, and on such examination the production of the books may be compelled on subpoena *duces tecum* to enable the officers examined to testify therefrom: Harbaugh v. Middlesex Securities Co., 110 App. Div. 633.

e. A landowner suing a city to abate an alleged nuisance committed by the defendant in interfering with a natural water-course so that plaintiff's lands were overflowed and damaged, is not entitled to examine the city engineer before the trial as to the correctness of data and maps made for the city as part of its defense, which data showed the record of floods, etc.: Lewis v. City of Buffalo, 115 App. Div. 735.

f. **After service of complaint.**—The court has power to grant an order for the examination of a witness pursuant to §§ 871-876 after the service of the complaint but before issue is joined; though proceedings were stayed under § 779 when the plaintiff obtained the order, yet it does not deprive the court of the power to issue the order and the order will not be vacated if plaintiff pays the costs in arrears before the return day of the motion to vacate; it is sufficient if, from the moving papers, an inference may be drawn that plaintiff intends to read the testimony of the witness at the trial: Jacobs v. Mexican Sugar Refining Co., 45 Misc. 56.

g. **Affidavit.**—Where the affidavit, upon which an order to take the deposition of expected adverse parties was obtained, omits to state the street and number of the office or place of business of the expected adverse parties and that they are of full age and does not state that it is desired to perpetuate the testimony of the witnesses, nor show a necessity for perpetuating it, nor show that a cause of action exists in favor of the applicants, the order must be vacated: Matter of Cohen, 53 Misc. 400.

h. **Testimony on another trial.**—Where a commission is issued to obtain testimony given on another trial, the witness should have his attention refreshed by the stenographic notes and then the evidence of his recollection should be embodied as an answer: Matter of Tifft, 115 App. Div. 915.

§ 872. Application; contents of affidavit.

See rule 82 (Sup. Ct.), Affidavit must show that witness is material and necessary.

i. § 872, subd. 5, relating to the examination of sick and infirm witnesses out of court, providing that subd. 5 does not apply where the person to be examined is a party, was enacted before the examination of a party at his own instance, was authorized and was intended to confine the provisions of subd. 5 to the examination of a witness and to make it clear that where a party was examined at the instance of an adverse party it was not necessary to show that the party to be examined was about to depart from the state or was so sick he would not be able to attend the trial; under § 870, before it was amended by chap. 696 of 1904, the deposition of a party to an action might, at his own instance, be taken out of court before the trial on the ground that he was sick and infirm, but prior to the amendment the deposition could only be taken before and not during the trial; the power granted by the amendment of 1904 to take a deposition during a trial should only be used where the necessity for taking the deposition arose after the trial commenced and not where the necessity existed and was known to the counsel and before the trial commenced, the application should not be granted unless an affidavit is presented alleging

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facts required by § 872, and the order should be made in writing entered and served on the attorney for the other party: Hebron v. Work, 101 App. Div. 463; 34 Civ. Pro. R. 134.

a. **Books of corporation.**—§ 872, subd. 7, in regard to the taking of the deposition of a witness at the instance of an adverse party, is not designed to afford the moving party such an inspection of the books of the corporation as he could obtain in a proceeding for the discovery of such books under §§ 803-806, but solely to enable such books to be used in connection with the oral examination: Mauthey v. Wyoming Co. Co-op. Fire Ins. Co., 76 App. Div. 579; 78 N. Y. Supp. 596.

b. In an action to recover damages for the death of the plaintiff's intestate, the plaintiff is entitled, under § 872, subd. 7, to examine the office of the defendants as to the identity of the train which killed the intestate: Muldoon v. N. Y. C. & H. R. R. Co., 98 App. Div. 169.

c. § 872, subd. 7, authorizes the production of books only as an incident to and in connection with the examination of a witness, but does not authorize the production of books of a corporation on an examination of an officer of said company where the officer knows nothing of the facts involved in the action and where the purpose of the proceeding is to inspect the books of the corporation; if an inspection of the books and papers is desired, the applicant should move to bring himself within §§ 803-809: Matter of Thompson, 95 App. Div. 542.

d. An examination before trial under § 873, is a proceeding entirely distinct from and cannot be joined with a proceeding for the discovery of papers under §§ 803 and 809 and so much of § 872, subd. 7, as relates to an examination and inspection of the books of a corporation, is intended to compel production of them so that they may be used only and solely as an incident to and in connection with the examination of a witness who is able to testify from them: Hart v. American Cotton Co., 41 Misc. 436.

e. **Subpoena duces tecum.**—An order for examination before trial may properly call upon the defendants for the production of books and papers where these are not to be produced for inspection, but, specifically, to refresh the recollection of witnesses upon the examination; and, under an order thus limited, the plaintiff may issue a subpoena *duces tecum*, although that process is not expressly authorized by the order, the judge granting an order for examination before trial has discretion to direct that the examination be general in its scope: Rosenbaum v. Rice, 36 Misc. 410; 73 N. Y. Supp. 714.

f. The order for the examination of a party before trial should not require the production of books to refresh his memory, the remedy is by subpoena *duces tecum:* Gee v. Pendas, 87 App. Div. 157; 84 N. Y. Supp. 32.

g. An order for the examination of a defendant under § 873 and an order for the examination and inspection of books are distinct and independent proceedings and cannot be united under one order, but under §§ 872-873 a witness may be required to produce books and papers as an adjunct to his oral examination and to refer to them for the purpose of making his examination effective: Bloodgood v. Slayback, 62 App. Div. 315; 71 N. Y. Supp. 809.

h. **To ascertain whether party has a cause of action.**—It is well settled that an examination to ascertain whether the plaintiff has a cause of action cannot be had and there is no authority in the statute to take the deposition of a person not a party to an action or not expecting to be made a party to the action before the action is commenced: Matter of Schoeller, 74 App. Div. 347; 33 Civ. Pro. R. 152; 77 N. Y. Supp. 614.

i. **Materiality.**—An order for the examination before trial of a witness may be on the ground that he is "so sick or infirm as to afford reasonable ground to believe that he will not be able to attend the trial," will be vacated where the only allegation as to the materiality of the witness is contained in the affidavit of the moving party who states that he expects to prove by the witness, etc.: Johnson v. New Home Sewing Machine Co., 62 App. Div. 157; 70 N. Y. Supp. 875.

j. Although the technical rules which formerly restricted the right of a party to examine his adversary before trial have been relaxed in the first department, it is nevertheless necessary to show by appropriate facts and circumstances that the testimony sought to be elicited is material and necessary to the party making the application: Oakes v. Star Co., 119 App. Div. 358.

k. Upon an application by plaintiff for a commission to take the testimony of defendant's wife who is not within the state, the materiality of her testimony is sufficiently shown by the affidavit's counsel, stating facts showing such materiality upon information derived from defendant's son; and the affidavit of defendant's son will not be required: Moriarta v. Raymond, 54 Misc. 271.

l. Although a party is entitled to examine his adversary before trial as to facts which are material and to take the deposition of his opponent for use on the trial, yet it must be shown that material issues are involved of which the party has knowledge and this must be established by allegations of facts from which the justice can draw his own conclusions; the affidavit may make reference to an unverified complaint which is attached to and made part

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thereof: Grant v. Greene, 118 App. Div. 850.

a. **Cause of action.**—An examination will not be granted in the first department unless the applicant's moving affidavit names definitely the proposed defendant and shows a cause of action against him and in favor of the applicant: Matter of Singer, 40 Misc. 561; 82 N. Y. Supp. 870.

b. **Purpose.**—Under § 872, subd. 5, and § 882, the testimony of a witness, not a party to an action, cannot be taken by deposition unless for the purpose of presenting the evidence for use on the trial in case the witness is then absent or sick; such deposition cannot be taken where its purpose is to get the testimony of the witness in order to enable the moving party to prepare for trial; requisites of affidavits on which to obtain a deposition considered: Davis Machine Co. v. Robinson, 42 Misc. 52.

c. **Sufficient affidavit.**—An affidavit is sufficient which sets forth the nature of the action, the substance of the judgment demanded, the nature of the defense and complies in all respects with § 872: Corn Exchange Bank v. Lorillard, 84 App. Div. 194; 82 N. Y. Supp. 641.

d. A moving affidavit on an application to examine a defendant insurance company before trial, which states the sources of the affiant's belief to be information received from the son of insured, and also gathered from the examination of papers issued by the defendant and found in the possession of the insured, is sufficient for the granting of the application; the authorities condemning affidavits made on information and belief apply only when the statements of the informer are the sole source of the affiant's belief: Meade v. So. Tier Mas. R. Assn., 119 App. Div. 761.

e. When the affidavits on a motion to take the deposition of a party before trial fulfill the requirements of § 872 and rule 82 of the general rules of practice, the court has no power to set up other requirements and the order must be granted; former decisions curtailing the right to examination before trial are no longer precedents: Shonts v. Thomas, 116 App. Div. 854.

f. When, on an application to examine a defendant corporation before trial, the affidavit names the officers whose testimony is necessary and specifies the papers of the corporation of which an inspection is desired, the application should be granted although the affidavit does not formally ask the examination of the defendant itself: Donaldson v. Brooklyn Heights R. R. Co., 119 App. Div. 513.

g. Notwithstanding the liberal rule as to the examination of parties before trial yet the affidavits should specify the facts and circumstances which show that the examination is material and necessary; an examination should not be granted where the testimony is not to be used upon the trial and where the answer may be framed by allegations upon information and belief: Waitzfelder v. Moses Sons & Co., 120 App. Div. 144.

h **Information can be obtained in another way.**—Examination of a party before trial will not be allowed where the information sought can be obtained in another way; the examination of only one defendant may be allowed: Tanenbaum v. Lippmann, 89 App. Div. 17; 85 N. Y. Supp. 122.

i. When an applicant has complied with §§ 870, 872 and 873 of the Code of Civil Procedure and with rule 82 of the general rules of practice, it is no answer to his application to show that he can subpoena the witness sought to be examined or that the witness or defendant will stipulate to appear at trial, or that the evidence sought can be obtained through other persons: Goldmark v. U. S. Electro-Galvanizing Co., 111 App. Div. 526; 97 N. Y. Supp. 1078.

j. **Personal injuries.**—When, in an action to recover damages for personal injuries, the defendants deny that the car which injured the plaintiff was owned or operated by them, an order for the examination of such defendants before trial should be granted when the plaintiff shows that he has no information on the subject and after diligent inquiry cannot learn where the same can be found: Watt v. Feltman, 111 App. Div. 314.

k. In an action to recover for personal injuries, an examination should not be ordered upon an affidavit by plaintiff's attorney alleging that the witness is the physician who attended the plaintiff at his illness consequent upon the injuries in question and that such witness is about to leave the state, where such averments are made upon information and belief: Vincent v. Kilmer, 107 App. Div. 499.

l. **Ignorance of exact amount.**—A plaintiff's ignorance of the exact amount which he claims to be entitled to recover is not, where he is able to state such amount with approximate accuracy, a sufficient ground for the examination of the defendants in order to enable him to frame his complaint: Boeck v. Smith, 85 App. Div. 575; 83 N. Y. Supp. 428.

m. **Attorney.**—An affidavit, on a motion for the examination of a witness before trial, made by the attorney for a moving party, answers the requirements of § 872 where it appears that the moving party was without the state, that the attorney had an actual knowledge of the facts and stated the sources of his information as to such facts as he alleged on information and belief: Treadwell v. Greene, 87 App. Div. 425.

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a. **Non-compliance.**—It is improper, on the trial of an action, to allow a party to read the deposition of a witness, taken before a notary public pursuant to permission granted by the court at an earlier stage of the trial, as there was not a compliance with §§ 872 and 882 of the Code: Meres v. Emmons, 103 App. Div. 381.

b. **Residence.**—Affidavit held sufficient, under § 872, subd. 4, which not only sets forth the name and residence of the person to be examined but that the person is material and necessary: Obregon v. DeLima, 35 Misc. 850; 72 N. Y. Supp. 1121.

c. **Code of Procedure.**—§ 158 of the former Code of Procedure, in relation to a bill of particulars, and §§ 390 and 391 of said Code of Procedure, in regard to the examination of a party to a pending action upon or before its trial were incorporated and continued in §§ 531, 870, 872 and 873 of the Code of Civil Procedure: Grout v. Williams, 105 App. Div. 98; 34 Civ. Pro. R. 231.

d. **Officer.**—An examination before suit of an officer of a corporation in an action to dissolve the corporation and sequestrate its property fraudulently transferred by it will not be denied on the ground that it will incriminate him; he may be required to produce books and papers of the corporation: Matter of Sayre, 70 App. Div. 329; 75 N. Y. Supp. 286.

e. **Patents.**—A plaintiff who brings an action, based on the fact that $3,000,000 of the stock of a corporation were issued to the defendants in payment of patents owned or controlled by said defendants, the value of which did not exceed $10,000, is entitled to an order permitting him to examine one of the defendants before trial as to the value of the patents: Insurance Press v. Montauk Fire Wire Co., 70 App. Div. 50; 74 N. Y. Supp. 1093.

f. **The appellate division** is committed to a construction of §§ 870 and 872 which will permit a party to an action to take the deposition of an adverse party where it is apparent that his evidence will be material at the trial of the action: Istok v. Senderling, 118 App. Div. 162.

g. **Stockholder.**—The affidavit of a minority stockholder in an action against the directors for an accounting is insufficient unless it shows that such information sought is peculiarly within the knowledge of the defendants sought to be examined and is not accessible to the moving party in any other way: Elms v. Duke, 39 Misc. 244.

h. **Contract.**—§ 872, subd. 6, read with §§ 870 and 876, limits the right to examine a person expected to be an adverse party to an action, which has not been commenced, to a case where proof is made by affidavit showing that it is necessary in order that the applicant's rights may be protected by the perpetuation of the testimony of the witness; an examination for the purpose of ascertaining whether the applicant has a cause of action is not contemplated by any provision of the Code, nor does the Code authorize a person who has a cause of action for a breach of the contract made between him and another to examine the supposed principals in order to ascertain the parties liable to him under his contract with the person with whom he dealt: Matter of Ellett v. Young, 95 App. Div. 417.

i. When the main question at issue in an action against a corporation is as to the authority of an employee to make a contract on its behalf, an examination of the officers as to the authority of the employee is proper if the moving affidavit complies with § 872; the production of the books and minutes should not be ordered unless the moving affidavit shows that they contain entries authorizing employees to make contracts: Wood v. Mott Iron Works, 114 App. Div. 108.

j. **Annullment.**—Where the plaintiff sues to annul her marriage for fraud, consisting in the defendant's having represented himself to her as in good health at the time of marriage, when, in fact, he was afflicted with a contagious venereal disease, the court may, solely by virtue of its inherent powers, compel him to submit to a physical examination, and such application does not rest upon § 872 and need not comply with the provisions of that section; the application should only be granted on the trial: Anonymous, 34 Misc. 109; 69 N. Y. Supp. 547.

k. **Order.**—Where an *ex parte* order for the examination of defendants was vacated and subsequently reinstated, on appeal, a later order requiring defendants to appear on a day certain is not a new order but merely one making the original order effective, and it is not necessary to procure the later that the affidavit should comply with all the requirements of § 872: Haebler v. Hubbard, 36 Misc. 642.

l. It is not a sufficient ground for vacating an order to examine an adverse party before trial that such party is a resident of the county and intends to be present at the trial, nor that the applicant can procure the required information from other persons; nor is a denial by the party sought to be examined of knowledge of facts a sufficient ground: Turck v. Chisholm, 53 Misc. 110.

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§ 873. Order for examination.

a. An order to examine an adverse party before trial will not be granted unless it appears that certain material facts are peculiarly within his knowledge and that the moving party has no other means of establishing them: Bagley v. Winslow, 34 Misc. 223; 69 N. Y. Supp. 611.

b. **Subpoena duces tecum.**—The order for the examination of a party before trial should not require the production of books to refresh his memory, the remedy is by subpoena *duces tecum:* Gee v. Pendas, 87 App. Div. 157; 84 N. Y. Supp. 32.

c. **Service of order.**—No authority exists for allowing substituted service of an order for the examination of a party before trial: Hall v. Gilman, 87 App. Div. 248; 84 N. Y. Supp. 279.

d. In order to shorten the time of service on the party to be examined, under the time set for such service by § 873, the facts making such short service necessary must appear in the petition or an order shortening the time of service is unauthorized: Miller v. Nevins, 115 App. Div. 139.

e. **Books.**—An order for the examination of a defendant under § 873 and an order for the examination and inspection of books are distinct and independent proceedings and cannot be united under one order, but under §§ 872-873 a witness may be required to produce books and papers as an adjunct to his oral examination and to refer to them for the purpose of making his examination effective: Bloodgood v. Slayback, 62 App. Div. 315; 71 N. Y. Supp. 809.

f. **Order, by whom made.**—The right to an order to examine a party is purely statutory, the statute must be followed and the application should be made to and the order made by a judge of the court or a county judge, not by the court: Matter of Wright, 73 App. Div. 75; 76 N. Y. Supp. 775.

g. **Sufficient affidavit.**—It is not essential that an application by a plaintiff to examine one of the defendants before trial, pursuant to the provisions of § 873 shall directly and explicitly state that it is the intention of the plaintiff to use the testimony of the defendant in question upon the trial; it is sufficient if such intention appears by fair inference; such an application will not be granted for the purpose of developing any defense of which the defendant sought to be examined may be possessed: McCormack v. Coddington, 98 App. Div. 13.

h. **Code of Procedure.**—§ 158 of the former Code of Procedure, in relation to a bill of particulars, and §§ 390 and 391 of said Code of Procedure in regard to the examination of a party to a pending action upon or before its trial, were incorporated and continued in §§ 531, 870, 872 and 873 of the Code of Civil Procedure: Grout v. Williams, 105 App. Div. 98; 34 Civ. Pro. R. 231.

i. **Anti-Monopoly Act.**—Right to compel witness to appear before referee under Anti-Monopoly Act, chap. 90 of 1899: Matter of Davies, 168 N. Y. 89.

j. **Appointment of physician.**—Although § 873 in regard to the physical examination of a party in an action for personal injuries, contemplates that the court shall appoint a physician, yet if the parties stipulate that the examination be made by a physician appointed by the defendant, the defendant waives his right and is not entitled after his physician has testified to have another physical examination of the plaintiff made by a physician designated by the court: Whitaker v. Staten Island M. R. R. Co., 76 App. Div. 351; 78 N. Y. Supp. 410.

k. **Order vacated.**—An order for the examination of the plaintiff before trial and for the service of the order for his examination without the state should be vacated where it appears that he resides in Scotland and is not now in this country; but his testimony may be taken by commission: Gilroy v. Interborough-Metropolitan Co., 55 Misc. 32.

l. **Corporation.**—An examination before trial under § 873 is a proceeding entirely distinct from and cannot be joined with a proceeding for the discovery of papers under §§ 803 and 809, and so much of § 872, subd. 7, as relates to an examination and inspection of the books of a corporation is intended to compel production of them so that they may be used only and solely as an incident to and in connection with the examination of a witness who is able to testify from them: Hart v. American Cotton Co., 41 Misc. 436.

m. **Strictly construed.**—This section is in abrogation of the common law securing the inviolability of the person and should be strictly construed; when a woman is compelled to submit to a physical examination under the provisions of said section she has a right to require such examination to be made by physicians of her own sex: Potter v. Village of Hammondsport, 112 App. Div. 91.

n. **Officer.**—There is no authority to examine an officer of a corporation, as such, before trial apart from an examination of the corporation; the order of examination in form should authorize an examination of the corporation and provide that the information be elicited by an examination of certain of its officers: Jacobs v. Mexican Sugar Refining Co., No. 2, 112 App. Div. 657; 98 N. Y. Supp. 542.

o. **Voluntary submission.**—An *ex parte* order for a physical examination of plaintiff before trial of an action for personal injuries is properly set aside when it is shown that the plaintiff had

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already voluntarily submitted to such examination at defendant's request and no reasons for such second examination are shown in the moving affidavit or on the application to set the order aside: Orlando v. Syracuse Rapid T. Ry. Co., 109 App. Div. 356.

a. **Subpoena.**—When an applicant has complied with §§ 870, 872 and 873 of the Code of Civil Procedure and with rule 82 of the general rules of practice, it is no answer to his application to show that he can subpoena the witness sought to be examined or that the witness or defendant will stipulate to appear at trial, or that the evidence sought can be obtained through other persons: Goldmark v. U. S. Electro-Galvanizing Co., 111 App. Div. 526; 97 N. Y. Supp. 1078.

b. **Oral examination.**—Physical examination of the plaintiff under this section can only be ordered in connection with an oral examination of the plaintiff as a witness before trial; the oral examination may be limited; but provision therefor cannot be stricken from the order leaving provision for the physical examination only to stand: Landau v. Citron, 47 Misc. 355.

c. **Attorney.**—It is error for the special term to limit scope of prior order for the examination of an attorney concerning his relations with a client, later declared to be incompetent: Malcolm v. Gibson, 119 App. Div. 881.

d. **Bill of particulars.**—Even if defendants might have procured the information asked for by a bill of particulars, they had a right to obtain it under an order for plaintiff's examination as a party before trial; where the requirements of §§ 870 and 873 and the general rules of practice have been complied with, a motion for an order for the examination of a party before trial must be granted unless made in bad faith: Tirpak v. Hoe, 53 Misc. 532.

e. **Physical examination.**—Where a husband sues to annul his marriage on the ground of the physical incapacity of his wife and moves for a physical examination before trial, and the defendant replies that she has been examined by three physicians whose privilege she will waive, the court in denying the motion should require a stipulation waiving the privilege to be signed by the attorneys of the parties: Geis v. Geis, 116 App. Div. 362.

f. The right of a physical examination before trial is wholly statutory and the statute is strictly construed; an order for such examination must be served on the party to be examined although he is a non-resident; the statute only allows an examination by physicians or surgeons designated by the court whose evidence is to be available to both parties: Goldenburg v. Zirinsky, 114 App. Div. 827.

g. The granting of a bill of particulars should not be conditioned on a waiver of a right to a physical examination: Baker v. New York City Railway Co., 116 App. Div. 858.

h. An action for damages for breach of promise to marry, is not an action for personal injury, although the complaint alleges that plaintiff was seduced by and was pregnant by defendant; and he is not entitled to an order for the physical examination of plaintiff under § 873: Pitt v. Dunlap, 54 Misc. 115.

§ 874. Punishment for disobeying order.

See § 852 et seq., ante, Compelling attendance and testimony of a witness.
See § 14, subd. 5, ante, Civil contempts.

i. **Contempt.**—Disobedience of the order involves punishment for contempt, but § 874 plainly prescribes that contempt proceedings may be instituted only as against a party personally served with the order: Hall v. Gilman, 87 App. Div. 248; 84 N. Y. Supp. 279.

§ 875. Service of order, etc.

j. **Substituted service.**—No authority exists for allowing a substituted service of the order for the examination of a party before trial: Hall v. Gilman, 87 App. Div. 248; 84 N. Y. Supp. 279.

§ 876. Deposition, when and where to be taken. Examination of adverse party.

k. § 872, subd. 6, read with §§ 870 and 876, limits the right to examine a person expected to be an adverse party to an action, which has not been commenced, to a case where proof is made by affidavit showing that it is necessary in order that the applicant's rights may be protected by the perpetuation of the testimony of the witness, an examination for the purpose of ascertaining whether the applicant has a cause of action is not contemplated by any provision of the Code, nor does the Code authorize a person who has a cause of action for a breach of the con-

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tract made between him another to examine the supposed principals in order to ascertain the parties liable to him under his contract with the person with whom he dealt: Matter of Ellett v. Young, 95 App. Div. 417.

a. A witness cannot be examined under §§ 871-876 to enable a plaintiff to frame a complaint in an action which is not yet commenced: Long Island Bottlers v. Bottling Brewers, 65 App. Div. 459; 72 N. Y. Supp. 976.

§ 880. Rules for examination of party or expected party. Manner of taking and returning depositions. Refusal of person examined to answer.

b. **Examination.**—A defendant cannot be ordered to answer questions in writing and to verify and file the same; an examination by question and answer should be had before the special term or a referee: Matter of Sands, 112 App. Div. 649.

c. **Nunc pro tunc.**—A deposition not certified to have been read to the witness and not filed within ten days should be suppressed unless so certified and unless an order to file *nunc pro tunc* be obtained: Faith v. Ulster & Delaware R. R. Co., 70 App. Div. 303; 75 N. Y. Supp. 420.

§ 881. When to be read in evidence.

d. **Physical examination.**—The statute authorizing a physical examination of a party only authorizes an examination by physicians or surgeons designated by the court whose evidence is to be available to both parties: Goldenberg v. Zirinsky, 114 App. Div. 827.

§ 882. Proof of witness's inability to attend.

e. Under § 872, subd. 5, and § 882, the testimony of a witness, not a party to an action, cannot be taken by deposition unless for the purpose of presenting the evidence for use on the trial in case the witness is then absent or sick; such deposition cannot be taken where its purpose is to get the testimony of the witness in order to enable the moving party to prepare for trial; requisites of affidavits on which to obtain a deposition considered: Davis Machine Co. v. Robinson, 42 Misc. 52.

f. It is improper on the trial of an action to allow a party to read the deposition of a witness, taken before a notary public pursuant to permission granted by the court at an earlier stage of the trial as there was not a compliance with §§ 872 and 882 of the Code: Meres v. Emmons, 103 App. Div. 381.

g. **Remainderman.**—When a widow, although a co-defendant of a remainderman, is an adverse party, her presence on the trial does not under the provisions of § 882 deprive the remainderman of the right to read in evidence her deposition taken prior to the trial: Hetzel v. Easterly, 96 App. Div. 517; 89 N. Y. Supp. 154.

h. **Proof.**—In an action to recover on the note of a corporation it is error to allow the deposition of the treasurer of the defendant, taken before trial, to be read in evidence, when the deponent has been produced on trial and sworn as a witness; such a deposition cannot be read in evidence unless it is proved that the witness is dead or unable to attend through sickness, etc., or is imprisoned, or absent from the state, so that his attendance cannot be compelled by subpoena: Miners & Merchants' Bank v. Ardsley Hall Co., 113 App. Div. 194.

§ 883. Effect of deposition.

i. The fact that a party, at whose instance a deposition is taken, reads in evidence upon the trial a portion of the deposition which is material and competent, does not, under § 883, entitle the opposing party to read portions of the deposition which were omitted by the other party, if such portions are incompetent and are duly objected to: Kramer v. Kramer, 80 App. Div. 20; 80 N. Y. Supp. 184.

§ 885. Deposition to be used on motion.

j. § 885, authorizing the taking for use upon a motion of the deposition of a person not a party to the action, does not relate solely to the examination of witnesses before trial, but applies to a case where the defendant in an action wishes to use the deposition on a motion to vacate the judgment theretofore rendered in the action and for a new trial upon the ground of newly discovered evidence: O'Connor v. McLaughlin, 80 App. Div. 305.

k. **Judgment debtor.**—Where the testimony of a witness is material in a proceeding to punish a judgment debtor for contempt, because of the alleged viola-

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tion by the latter of an injunction clause, contained in an order for his examination in proceedings supplementary to execution, the judgment creditor is not entitled to an order appointing a referee to take the witness's testimony; such testimony may be taken directly in the contempt proceeding itself, and the witness may be compelled to attend before the court on such proceeding either by subpoena or by an order under the provisions of § 2280: People ex rel. Tuell v. Paine, 92 App. Div. 303; 86 N. Y. Supp. 1109.

a. A **referee** to take depositions for use upon a motion for a new trial will not be appointed where it clearly and positively appears that the persons to be examined will not swear to the facts which defendant seeks to establish: Davis v. Rosenzweig Realty Operating Co., 53 Misc. 1.

§ 886. Where witness may be compelled to attend.

b. Proceedings vacated because the defendant was required to attend examination in a county other than that of his place of business or residence: Carr v. General Incandescent Arc Light Co., 37 Misc. 837; 77 N. Y. Supp. 464.

c. An order for the examination of the plaintiff before trial and for the service of the order for his examination without the state should be vacated where it appears that he resides in Scotland and is not now in this country; but his testimony may be taken by commission: Gilroy v. Interborough-Metropolitan Co., 55 Misc. 32.

§ 887. When commission to issue.

d. **Surrogate's court.**—The surrogate's court has power to issue a commission to take the testimony of non-resident witnesses for use before an appraiser appointed in a proceeding to fix a transfer tax upon the estate of a deceased non-resident: Matter of Wallace, 71 App. Div. 284; 75 N. Y. Supp. 838.

e. **Insufficient affidavit.**—An order for the issuance of a commission to examine witnesses without the state will be vacated where the allegations of the moving affidavit concerning the residence of the witnesses and their absence from the state are made upon information and belief and the sources of such information are not stated and no reason is given why an affidavit of a person familiar with the matter is not produced: Fox v. Peacock, 97 App. Div. 500; 90 N. Y. Supp. 137.

f. The affidavit used on a motion for a commission to examine a witness who is a resident of another state need not set out the exact place of his residence: Dambmann v. Metropolitan Street Ry. Co., 110 App. Div. 165.

g. **Accounting.**—An affidavit in an action for an accounting that certain witnesses reside in the state of Pennsylvania and are not within the state of New York, and are material witnesses to prove the allegations of the complaint, and that the sources of the information are interviews and correspondence, is sufficient under §§ 887 and 888 to warrant the granting of an order for the issuance of a commission to take the testimony of such witnesses upon interrogatories annexed to the commission: Laidlaw v. Stimson, 67 App. Div. 545; 74 N. Y. Supp. 684.

h. **Incompetent matter.**—Testimony taken out of the state by a commission, that is incompetent when read and objected to on the trial, does not become admissible because objections were not made upon the allowance of the interrogatories or by motion to suppress the commission: Wanamaker v. Megraw, 168 N. Y. 125; 32 Civ. Pro. R. 201, rev'g 48 App. Div. 54; 62 N. Y. Supp. 692.

i. **Interrogatories.**—When an application is made to examine a non-resident party to an action in his own behalf as well as other witnesses, without the consent of the other party, the examination can only be upon interrogatories and an examination upon an open commission or an examination wholly or partly upon oral questions is unauthorized. In such a case not only must the interrogatories be annexed to the order, but all witnesses to be examined must be named: Ordway v. Radigan, 114 App. Div. 538.

j. A commission to take the testimony of a witness upon interrogatories under § 887 must name the person to whom it is issued or it will be vacated: Spurr & Sons v. Empire State Surety Co., 117 App. Div. 816.

k. **Open commission.**—An oral examination of witnesses upon a commission to be executed without the state is proper only when very strong reasons therefor are shown to exist; the fact that the action is for divorce and that the witnesses are to be asked to testify to alleged acts of adultery, tends rather against than for the granting of such commission: Depue v. Depue, 115 App. Div. 466.

l. Where, in a proceeding for the probate of a will involving the interests of an infant contestant, an open commission has been granted upon the application of the proponent to take the testimony of a foreign witness, and the special guardian applies for an allowance from the estate to defray his expenses in attending the execution of the commission or employing counsel to represent him and the proponent op-

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poses such allowance, the court, being without power to order the allowance, should vacate the order for an open commission and make an order providing for a commission to take the testimony upon written interrogatories: Matter of Sentell, 53 Misc. 165.

§ 888. The same.

a. In an action for the construction of a will where it is necessary to prove the unwritten laws of the Republic of Switzerland, the court should not refuse to grant a commission because they may under § 942 be shown by lawyers of the city of New York who are versed in such laws; where it appears that the action is at issue in regard to the defendants who applied for a commission, the fact that it is not at issue as to other defendants does not under § 888, subd. 5, constitute the granting for a denial of the motion for a commission: Boyes v. Bossard, 87 App. Div. 605.

b. **The affidavit** used on a motion for a commission to examine a witness who is a resident of another state need not set out the exact place of his residence: Dambmann v. Metropolitan St. Ry. Co., 110 App. Div. 165.

c. The affidavit of one who has given in two other affidavits, made on information and belief, as the source of such information, that he was acquainted with the non-resident witness; that said witness now resides in the city of Newark, in the state of New Jersey, and is now in said state and not within the state of New York, is sufficient: Tirpak v. Hoe, 53 Misc. 532.

§ 889. How and upon what terms granted.

d. **Order** for issuing of commission modified by requiring plaintiff to stipulate that he would be present upon the trial for the examination, etc.: Merino v. Munoz, 63 App. Div. 613; 71 N. Y. Supp. 321.

e. **Mandatory.**—In the absence of bad faith, the provisions of § 889, requiring the issuance of a commission upon interrogatories, is mandatory. All that is necessary to show upon such commission is that the action is one mentioned under § 888 and that the testimony of one or more witnesses not within the state is material to the applicant: Oakes v. Riter, 118 App. Div. 772.

§ 892. Id.; to be annexed; directions for return.

f. **Negligence.**—Where the plaintiff in a negligence action applies for a commission to take the evidence of a non-resident witness in the employ of the defendant, and it appears that such witness is reluctant to testify, although not hostile to the plaintiff, and that he refused to acquaint the plaintiff's attorneys with facts sufficient to enable them to prepare written interrogatories intelligently, the appellate division will not interfere with the discretion of the special term in permitting the witness to be examined wholly upon oral questions: Frounfelker v. D., L. & W. R. Co., 81 App. Div. 67; 80 N. Y. Supp. 701.

g. **Incompetent testimony.**—Testimony taken out of the state by a commission, that is incompetent when read and objected to on the trial, does not become admissible because objections were not made upon the allowance of the interrogatories or by motion to suppress the commission: Wanamaker v. Megraw, 168 N. Y. 125; 32 Civ. Pro. R. 201, rev'g 48 App. Div. 54; 62 N. Y. Supp. 692.

§ 894. When open commission may issue, or depositions may be taken.

h. An open commission to examine witnesses out of the state will not be granted except under peculiar circumstances, and then only when the facts stated show the necessity for resorting to that course of practice: Stewart v. Russell, 66 App. Div. 542; 73 N. Y. Supp. 249.

§ 897. Open commission.

i. **Probate.**—In a contested probate proceeding it is proper for the surrogate, under § 897, to issue an open commission to be executed in Salt Lake City and in Colorado Springs for examining witnesses, including the subscribing witnesses that might be produced by either the proponent or contestant, and the witnesses should be named in the order granting the commission: Matter of Anderson, 84 App. Div. 268; 82 N. Y. Supp. 683.

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§ 901. Commission or order to take depositions; how executed and returned.

a. Upon a motion to suppress a deposition because the commissioner's certificate is not attached and he did not subscribe his name to each exhibit and to each half sheet, the party on whose behalf the deposition was taken should be allowed to return it to the commissioner for amendment: Risley v. Harlow, 48 Misc. 277.

§ 902. Certificate of execution.

b. Upon a motion to suppress a deposition because the commissioner's certificate is not attached, and he did not subscribe his name to each exhibit and to each half sheet, the party on whose behalf the deposition was taken should be allowed to return it to the commissioner for amendment: Risley v. Harlow, 48 Misc. 277.

§ 910. When deposition may be suppressed.

c. Upon a motion to suppress a deposition because the commissioner's certificate is not attached and he did not subscribe his name to each exhibit and to each half sheet, the party on whose behalf the deposition was taken should be allowed to return it to the commissioner for amendment: Risley v. Harlow, 48 Misc. 277.

§ 911. Deposition, etc., evidence.

d. Though the plaintiff in an action for personal injuries has taken the deposition of a physician who examined her, it does not constitute a waiver of the privilege secured to such communications, and when such deposition is not offered in evidence by the plaintiff it is not error to allow the defendant to introduce it over the objection of the plaintiff; as § 834 now stands, such privilege can only be waived in open court or by stipulation before trial; by virtue of § 911 the competency of the evidence in such deposition does not arise until the trial: Clifford v. Denver & Rio Grande R. R. Co., 111 App. Div. 513.

e. On a trial the party against whom the deposition is read may then object either to the questions or to the answers with the same force as if a witness was then personally being examined: Wanamaker v. Megraw, 168 N. Y. 125; 32 Civ. Pro. R. 201, rev'g 48 App. Div. 54; 62 N. Y. Supp. 692.

f. **Incompetent testimony.**—Where testimony taken upon the direct examination of a witness under a commission has been read upon a trial, a party may decline to read the testimony taken upon his cross-examination of the witness, and, if read by his adversary, he may, under § 911, object to any question as incompetent or irrevelant, although it was framed by him and constituted part of his own cross-examination: Cudlip v. N. Y. Evening Journal Pub. Co., 180 N. Y. 85; 34 Civ. Pro. R. 175, rev'g 87 App. Div. 633; 84 N. Y. Supp. 1122; 84 N. Y. Supp. 1139.

g. When a commission issues to examine foreign witnesses who reside in London and Leipsic, some of whom do not speak or understand the English language, an application to frame the interrogatories in both English and German languages should be granted: Roth v. Mautner, 115 App. Div. 148.

§ 914. In what cases deposition may be taken.

See rule 17 (Sup. Ct.), Subpoena to compel attendance of witness.

h. The power of the legislature to thus subject a citizen to a searching examination in relation to his property, books and papers is sanctioned by long usage, with the approval of the courts, the bar and the public. It is not challenged as non-judicial in character, or as in violation of due process of law. So a party or a prospective party, may be examined out of court and depositions of witnesses may be taken within or without the state for use in courts of justice within or without the state: Matter of Davies, 168 N. Y. 89; 32 Civ. Pro. R. 163.

i. **Insufficient proof.**—An order for the taking of the testimony of a witness in the state of New York, under §§ 914 and 915, will not be granted upon mere proof of the pendency of the action in a foreign jurisdiction and the presence of the witness in this state; the court will examine as to whether the application is made in good faith, as required by rule 17 of the general rules of practice: Matter of Spinks, 63 App. Div. 235; 71 N. Y. Supp. 398.

j. **Subpoena duces tecum.**—A witness cannot be compelled to examine the

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books of a corporation, not before the court, for the purpose of refreshing his recollection; he should be required to produce the book upon service on him of a subpoena *duces tecum*, under § 914: Matter of Dittman, 65 App. Div. 343; 72 N. Y. Supp. 886.

a. §§ 914 and 915 require the production of books and papers, but only for use in connection with the testimony of a witness, and those sections cannot be used to enforce production of books and papers merely for the purpose of putting them in evidence: Matter of Lee, 41 Misc. 642; 85 N. Y. Supp. 224.

b. **Jurisdiction.**—A subpoena issued under the commission of a foreign court, to take testimony in this state, must be vacated where it appears that the court from which the commission issued was without jurisdiction: Matter of Great Northern Const. Co., 50 Misc. 467.

§ 915. Proceedings to obtain testimony.

See rule 17 (Sup. Ct.), Subpoena to compel attendance of witness.

See § 852 et seq., ante, Compelling attendance and testimony of witness.

See § 2266 et seq., post, Proceedings to punish civil contempts.

c. **Insufficient petition.**—An order for the taking of the testimony of a witness in the state of New York, under §§ 914 and 915, will not be granted upon mere proof of the pendency of the action in a foreign jurisdiction and the presence of the witness in this state; the court will examine as to whether the application is made in good faith, as required by rule 17 of the general rules of practice: Matter of Spinks, 63 App. Div. 235; 71 N. Y. Supp. 398.

d. **Surrogate's court.**—It is doubtful whether § 915 permits the surrogate's court of this state to issue a subpoena to compel a person residing in this state to appear and give testimony in this state before a commissioner appointed by a court of another state, and even if § 915 does authorize the issuing in such a case of a subpoena, it will not be issued unless it appear that the commission was issued to take testimony in this state: Matter of Canter, 82 App. Div. 103; 81 N. Y. Supp. 416.

e. **Contempt.**—Proceedings under § 915 to punish a witness for contempt is a special proceeding; the final order therein from which an appeal will lie to the court of appeals is the one which punishes or refuses to punish the witness; no appeal will lie from an order which directs witness to answer certain questions, as such a one is interlocutory: Matter of Strong v. Randall, 177 N. Y. 400.

f. **Books.**—§§ 914 and 915 require the production of books and papers, but only for use in connection with the testimony of a witness, and those sections cannot be used to enforce production of books and papers merely for the purpose of putting them in evidence: Matter of Lee, 41 Misc. 642; 85 N. Y. Supp. 224.

g. **Subpoena duces tecum.**—Where an action is pending in another state against a bank, to recover the value of bonds converted by its cashier, whom the defendant is alleged to have employed with knowledge of his unfitness, the plaintiff may have a subpoena *duces tecum* under § 915, requiring a broker in this state with whom the cashier is alleged to have speculated with the knowledge of the defendant to testify and to produce a record of the cashier's transactions before a notary public; the books themselves should be produced by which the witness may refresh his recollection, and if copies are desired the books may be read into the minutes: Matter of Waterman, 110 App. Div. 115.

§ 921. Certain official certificates, evidence.

See § 961, post, Certificate of surrogates, etc.

§ 923. Notary's certificate, evidence.

h. Notice of protest, when deemed sufficient: Mohlan v. McKane, 60 App. Div. 546; 69 N. Y. Supp. 1046.

i. Where no affidavit was filed by the defendant with his pleading or within ten days after joinder of issue to the effect that he had not received notice of the nonpayment of a note, the certificate of the notary and its service upon the indorser are deemed to have been sufficient: German American Bank v. Mills, 99 App. Div. 312; 91 N. Y. Supp. 142.

j. A certificate of a notary who presented a note at a bank stating that he "found the bank closed" is sufficient, although it does not state that it was presented during banking hours, as there is a legal presumption that the notary made the presentation at the proper time of day: Schlesinger v. Schultz, 110 App. Div. 356.

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§ 929. Book of foreign corporation; when evidence.

a. **Evidence.**—Under §§ 929 and 930, the original books of a foreign corporation, which have been in the custody of one of the officers of such corporation, are admissible to prove its corporate acts in an action brought against a transferee of stock for unpaid calls and are presumptive evidence without proving the correctness of entries: Sigua Iron Co. v. Brown, 171 N. Y. 488, aff'g 58 App. Div. 436; 69 N. Y. Supp. 295.

b. When it does not appear that there were any written minutes of meetings of the trustees of a membership corporation, or any record of contracts alleged to have been made, parol evidence of such matters is proper: Braxmar v. Stanton, 110 App. Div. 167.

§ 930. When a copy thereof is evidence.

c. **Evidence.**—Under §§ 929 and 930, the original books of a foreign corporation, which have been in the custody of one of the officers of such corporation, are admissible to prove its corporate acts in an action brought against a transferee of stock for unpaid calls and are presumptive evidence without proving the correctness of entries: Sigua Iron Co. v. Brown, 171 N. Y. 488, aff'g 58 App. Div. 436; 69 N. Y. Supp. 295.

d. When it does not appear that there were any written minutes of meetings of the trustees of a membership corporation, or any record of contracts alleged to have been made, parol evidence of such matters is proper: Braxmar v. Stanton, 110 App. Div. 167.

§ 933. Copies of records and papers in certain offices, presumptive evidence.

e. **Bill of sale.**—Certified copy of a bill of sale which was filed pursuant to law may be received in evidence as if the original were produced: Polykranas v. Krausz, 73 App. Div. 583; 77 N. Y. Supp. 46.

f. **Transcript.**—While the transcript of a judgment is not evidence of the contents of the judgment roll, so as to operate as an estoppel, yet, under the provisions of § 933, it is evidence of the fact that a judgment has been duly recovered, and of all of the matters which it recites under the provisions of law, for the purpose of showing the right of the party recovering the judgment to maintain a judgment creditor's action: Bailey v. Fransioli, 101 App. Div. 140; 91 N. Y. Supp. 852.

g. A transcript of a part of the record containing the assessment against the defendant, certified by the chief clerk of the department of taxes, is not competent in evidence under § 933, where such certificate has no seal attached to it: City of New York v. Vanderveer, 91 App. Div. 303; 86 N. Y. Supp. 659.

h. **Certificate of incorporation.**—A certificate of incorporation filed with the secretary of state, as provided by the General Corporation Law, § 5, or a certified copy thereof, is presumptive evidence of the incorporation and of the facts set forth in the certificate: Acker, Merrall & Condit v. Richards, 63 App. Div. 305; 71 N. Y. Supp. 929.

i. **Mount Vernon.**—A complaint not served is proof of the jurisdictional facts; a copy of the judgment roll in an action in the city court of Mount Vernon is properly authenticated by the certificate of the clerk of the court, under § 933, and the appropriate sections of the charter of the city: Phipps v. Oprandy, 69 App. Div. 497.

j. **Census returns** are not admissible as proof of date of birth, both on account of their gross inaccuracy, and because they are hearsay: Maher v. Empire Life Insurance Co., 110 App. Div. 723.

k. **Journals.**—When an executor claims that the act authorizing the transfer tax is unconstitutional in that three-fifths of the members of both houses, as required by the Constitution, are not shown to' have been present by the certificates of the presiding officers of said houses as required by the Legislative Law, § 40, certified copies of the journals of the two houses and corrected certificates filed by the presiding officers thereof are admissible to show that in fact three-fifths of the members were present: Matter of Weeks, 109 App. Div. 859; 96 N. Y. Supp. 876, aff'd 185 N. Y. 541.

§ 934. Id.; of papers filed with town clerk.

l. **Census returns** are not admissible as proof of date of birth, both on account of their gross inaccuracy and because they are hearsay: Maher v. Kamaiky, 110 App. Div. 713.

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§ 935. Conveyance, when acknowledged, or record, or transcript of of record, evidence.

a. **A lease** for a term of less than three years is not a "conveyance" within the meaning of § 935 making a conveyance acknowledged or proved and certified in the manner prescribed by law to entitle it to be recorded in the county where it is offered, evidence without further proof thereof: Goodman v. Greenberg, 53 Misc. 586.

b. **Map.**—In an action to recover damages for the cutting off of subterranean waters from the plaintiff's premises when the defendant claims that the premises were too remote to be affected, a map made under the directions of the defendant's engineer is not admissible when there is no evidence to show that the distances indicated thereon are correct: Camden v. City of New York, 119 App. Div. 84.

§ 936. Such evidence may be rebutted.

c. When consents to the construction of a street railroad are presumptively sufficient: Adee v. Nassau Electric R. R. Co., 65 App. Div. 529; 72 N. Y. Supp. 992.

d. **Mortgage.**—Weight of certificate of acknowledgment of execution of bond and mortgage as against testimony of persons who are alleged to have executed the same: Austen v. Richardson, 67 App. Div. 166; 73 N. Y. Supp. 731.

§ 938. Justice's docket and transcript, evidence before him.

See § 3140, post, Entries in docket book.

§ 941. Ordinances, etc., of cities, villages, etc.

See § 1556, Greater New York charter, chapter 378 of 1897.

e. **Counterclaim.**—The right to a counterclaim based upon a city ordinance cannot be allowed where the ordinance was not proved as required by § 941: Sachs v. Lyons, 53 Misc. 642.

§ 942. Printed copies of laws of another state, etc.

f. **Judicial notice.**—The supreme court of the state of New York may take judicial notice of the existence and jurisdiction of the high court of justice of the province of Ontario, and the jurisdiction is sufficiently proved where a book, purporting to be the last revision of the statutes of the legislature of the province and containing the judicature act establishing the jurisdiction of its high court, is given in evidence and identified by one who has been a solicitor and practitioner in that province, as issued officially by the queen's printer: Grant v. Birrell, 35 Misc. 768.

g. **Decision.**—On a motion to dismiss a complaint, the reading of a citation of a decision of the New Jersey court, coupled with the offer by the attorney to "read the syllabus and hand the book for your honor to read," is not equivalent to offering the decision in evidence: De Maio v. Standard Oil Co., 68 App. Div. 167; 74 N. Y. Supp. 165.

h. **Common law.**—A report of a decision of the supreme judicial court of Maine is presumptive evidence of the common or unwritten law of Maine, as such an adjudication does not create the law but simply declares it, it is immaterial that the adjudication was not rendered until after a certain lease was executed: Bath Gas Light Co. v. Rowland, 84 App. Div. 563; 82 N. Y. Supp. 841.

i. **Commission.**—In an action for the construction of a will, where it is necessary to prove the unwritten laws of the republic of Switzerland, the court should not refuse to grant a commission, because they may, under § 942, be shown by lawyers of the city of New York who are versed in such laws; where it appears that the action is at issue in regard to the defendants who applied for a commission, the fact that it is not at issue as to other defendants does not, under § 888, subd. 5, constitute the granting for a denial of the motion for a commission: Boyes v. Bossard, 87 App. Div. 605.

j. **Foreign country.**—The statutes of a foreign country can only be proved in the manner prescribed by § 942 by producing a printed copy of the statute, contained in a publication purporting or proved to have been published by the authority of the foreign country, or proved to be commonly admitted as evidence of the existing law in the judicial tribunals of the foreign country: Pirrung v. Supreme Council, 104 App. Div. 571.

k. The written law of a foreign country must be proved in this state by the production duly of an authenticated record of the law itself or by reports or other authorized publications duly proved of such law: People v. Rosenzweig, 47 Misc. 584.

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a. Although in an action upon a judgment of a foreign court, the record of the judgment was not authenticated in the manner required by the Code of Civil Procedure to be read in evidence, the defect may be remedied by the presentation of a duly authenticated record in the appellate record: Milliken v. Dotson, 117 App. Div. 527.

§ 944. Copies of documents on file in departments of U. S. presumptive evidence.

A copy of a record or other paper, remaining in a department of the government of the United States, is evidence, when certified by the head, or acting chief officer, for the time being, of that department; or when certified by the officer in whose charge it is, pursuant to a statute of the United States, or otherwise in accordance with a statute of the United States, relating to certifying the same. A certificate of the director or other officer in charge of the census of the United States, attested by the secretary of the interior, stating the population of any part of the United States, or giving the result of said census otherwise shall be received as prima facie evidence of such facts. The record of the observations of the weather, taken under the direction of the signal service of the United States, when certified by the officer in charge thereof, at the place where they were taken and are kept, is prima facie evidence of the matters of fact stated therein. The records of the observation of the weather taken at the arsenal in Central park under the direction of the meteorological and astronomical observatory of the city of New York, when duly certified by the official in charge thereof, or his deputy, shall be presumptive evidence of the facts set forth therein, and shall be received in evidence on the trial of any action in all the courts of this state.

Amended by chap. 416 of 1877, chap. 542 of 1879, chap. 99 of 1899 and chap. 252 of 1907.

b. **Weather.**—A party to an action is entitled to prove the condition of the weather on a specified day by introducing in evidence the records of the United States weather bureau for that date, which are *prima facie* evidence of the matters therein stated, by § 944 of the Code: Bretsch v. Plate, 82 App. Div. 399.

§ 949. Id.; how authenticated.

c. Although in an action upon a judgment of a foreign court, the record of the judgment was not authenticated in the manner required by the Code of Civil Procedure to be read in evidence, the defect may be remedied by the presentation of a duly authenticated record in the appellate record: Milliken v. Dotson, 117 App. Div. 527.

§ 953. Other proof.

d. The affidavit of the president of a railroad used in a motion for a bill of particulars which admitted that the services were rendered "for the defendant" is competent evidence against it: Bogart v. New York & Long Island R. R. Co., 118 App. Div. 50.

§ 955. Public records in New York county.

All maps, surveys and official records, which shall have been on record or on file in the office of either the register of the city and county of New York, or the surrogate of said city, or any of the courts of record of said city, or the clerk of the city and county of New York, or any county within

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the city of New York, or any of the departments of said city as enumerated in section thirty-four of the New York city consolidation act, or in the office of the registers, surrogates, commissioners of public works or kindred department, or park department, for a period of twenty years or upwards prior to such trial shall be presumptive evidence of their contents, and shall be receivable in evidence as such upon any trial in any of the courts of this state in any controversy pending therein, between any parties.

Added by chap. 522 of 1892.

Amended by chap. 444 of 1904.

a. The death certificate made by an attending physician and filed with the health department is not admissible to prove the cause of death notwithstanding the provision of § 955 that official records which have remained on file for a period of twenty years shall be presumptive evidence of their contents: Robinson v. Supreme Commandery, 77 App. Div. 215; 79 N. Y. Supp. 13.

§ 956. Documents from foreign countries; how authenticated.

"Circuit court" at the present time, Trial term. "Court of oyer and terminer," now criminal part of the supreme court.

§ 960. Evidence, in actions for injury to unoccupied lands and timber thereon.

In all actions to recover the possession of, or otherwise to determine the title to, or for trespass upon or injury to, unoccupied lands, timber, trees or underwood thereon, except an action in which any county or any state or county officer, board or commission is a party defendant, the plaintiff may show an unbroken chain of title or conveyance of the land to himself for thirty years next preceding the commencement of the action, or if an action for trespass, next preceding the commission of the trespass or injury, and such proof shall be presumptive evidence of ownership at the times, respectively, of the commencement of such action or commission of such trespass or injury, but such presumption may be rebutted by the defendant by showing ownership of said lands at the times, respectively, of the commencement of said action or the commission of said trespass or injury, in some person other than the plaintiff.

Added by chap. 32 of 1898.

Amended by chap. 509 of 1906.

The original § 960 was repealed by Statutory Construction Law, chap. 677 of 1892, and the former provisions of § 960 were practically re-enacted in § 13 of that law.

b. **Trespass.**—When, in an action for trespass upon salt meadows, the defendant admits the trespass, if the lands belong to plaintiff and the plaintiff produces a paper title going back to 1830, and the defendant offers no evidence of a title in himself or another, save some isolated acts of cutting hay and gathering driftwood on the premises and some evidence throwing doubt upon the exact location of the eastern boundary under the plaintiff's title, there is no question of fact raised by the evidence and the court may direct a verdict for the plaintiff; a map made in 1856, which is produced from a proper custody, may be introduced to establish a boundary in dispute: Cravath v. Baylis, 113 App. Div. 666.

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§ 961. Surrogates, clerks, etc., to search files, and to certify, etc.

See § 921, ante, Certain official certificates, evidence.

See § 3296 et seq., Sums allowed as fees.

a. The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted, it must stand as proof of such non-existence: Deshong v. City of New York, 176 N. Y. 475.

§ 964. When issues of law arise; when issues of fact arise.

b. A motion for a preference for the trial of an issue of fact will be denied where an issue of law remains undisposed of: N. Y. Contracting and Trucking Co. v. Hawkes, as Commissioner, 41 Misc. 125; 34 Civ. Pro. R. 14.

§ 965. Issues to be judicially examined by a trial.

c. Nothing in chap. 6, referred to in this section, places any limitation upon the right to trial of issues of fact raised in an action where such issues are required to be determined in order to adjust the rights of the parties: Farmers' Loan & T. Co. v. Hoffman House, 96 App. Div. 301; 89 N. Y. Supp. 281.

d. **Damages.**—Assessment of damages is not a trial or an inquest so as to allow plaintiff to tax a trial fee: Young v. Syracuse B. & N. Y. R. R. Co., 35 Misc. 114; 71 N. Y. Supp. 221.

§ 966. Order of trial, where issues of law and of fact arise in the same action.

e. In an action in equity by a principal against his agent for an accounting when there is an issue as to the basis of the agent's compensation, the trial of the main issue should be had before the court before the case is sent to a referee. If on such trial it appear that an accounting is necessary, the reference should be provided for in the interlocutory decree: Prince Line, Lim., v. Seager Co., 118 App. Div. 697.

§ 967. But court may direct the order, etc., of disposition of the issues.

See § 521, ante, When defendant to serve copy answer on co-defendant.

f. An order withdrawing certain issues, equitable in their nature, from the consideration of the jury and directing that they be tried before another judge without a jury, is not justified where none of the parties to the action consent thereto: Reed v. Provident Sav. Life Assur. Soc., 79 App. Div. 163; 79 N. Y. Supp. 665.

§ 968. What issues of fact are triable by a jury.

See § 1757, post, Answer; mode of trial; judgment by default.

g. In an action at law the court has no power against the objection of either party to discharge the jury, and in its absence to pass upon the questions involved. If the evidence conclusively establishes the right of either party to recover, the court should direct a verdict, but cannot properly dismiss the jury and decide the case itself: Gansberg v. Sagemohl, 67 App. Div. 554; 73 N. Y. Supp. 984.

h. **Equity.**—Although the action is one in equity, yet the question of fact may be submitted to the jury for their determination subject to the approval of the court: Lee v. Lee, 40 Misc. 251, 81 N. Y. Supp. 986.

i. Where the complaint in an action prays for such relief as only a court of equity can grant, the plaintiff is not entitled to a trial by a jury, as a matter of right, under the provisions of § 968: Dykman v. U. S. Life Ins. Co., 176 N. Y. 299, aff'g 82 App. Div. 645; 81 N. Y. Supp. 1125.

j. Where the party is not entitled, as of right, to a trial by jury, the verdict is not conclusive upon the parties and the trial court may adopt it, modify it or disregard it and find the facts anew; the verdict is treated as an aid to the court to inform its conscience, but it is in no wise bound thereby, for the responsibility of determining the facts rests upon the trial judge: Wurster v. Armfield, 98 App. Div. 298; 34 Civ. Pro. R. 167.

k. **Waiver.**—A party to an action, by consenting to the appointment of a referee

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to hear and determine the issues therein, waives any constitutional right which he might have in such an action: Brooklyn H. R. R. Co. v. Brooklyn C. R. R. Co., 105 App. Div. 88.

a. **Reference.**—The court has no power as the condition of the changing of venue for the convenience of witnesses to require the moving party to consent to a reference: L'Amoureux v. Erie Railroad Co., 62 App. Div. 505; 71 N. Y. Supp. 70.

b. **Counterclaim.**—Under § 968, which provides that an issue of fact in an action in which the complaint demands judgment for a sum of money only must be tried by a jury, and § 974, which provides that where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact is the same as if it arose in an action, brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment, the defendant is entitled, as a matter of right, to a jury trial of the issues arising on a counterclaim: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

c. **Estoppel.**—The fact that the defendants in an action in equity are estopped from insisting that the action should be tried as one in equity does not preclude the court, sitting at a trial term, from granting the defendant's motion to strike the case from the trial term calendar, as an estoppel of the defendants does not extend to the court: Weldon v. Brown, 89 App. Div. 586; 85 N. Y. Supp. 599.

d. **Bankruptcy.**—Where a trustee in bankruptcy brings an action in the supreme court pursuant to section 60, subd. b, of the National Bankruptcy Act, and the complaint demands judgment for a sum of money only, the action is one which must be tried by a jury under § 968: Stern v. Mayer, 99 App. Div. 427; 91 N. Y. Supp. 292, 113 App. Div. 182.

e. **Nuisance.**—When an action by a lessee for an injunction to restrain a nuisance, to which has been joined, as a mere incident and to avoid multiplicity of suits, a legal claim for damages, is, by the expiration of the lease and the vacation of the premises prior to the trial, shorn of all its equitable features, leaving nothing but the claim for damages, the defendant is entitled to a trial by jury unless it has been waived: McNulty v. Mt. Morris El. Light Co., 172 N. Y. 410.

f. § 968 applies only to the "action for a nuisance" which is authorized by § 1660 and that is purely a common-law action; an action for a perpetual injunction to restrain the defendant from using its property in such a way as to continue a nuisance should be tried as an action in equity and only specific issues may be sent to a jury: Miller v. Edison Electric Illuminating Co., 78 App. Div. 390; 80 N. Y. Supp. 319.

g. **Separation.**—A party to an action for a separation from bed and board is not entitled, as a matter of right, to have the issues of fact tried by the jury, even though the validity of the marriage is involved in the action and may be determined by the final judgment: Packard v. Packard, 88 App. Div. 339; 84 N. Y. Supp. 1090.

h. **Issue of fact on mandamus.**—Under §§ 968 and 2083 the relator is entitled, as a matter of right, to have the jury render a verdict upon such issues. The presiding judge may, in a proper case, direct a verdict upon the issues or submit them to the jury for their determination, but he has no power to nonsuit the relator: People ex rel. Bean v. Clausen, 74 App. Div. 217; 77 N. Y. Supp. 521; 33 Civ. Pro. R. 141.

i. **Trespass.**—A complaint which alleges that the defendants have wrongfully trespassed on plaintiff's premises by cutting timber thereon and are continuing and threaten to continue to do so to the plaintiff's irreparable damage, followed by a prayer for an injunction with damages for the cutting already done, sets out only an action in equity, and defendants have no right to a jury trial, although the defendants are alleged to be liable for treble damages under §§ 1667 and 1668: Page v. Herkimer Lumber Co., 109 App. Div. 391.

j. **Accounting.**—An action for conversion of stock is not changed to one in equity merely on account of the fact that the prayer for relief demands an accounting: Brightson v. Claflin Co., 108 App. Div. 284.

k. **Nuisance.**—The denial of equitable relief in an action brought to restrain the continuance of a nuisance and to recover the damages sustained, does not make the action triable, as of right, by a jury: Miller v. Edison El. Illuminating Co., 184 N. Y. 17, rev'g 97 App. Div. 638; 89 N. Y. Supp. 1059.

l. **Ejectment.**—A complaint which demands the recovery of possession of lands with an incidental request that the defendant railway in possession thereof be compelled to remove its tracks, and be enjoined from using the same, states a mere action for ejectment and should be tried before a jury; the fact that incidental equitable relief is asked does not deprive the defendant of its right to a jury trial, as such relief would be given in the common-law action: Remsen v. N. Y., Brooklyn and M. Beach R. Co., 111 App. Div. 413.

m. **Agency.**—Where the liability of the defendants devolves into the question as to whether they acted as agents or individually, there is a question of fact for the jury to decide, and a nonsuit is error: People v. Stillman, 117 App. Div. 170.

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a. **Master and servant.**—When a plaintiff being employed by one master is injured while at work as a carpenter in the building of the defendant by the breaking of a scaffold, the question as to whether the relation of master and servant existed between plaintiff and defendant is for the jury and not for the court: Williams v. First National Bank, 118 App. Div. 555.

b. **Credibility of witness.**—While generally the credibility of a witness who is a party to an action raises a question for the jury, yet when an agent testifies for his principal and there is no evidence to contradict the testimony, which is not opposed to the probabilities or contradicted by any legitimate inference, the credibility of the witness standing alone does not raise a question for the jury: Molloy v. Whitehall Portland Cement Co., 116 App. Div. 839.

§ 969. What issues are triable by the court.

c. **Equity.**—Although the action is one in equity yet the questions of fact may be submitted to the jury for their determination subject to the approval of the court: Lee v. Lee, 40 Misc. 251; 81 N. Y. Supp. 986.

d. **Specific performance.**—A complaint in an action for specific performance is improperly dismissed where plaintiff alleges full performance and defendant alleges it has attempted to rescind on the ground of non-performance: St. Regis Paper Co. v. S. C. Lumber Co., 173 N. Y. 149, rev'g 66 App. Div. 617; 73 N. Y. Supp. 1146.

e. **Agency.**—Where the liability of the defendants devolves into the question as to whether they acted as agents or individually, there is a question of fact for the jury to decide, and a nonsuit is error: People v. Stillman, 117 App. Div. 170.

f. **Contributory negligence.**—It is error to dismiss a complaint in an action for negligence where there is a question of fact in regard to plaintiff's contributory negligence; that subject is not a matter of law: Heitz v. Yonkers Railroad Co., 117 App. Div. 747.

g. **Pleading.**—When a question arises as to whether a pleading states a cause of action or defense, the issue must be presented by demurrer, or upon trial at the opening thereof, or when the evidence is offered, or at the close of the case by motion. Especially is this true as to the measure or items of damage; thus when the complaint in an action to recover damages for death by wrongful act alleges that the widow of the deceased spent large sums of money for hospital room and board and for care and medical attendance, the right to recover such items cannot be decided upon a motion to strike the allegations from the complaint: Fox. v. Chapman, 117 App. Div. 127.

h. **Appeal.**—When at the trial, the plaintiff moves for the direction of a verdict and the defendant moves for the dismissal of the complaint, and in the alternative for a direction of verdict for plaintiff for nominal damages and the court directs judgment for the plaintiff, the case on appeal should state the grounds upon which the defendant moved to dismiss the complaint and for the direction of a verdict, so that there can be no question that he waived any position which he was entitled to take: Blewett v. Hoyt, 117 App. Div. 32.

§ 970. Order for trial by jury, of specific questions of fact; when of right.

See § 823, ante, Feigned issues have been abolished.

See rule 31 (Sup. Ct.), Motions for issues of fact to be tried by jury.

i. **Counterclaim.**—The defendant is entitled as a matter of right under § 970 to have its motion for the settlement of the issues arising on the counterclaim granted, and the motion may be made at any time before the trial commences: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

j. **Waiver.**—Where a party is entitled to a jury trial of any specific question of fact, he will be deemed to have waived such right by failing to apply as provided by § 970 for an order directing such a trial: Steinway v. Von Bernuth, 82 App. Div. 596.

k. **Mechanic's lien.**—§ 3412 may be given effect without depriving the parties of their constitutional right to a jury trial; in case the validity of the lien is not established, either party is entitled to have issues framed for trial by a jury, as a matter of right, under §§ 970 and 974, or, if the court determines that the lien is invalid, by introducing an interlocutory judgment to that effect and allowing the remaining issues to be sent to a jury for trial: Hawkins v. Mapes-Reeve Construction Co., 82 App. Div. 72; 81 N. Y. Supp. 794.

l. **Partition.**—An action in partition brought in the first judicial district cannot be placed upon the general trial term calendar, but may be placed upon the preferred trial term calendar and brought to trial there, whenever a proper order is made sending the issues to the trial term: Southack v. Central

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Trust Co., 62 App. Div. 260; 70 N. Y. Supp. 1122.

a. **Separation.**—A party to an action for a separation from bed and board is not entitled, as a matter of right, to have the issues of fact tried by the jury, even though the validity of the marriage is involved in the action and may be determined by the final judgment: Packard v. Packard, 88 App. Div. 339; 84 N. Y. Supp. 1090.

b. **Divorce.**—The finding of a jury is conclusive as to the issues submitted, and where another issue is raised by an affirmative defense in an action for divorce, the proper practice is to send the remaining issue to the special term where a decision as to all the issues should be made: Israel v. Israel, 38 Misc. 335; 77 N. Y. Supp. 912.

c. **Indebtedness.**—In an action by a creditor to reach a fund conveyed by one since dead in fraud of creditors, the deceased's executors cannot be deprived of the right of a trial by jury on the question of the existence of an indebtedness to the plaintiff: Montgomery v. Boyd, 78 App. Div. 64; 79 N. Y. Supp. 879.

d. **Special verdict.**—Where the court has taken a special verdict which is rendered in favor of the plaintiff and then dismisses the complaint, and there are no exceptions taken by the defendant which would justify the appellate division in ordering a new trial, the appellate division on reversing the order dismissing the complaint should direct judgment for the plaintiff on the special verdict: Nicholls v. American S. & W. Co., 117 App. Div. 21.

§ 971. Id.; when discretionary.

e. **Equity.**—The direction of a trial by jury of issues of fact in an equitable action is placed in the discretion of a court by the explicit language of § 971: Second National Bank v. Weston, 62 App. Div. 621; 71 N. Y. Supp. 65.

f. An action to restrain the defendant from violating a contract and for damages for a breach thereof contains an equitable cause of action and a cause of action at law, and as to the first the defendant is entitled to a jury trial, while as to the latter he is not: Magnolia Metal Co. v. Drew, 68 App. Div. 47; 74 N. Y. Supp. 34.

g. Although the action is one in equity, yet the questions of fact may be submitted to the jury for their determination subject to the approval of the court: Lee v Lee, 40 Misc. 251; 81 N. Y. Supp. 986.

h. Though, in an equity case, the court adopt the findings of a jury, the appellate court may review the findings and decision as if there had been no submission of fact to the jury: Hackett v. View, 109 App. Div. 351; 95 N. Y. Supp. 675.

i. **Bankruptcy.**—An action by a trustee in bankruptcy to set aside an assignment of accounts is reviewable, as an action in equity, and a trial by jury is not, as a matter of right, but rests in the discretion of the court: Evans v. National Broadway Bank, 88 App. Div. 549; 85 N. Y. Supp. 101.

§ 972. Trial of the remainder of the issues.

j. An order withdrawing certain issues, equitable in their nature, from the consideration of the jury and directing them to be tried before another judge without a jury, is not justified where none of the parties in the action consent thereto: Reed v. Provident Sav. Life Assur. Soc., 79 App. Div. 163; 79 N. Y. Supp. 665.

§ 973. Separate trial on one or more issues.

The court in its discretion may order one or more issues to be separately tried prior to any trial of the other issues in the case.

Added by chap. 526 of 1907.

§ 974. Counterclaim to be deemed an action, within the foregoing sections.

See § 500 et seq., ante, General provisions relating to counterclaims.

k. Under § 968, which provides that an issue of fact in an action in which the complaint demands judgment for a sum of money only, must be tried by a jury, and § 974, which provides that where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact is the same as if it arose in an action, brought by the defendant against the plaintiff for the cause of action stated in the counterclaim, and demanding the same judgment, the defendant is entitled, as a matter of right, to a jury trial of the issues arising on a counterclaim: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

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a. **Burden of proof.**—When a defendant interposes a counterclaim and thereupon demands an affirmative judgment, the defendant has the affirmative of the issue and the burden of proof, erroneous admission of assignment of contract executed after commencement of action: Liberty W. P. Co. v. Stoner W. P. Co., 178 N. Y. 219.

b. **Failure to appear.**—The result of the failure of a defendant to appear and sustain a counterclaim is "under § 974" the same as a failure to appear and sustain a cause of action; the effect of the judgment obtained against him is nothing more than a nonsuit as to the counterclaim, and such judgment is not a bar to a subsequent action brought on the subject matter in the counterclaim: Honsinger v. Union Carriage and Gear Co., 175 N. Y. 229.

c. **Equitable counterclaim.**—The trial of the issues at the trial term will be stayed until the issue raised by an equitable counterclaim can be tried at the special term; where an answer sets up an equitable counterclaim under the provisions of § 974 the defendant is entitled to have the issues raised by such counterclaim tried at special term: Thomas v. Bronx Realty Co., 60 App. Div. 365; 70 N. Y. Supp. 206.

d. **Mechanic's lien.**—§ 3412 may be given effect without depriving the parties of their constitutional right to a jury trial; in case the validity of the lien is not established, either party is entitled to have issues framed for trial by jury, as a matter of right under §§ 970 and 974, or, if the court determines that the lien is invalid, by introducing an interlocutory judgment to that effect and allowing the remaining issues to be sent to a jury for trial: Hawkins v. Mapes-Reeve Construction Co., 82 App. Div. 72; 81 N. Y. Supp. 794.

e. **Goods sold and delivered.**—In an action for goods sold and delivered, the defendant interposed a counterclaim alleging breach of warranty, defaulted in appearance at the trial, the result of which failure to appear is under § 974 the same as a failure to appear in an action; the judgment obtained against him is a nonsuit to counterclaim, and is not a bar to a subsequent action for a breach of the warranty: Spies v. Nat. City Bank, 174 N. Y. 229 aff'g 68 App. Div. 70; 74 N. Y. Supp. 64.

§ 977. Notice of trial and note of issue — Calendar to be prepared.

At any time after the joinder of issue, and at least fourteen days before the commencement of the term, either party may serve a notice of trial. The party serving the notice must file with the clerk a note of issue, stating the title of the action, the names of the attorneys, the time when the last pleading was served, the nature of the issue, whether of fact or of law; and, if an issue of fact, whether it is triable by a jury, or by the court, without a jury, and the particular nature of the same and the object of the action. The note of issue must be filed at least twelve days before the commencement of the term. The clerk must thereupon enter the cause upon the calendar according to the date of issue. The clerk must prepare the calendar and have the necessary copies ready for distribution at least five days before the commencement of the term. The appellate division of each department may provide by rule for the manner of making up calendars in each county embraced within the department; and for the classification for the purposes of trial, of actions placed upon such calendars; and may also provide for the making up of two or more calendars within such classification. In the counties of New York, Kings, Queens, Richmond, Albany, Erie, Monroe, Onondaga, Schenectady, and Westchester, where a party has served a notice of trial, and filed a note of issue, for a term at which the case is not tried, it is not necessary for him to serve a new notice of trial, or file a new note of issue, for a succeeding term; and the action must remain on the calendar until it is disposed of.

Co. Proc., § 256; L. 1876, chap. 431, § 9.

Amended by chap. 416 of 1877, chap. 96 of 1882, chap. 565 of 1896, chap. 70 of 1898, chap. 18 of 1899, chap. 51 of 1903, chap. 474 of 1904 and chap. 211 of 1907.

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a. Where a cause, which by stipulation had been adjourned to a particular day, is dismissed by the clerk on the call of the calendar the day before the adjourned day, the court may restore the cause and set a day for the trial over defendant's objection: Johnson v. Monahan, 47 Misc. 689.

b. The registry of the package containing the plaintiff's notice of trial, served by mail, does not invalidate such service; but where, by reason of illness, the defendant did not receive it until five days after the court had convened, a judgment obtained by the plaintiff on an inquest should be set aside: Sears v. Tenhagen, 50 Misc. 275.

c. **Two actions.**—Where two actions brought by the same plaintiff against different defendants are both on the trial term calendar of the supreme court, the court has no power to transfer the action last brought to the place on the calendar occupied by the action first brought upon the mere allegations of plaintiff's attorney that the action first brought was begun by mistake: Crawford v. N. Y. City R. R. Co., 108 App. Div. 190.

d. **Non-residents.**—Where a transitory action is brought on for trial, at a term of court held in the county in which the venue is laid, the judge presiding in such court may not, of his own motion, and without any request from either of the parties, strike the case from the calendar simply because it appears that both the parties are residents of another county: Phillips v. Tietjen, 108 App. Div. 9; 95 N. Y. Supp. 469.

e. **Short notice.**—While the court has power, as a condition of granting a favor, to require the party seeking the favor to accept a short notice of trial, it has no power to require the acceptance of such notice by the party who has returned a former notice of trial served in time on the ground that the party serving it was stayed because of non-payment of motion costs, and consequently has sought no favors from court, but stood upon her strict statutory rights: Roberts v. Schaf, 76 App. Div. 433; 78 N. Y. Supp. 778.

f. **Preference.**—A cause cannot, because of the defendants being in actual imprisonment, be granted a preference under rule 36 of the General Rules of Practice, and be placed upon the day calendar for trial until fourteen days notice of trial has been served, as required by the Code of Civil Procedure, and the cause has been placed upon the general calendar: Veinstock v. Veinstock, 63 App. Div. 16; 71 N. Y. Supp. 195.

g. An order that a cause be stricken from the special term calendar and be placed on the trial term calendar and on the first call calendar is not authorized by any provisions of the Code or of the General Rules of Practice: Poerschke v. Baldwin, 83 App. Div. 284; 82 N. Y. Supp. 159.

h. In an action the plaintiff noticed the case for trial at the October term and the defendants did not serve any notice of trial or file any note of issue for the October term, but served a notice of trial for the December term accompanied by a notice of motion for a preference; *held*, that the action of the defendants in noticing the case for the December term and filing another note of issue was not authorized by § 977, and that the court was without power to grant a preference: Montgomery v. Daniell, 91 App. Div. 18.

i. **Appeal.**—Where a plaintiff fails to serve a reply within the twenty days allowed to him by an interlocutory judgment sustaining a demurrer to one defense and overruling the demurrer in all other respects, and takes an appeal from the interlocutory judgment, but does not obtain a stay of proceedings, the defendant may properly file a note of issue and serve a notice of trial pending the appeal: Ward v. Smith, 45 Misc. 169.

j. **Dismissal of action.**—On a motion for a dismissal of an action for failure to prosecute it, the fact that a note of issue was filed will not be considered where a notice of trial was not served until after the motion for dismissal was made: McMann v. Brown, 92 App. Div. 249; 87 N. Y. Supp. 38.

k. **Reply.**—After the service of a reply the party moving the action for trial must not only file a new notice of trial, but also a new note of issue: Ward v. Smith, 103 App. Div. 375.

l. **New York county.**—In New York county but one note of issue and one notice of trial are necessary: Morse v. Press Pub. Co., 71 App. Div. 351; 75 N. Y. Supp. 976.

m. A rule of the City Court of the city of New York providing for a new calendar and requiring notes of issue to be filed before a given date and further providing that no cause should be restored to the calendar for which a new note of issue should not be filed before that date, is in contravention of § 977: Rauchberger v. Interurban Street R. Co., 52 Misc. 518.

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§ 980. Either party may bring issue to trial.

See rule 28 (Sup. Ct.), When inquests may be taken.
See rule 23 (Sup. Ct.), Affidavit of merits.

a. A person who is served with a summons who has the same name as a defendant intended to be served is justified in defending and when the mistake is shown should be granted a dismissal, with costs: City of New York v. Ackerman, 51 Misc. 424.

b. **Inquest.**—Where the plaintiff serves an unverified answer the plaintiff may take an inquest unless an affidavit of merits is filed and served; but in view of the rare enforcement of the right and the consequent unfamiliarity of counsel with the procedure upon such application, the defendant will be permitted to file and serve his affidavit of merits forthwith, whereupon the application will be denied without costs to either party: Beglin v. People's Trust Co., 48 Misc. 494.

c. **Default.**—A judgment taken by default will not be opened on an answer making a general denial, and the affidavit of defendant's attorney which fails to aver that the client has fully and fairly stated the facts constituting the defense and that the attorney believes the facts to constitute a good and substantial defense on the merits, and when there is no affidavit of the defendant nor explanation why such affidavit is not presented: Clews v. Peper, 112 App. Div. 430.

d. **Foreign corporation.**—When, in an action against a foreign defendant for breach of contract, a commission to take testimony in a foreign country has been issued, but not executed, because, as shown by affidavit of defendant's counsel, he went to the foreign country to obtain the evidence in person, and was there delayed, an inquest taken in the meantime after a denial of defendant's request for an adjournment should be opened and the defendant let in to defend; the defendant, however, should pay the costs and disbursements: Marchesini v. Scaccianoce, 110 App. Div. 130.

e. **Failure to prosecute.**—When three years have elapsed since joinder of issue, and a case has not been placed upon the calendar and no excuse is given for the delay, the action will be dismissed on motion for failure to prosecute. The dismissal should not be conditioned on the plaintiff's failure to pay costs of the motion: Anderson v. Hedden & Sons Co., 116 App. Div. 231.

§ 981. What papers to be furnished on trial, and by whom.

f. **Dismissal of complaint.**—It is error to dismiss a complaint to recover the value of goods sold and delivered because it was agreed between the buyer and seller that the goods were to be billed and shipped to a third party: Frazer & Haughton, Lim., v. Mott, 118 App. Div. 791.

g. Erroneous dismissal of complaint for defect of parties defendant: Anderson v. Walsh, 189 N. Y. 159, rev'g 114 App. Div. 902.

h. It is error to nonsuit in an action for negligence caused by a shifting railway switch, and from which the jury would have been justified in finding that the accident was caused by improper switching of the switch or that the switch was defective: France v. N. Y. C. & H. R. R., 118 App. Div. 550.

i. Where a motion is made by the defendant at the close of plaintiff's case for a dismissal for a defect in the proof and erroneously denied, the defendant's subsequent admission of the facts not proved cures the error: Reshofsky v. Weisz, 53 Misc. 602.

j. When it is error to grant nonsuit in an action to recover for injuries received from defective sidewalk: Mayhood v. City of New York, 119 App. Div. 100.

k. When in an action based upon injuries received by the plaintiff in jumping from the step of a train which had stopped at a station, there is uncontradicted evidence that her foot caught in a hole and that the step of the car was too high for her to alight without jumping, a nonsuit is error: Truesdell v. Erie R. R. Co., 119 App. Div. 371.

l. In an action by a vendee for the specific performance of a contract for the sale of real estate, where it is alleged in the complaint that the defendant is unable to convey to the plaintiff a good and marketable title to the premises free from all incumbrances except those mentioned in the contract, the complaint will not be dismissed; but the cause will be stricken from the calendar for the trial of issues by a jury: Messenger v. Chambers, 53 Misc. 117.

m. It is error to nonsuit a plaintiff where he is entitled to at least nominal damages: Plunkett Plumbing Co. v. Bassford R. Co., 52 Misc. 479.

n. Where, upon a trial, after motions to dismiss the complaint were denied, the jury brought in a general verdict for the plaintiff and the judge entertained a motion to set aside the verdict and for a new trial on the grounds and ordered that, in the event of his denial of the motion, the defendant should have the usual stay of thirty days, and thirty days to make case after decision, but, before the judge decided the motion, he was duly designated a justice of the appellate division; and where the plaintiff entered judgment in accordance with the verdict and the de-

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fendant moved to set the judgment aside; *held:* that the entry of judgment was not in violation of the stay; that the trial was complete and not a mistrial; that the motion under § 999 should be denied and the defendant left to move for a new trial under § 1002: Stern v. Wabash R. R. Co., 52 Misc. 12.

a. **Right to open and close.**—The right to open and close is determined by the pleadings at the time of the trial and cannot be altered by admissions made during its course; and where defendant denies in his answer the allegations of the complaint, the plaintiff has the right to open and close: Hollander v. Farber, 52 Misc. 507.

b. **Request to go to jury.**—After both parties had moved for the direction of a verdict and a verdict for defendant had been directed and recorded, plaintiff's request to go to the jury came too late; where plaintiff's request was to go to the jury on the entire case it was not a matter of right even though the request had been made in time: Solomon v. Levine, 54 Misc. 270.

c. **Process.**—When a plaintiff has begun two actions by separate attorneys against the same defendant for personal injuries, the attorneys in the second action cannot by motion in that action set aside the service of process in the first action; if the authority of the attoneys in the first action is questioned, the motion must be made in that action: Toma v. Foundation Co., 119 App. Div. 151.

d. **Waiver.**—An objection that a complaint fails to allege compliance with § 181 of the Tax Law refers solely to plaintiff's capacity to sue and, if not taken by either demurrer or answer, it is deemed to be waived: Wright & Co. v. Faulkner, 52 Misc. 100.

e. **Default.**—When the default in a case marked "ready" should not be opened: Loehr v. Brooklyn Ferry Co., 115 App. Div. 666; 101 N. Y. Supp. 209.

f. **Charge.**—Where no exception is taken to the charge of the court, a judgment will not be reversed upon the ground that instructions to the jury were legally inaccurate: Kaplan v. Shapiro, 53 Misc. 609.

g. Erroneous charge as to liability of bank paying out money to person who was not a depositor: Fricano v. Columbia National Bank, 118 App. Div. 567.

h. When the jury finds substantially for a defendant, error in charging on the question of the plaintiff's damages is immaterial: Ware v. Gautemalan & Mexican Mahogany & E. Co., 119 App. Div. 262.

i. It is error to charge as to effect of attempt to bribe witness and failure to produce witnesses: Ferrari v. Interurban Street Railway Co., 118 App. Div. 155.

j. In an action for negligence for injuries received by infant from street car, it is erroneous to charge failure to look: Peterson v. Interurban Street Railway Co., 118 App. Div. 210.

k. It is an erroneous charge in an action for negligence as to neglect of foreman employed to give warning: Curran v. Manhattan Ry. Co., 118 App. Div. 347.

l. In an action for negligence, a charge is erroneous which instructs the jury that if the plaintiff received a shock, he is entitled to recover; such instruction is equivalent to holding that the defendant was an insurer: Sullivan v. Brooklyn Heights R. R. Co., 117 App. Div. 784.

m. When in an action based on negligence the jury returns a verdict which the court deems inadequate, it is error for the court to direct the jury to retire and reconsider their verdict with instructions that it is insufficient. It is also error to refuse to receive the defendant's request to charge that the jury was not bound by the views of the court as to the amount of the verdict and that it was within their discretion; the court has power to request the jury to reconsider their determination as to the amount of a verdict whether the action be for liquidated or unliquidated damage, but in the latter case the court should not intimate to the jury that the amount of damage was not for them, or give any instructions which indicate the amount to which the plaintiff is entitled: Douglas v. Metropolitan Street Railway Co., 119 App. Div. 203.

n. **Release.**—The failure of the plaintiff to tender consideration for release is not available on appeal: Ambellan v. Barcalo Mfg. Co., 118 App. Div. 547.

o. **Improper remarks.**—When it is not clear that evidence fully sustains a verdict, the judgment may be reversed on account of improper remarks by counsel in summing up, which were designed to prejudice the jury: Cox v. Continental Ins. Co., 119 App. Div. 682.

p. When the defendant's counsel on cross-examination interrogates a witness concerning a discrepancy between her testimony and the complaint filed by her in another action, it is improper for the plaintiff's attorney to state before the jury that he was responsible for the prior complaint which had been withdrawn. So, too, it is improper for the plaintiff's attorney to go beyond the evidence and state that the defendant "has millions of capital" and "thousands of employees," etc.: Keenan v. Metropolitan Street Ry. Co., 118 App. Div. 56.

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a. It is improper to rule that because the plaintiff was forced to trial the absence of the physician cannot be commented upon, especially where the plaintiff has sought to explain his absence and the jury has had full benefit of the explanation: Brotherton v. Barber Asphalt Paving Co., 117 App. Div. 791.

b. **Respect** should be shown to the trial judge, and exceptions to his harmless pleasantries or wholesome remarks should not be taken. Thus, if he say to an expert witness who hoped the plaintiff would recover, "you expect what is probable; your hope may be very improbable," an exception thereto is not very well taken: Devlin v. New York City Railway Co., 116 App. Div. 894.

c. **Verdict.**—Where upon the trial each party requests the direction of a verdict in his favor, the court is clothed with the functions of a jury in determining questions of fact: Dilcher v. Nellany, 52 Misc. 364.

d. The direction of a verdict for plaintiff is erroneous when there is a conflict of evidence: Conte v. City of New York, 116 App. Div. 356.

e. A verdict for the plaintiff founded upon the alleged negligence of a municipal corporation whereby water backed up through sewers and damaged the plaintiff's property cannot be founded upon mere evidence of the flooding of premises of other owners by an entirely different sewer system: McKenzie v. City of New York, 119 App. Div. 60.

f. Where the jury finds a verdict for a certain amount and interest, without specifying the amount of the interest nor the date from which it is to be computed, and it was not clearly shown from what date interest should be computed, the court has not power to correct the verdict by adding a certain amount for interest: Schnaufer v. Ahr, 53 Misc. 299.

§ 982. Certain actions to be tried where the subject thereof is situated.

See § 218, ante, Supreme court may change place of trial of actions pending in other courts.

See § 983, post, Other actions, where the cause thereof arose.

See § 984, post, Other actions, according to the residence of the parties.

See § 987, post, When court may change the place of trial.

g. **Inferior courts.**—§ 982 has no application to actions brought in justice's court or in the municipal court in the city of New York: Eaton v. Hall, 78 App. Div. 542; 79 N. Y. Supp. 887.

h. **Jurisdiction.**—The supreme court has jurisdiction of an action to foreclose a mortgage upon land located partly in this state and partly in Connecticut, and may, when the mortgagors are residents of New York and have been served personally, provide in the decree that a referee shall sell all the mortgaged land: Mead v. Brockner, 82 App. Div. 480; 81 N. Y. Supp. 594.

i. **Cemetery.**—An action in equity against a cemetery corporation in which the mother of the plaintiffs had been interred, to compel the cemetery corporation to allow the plaintiffs to disinter the body for the purpose of reinterring it in another cemetery, does not affect any right or interest in real property, and is consequently not a local action within the meaning of § 982: Cohen v. Congregation Shearith Israel, 85 App. Div. 65.

j. **Venue.**—Where some of the real estate as to which the action is brought is not in the county of New York, the venue should be laid, under § 982, in that county; § 984 relates to other actions than those specifically provided for in §§ 982-983; an action specifically provided for in § 982 does not fall within the provisions of § 984, even though none of the parties reside in the county where the real estate is located: Hall v. Gilman, 77 App. Div. 464; 33 Civ. Pro. R. 283.

k. Where the venue of an action brought to annul a mortgage upon real property is not laid in the county in which the real property is situated in compliance with § 982, the defendant mortgagee is entitled to an order changing the venue to the latter county, notwithstanding the fact that no notice of his application for such order has been given to the defendant mortgagor who has not answered or appeared in the action and whose time to do so has not expired: North Shore Ind. Co. v. Randall, 108 App. Div. 232.

l. **Contract.**—An action brought to compel the vendee in a land contract to accept the title tendered by the vendor and to pay the contract price therefor, in an action brought "to procure a judgment establishing, etc., or affecting an estate, etc., interest in real property," within the meaning of § 982: Turner v. Walker, 70 App. Div. 306.

m. **Breach of contract.**—An action to recover damages for the breach of a contract upon the sale of real estate under an agreement that the defendant would purchase, if the plaintiff was unable to

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sell at the expiration of a certain period, does not affect any interest in the real estate and need not, under § 982, be brought in the county in which the real estate is situated: Maier v. Rebstock, 68 App. Div. 481.

a. **Contribution.**—An action to compel contribution toward the expenses of a real estate transaction is not an action "to recover real property" within the meaning of § 982, and therefore need not be tried in the county where the real estate was situated: Barnes v. Barnhart, 102 App. Div. 424.

b. **Libel.**—Where the complainant in an action for libel makes no allegation that there was any publication thereof outside of the county where the newspaper was printed and circulated, the action should be tried in that county: MacCormac v. Tobey, 109 App. Div. 581.

c. **Personal injuries.**—In an action to recover damages for personal injuries, against a railroad company, the place of trial is properly laid in a county through which its road is operated, in which it owns property and has a place for the regular transaction of business: Mole v. New York, O. & W. R. R. Co., 53 Misc. 22.

d. **False imprisonment.**—The trial of a cause of action for false imprisonment should be changed to the county where the arrest was made and a large number of necessary witnesses reside, when the plaintiff is unable to name witnesses residing in the county where the venue is laid: Lutfy v. Sullivan, 119 App. Div. 506.

e. **Foreign corporation.**—When a foreign corporation doing business in this State, sues resident defendants in an action upon contract not specified in §§ 982 or 983, the trial should be laid in the county in which one of the defendants resides; the residence of a citizen of this State is not affected by the place of his business interests or official position. When such defendant moves to change the venue to the county of his residence, the court is without authority to consider the convenience of witnesses at the instance of the plaintiff: Mills & Gibb v. Starin, 119 App. Div. 336.

§ 983. Other actions, where the cause thereof arose.

f. When the transaction out of which the issues arose took place in the county to which the venue is sought to be transferred, the cause of action may be said to have arisen in that county, although it involves insurance policies written in another state: Nichols v. Riley, 112 App. Div. 102.

g. An action against the sheriff of Kings county for neglect to seize certain chattels located therein must under this section be tried in Kings county; a change of place of trial to the county where the statute requires an action to be tried is a matter of right and an affidavit of merits upon the motion to change the venue is not necessary: Packard v. Hesterberg, 48 Misc. 30.

h. **Libel.**—When the complaint in an action for libel makes no allegation that there was any publication thereof outside of the county where the newspaper was printed and circulated, the action should be tried in that county: MacCormac v. Tobey, 109 App. Div. 581.

i. **Summons and complaint.**—The rule, that where there is a difference between the summons and complaint as to the place of trial, the complaint controls, is subject to the exception that, where it appears that the statement of a different place of trial in the complaint from that named in the summons was due to the inadvertence of the plaintiff's attorney, the place of trial is not changed to the county named in the complaint, provided the plaintiff's attorney moves promptly in the matter to correct the error, so as not to permit his adversary to presume that the charge was intentional: Bell v. Polymero, 99 App. Div. 303; 90 N. Y. Supp. 920.

j. **New York.**—The venue of an action brought by a taxpayer against the city of New York and the commissioners of the new East river bridge to have certain contracts for the construction of the approaches to such bridge declared void, on the ground that there were inserted in the contracts certain provisions of the Labor Law which have since been declared unconstitutional, and that the cost of the work was materially increased, should, under the provisions of § 983 and § 262 of the Greater New York charter, be laid in the county of New York: Knowles v. City of New York, 71 App. Div. 410.

k. In an action for breach of contracts made and to be performed in the city of New York by parties engaged in business there an assignee of one party who resides in Rockland county, but who is engaged in business in New York, and who is in the employ of his assignor, is not entitled to retain the venue in Rockland county. This, not on the ground of convenience of witnesses, but because the cause of action arose in New York county: Brady v. Hogan, 117 App. Div. 898.

l. **Penalty.**—An action to recover a penalty under the provisions of the Percy-Gray Racing Law, chap. 570 of 1895, § 17, is in its nature remedial and not penal, and therefore need not be brought in the county where the cause of action arose, as would be the case under § 983, were the action one to recover a statutory penalty: Mendoza v. Rose, 44 Misc. 241; 88 N. Y. Supp. 938.

m. § 29 of the Domestic Commerce Law, providing for the place of trial of an action brought to recover a penalty for unlawfully detaining milk cans, repealed, by implication, § 982 of the Code in regard

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to the place of trial of the action to recover a penalty: Warner v. Palmer, 66 App. Div. 127.

a. **Annual report.**—§ 31 of the Stock Corporation Law, as amended by chap. 688 of 1892, in regard to a false statement in the annual report of a corporation, is not a penal statute, and an action brought therein is not governed by § 983, which provides that an action "to recover a penalty or forfeiture imposed by statute" must be tried in the county where the cause of action arose: Hutchinson v. Young, 80 App. Div. 246; 80 N. Y. Supp. 259.

b. **False imprisonment.**—Where an action for false imprisonment is based on the fact that the plaintiff was arrested in Saratoga county by the defendant, who was a deputy sheriff of Warren county, and was by such defendant carried to and imprisoned in Warren county, the action may be brought in Saratoga county, as part of the action arose there: Ellis v. Baker, 62 App. Div. 542; 71 N. Y. Supp. 88.

c. A police officer sued for false imprisonment, whose answer does not allege facts showing that the arrest was made in virtue of his office, is not entitled to a change of venue so that the trial may be had in the county where the arrest was made, as provided in subd. 2 of § 983: Philips v. Leary, 114 App. Div. 871.

d. **Conversion.**—An action against a collector of taxes for the conversion of personal property, seized by virtue of his office under a tax warrant against a third party, is an action against a public officer, and under subd. 2 of § 983 must be tried in the county where the cause of action arose, even though the complaint does not contain anything indicating that the defendant was a public officer: Murphy v. Callan, 69 App. Div. 413; 74 N. Y. Supp. 1009.

e. **Foreign corporation.**—When a foreign corporation doing business in this State, sues resident defendants in an action upon contract not specified in §§ 982 or 983, the trial should be laid in the county in which one of the defendants resides; the residence of a citizen of this State is not affected by the place of his business interests or official position. When such defendant moves to change the venue to the county of his residence, the court is without authority to consider the convenience of witnesses at the instance of the plaintiff: Mills & Gibb v. Starin, 119 App. Div. 336.

f. **Venue.**—Although the defendant, after having served a demand for the change of venue by mail, failed to make a motion therefor within the statutory time owing to a reliance upon decisions of doubtful authority, the court nevertheless has inherent power to change the venue to the proper county: State Board of Pharmacy v. Rhinehardt, 116 App. Div. 495; 101 N. Y. Supp. 769.

§ 984. Other actions, according to the residence of the parties.

See § 481, ante, Complaint; what to contain.

g. **Definition.**—The word "resided" as used in § 984 means a permanent residence, one's home, as distinguished from a mere stopping place for the transaction of either business or pleasure; it is nearly or quite synonymous with the word "domicile," the permanent home and the place to which, whenever absent, one intends to return: Washington v. Thomas, 103 App. Div. 423; 92 N. Y. Supp. 994.

h. The words "party to an action," as used in § 984, include parties to the record and no one else, and the residence of a party in interest who is not a party to the record cannot be considered; on a motion to change the venue of an action on the ground of convenience to witnesses, the convenience of witnesses whose testimony will be material and competent can alone be considered: Lane v. Bochlowitz, 77 App. Div. 171; 78 N. Y. Supp. 1072.

i. **Insufficient affidavit.**—On a motion to change the venue of an action, affidavits in regard to residence are defective unless the averments relate to the time of the commencement of the action, and where there is no evidence before the court as to the residence of the parties at the time the action was commenced, the plaintiff is entitled, under § 984, to designate any county: Burke v. Frenkel, 97 App. Div. 19.

j. **Railroad.**—A railroad company is considered as having a residence in every county through which its railroad runs: Poland v. United Traction Co., 88 App. Div. 281; 85 N. Y. Supp. 7.

k. **Party.**—One of a class, for whose benefit an action has been brought under § 448, but who has not been named in the summons or complaint, and who has not been made a party to the action, is not to be regarded as a party for the purpose of influencing the disposition of a motion to change the venue of the action: Brown v. Bache, 66 App. Div. 367; 72 N. Y. Supp. 687.

l. **Executrix.**—Where an action is brought by an interested person because an executrix refuses to bring such an action, it is properly brought, under § 984, in the county of her residence: Rathbun v. Brownell, 43 Misc. 307.

m. **New York.**—Where some of the real estate as to which the action is brought is not in the county of New York, the venue should be laid, under § 982, in that county; § 984 relates to other actions than those specifically provided for in §§ 982-983; an action specifically provided

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for in § 982 does not fall within the provisions of § 984, even though none of the parties reside in the county where the real estate as located: Hall v. Gilman, 77 App. Div. 464.

a. **Residence.**—A person will be held to be a resident of Nassau county within the meaning of § 984 where he merely had an apartment in New York, temporarily, and continued to vote in Nassau county, and before commencement of present action, surrendered his apartment, dismissed his servants and moved back to Nassau county: Dresser v. Mercantile Trust Co., 53 Misc. 18.

b. The place of trial of an action brought by an agent residing in Queens county against a defendant residing in Kings county cannot be properly laid in Madison county where the owner resides, pursuant to chap. 482 of 1902, and the defendant may require the place of trial to be changed to Kings county: Walsh v. Maroney, 53 Misc. 369.

c. Where a transitory action is brought on for trial at a term of court held in the county in which the venue is laid, the judge presiding at such court may not, of his own motion, without any request from either of the parties, strike the case from the calendar simply because it appears that both the parties are residents of another county: Phillips v. Tietjen, 108 App. Div. 9; 95 N. Y. Supp. 469.

§ 985. Place of trial, if proper county not designated.

d. **Transitory action.**—Where a transitory action is brought on for trial at a term of court held in the county in which the venue is laid, the judge presiding at such court may not, of his own motion and without a request from either of the parties, strike the case from the calendar simply because it appears that both of the parties are residents of another county: Phillips v. Tietjen, 108 App. Div. 9; 95 N. Y. Supp. 469.

§ 986. Defendant may demand change; proceedings thereupon.

e. **Affidavit of merits.**—A change of place of trial to the county where the statute requires an action to be tried is a matter of right and an affidavit of merits, upon the motion to change the venue, is unnecessary: Packard v. Hesterberg, 48 Misc. 30.

f. **Mortgage.**—Where the venue of an action brought to annul a mortgage upon real property is not laid in the county in which the real property is situated, in compliance with § 982, the defendant mortgagee is entitled to an order changing the venue to the latter county; notwithstanding the fact that no notice of his application for such order has been given to the defendant mortgagor, who has not answered or appeared in the action, and whose time to do so has not expired: North Shore Ind. Co. v. Randall, 108 App. Div. 232.

g. **Transitory action.**—Where a transitory action is brought on for trial at a term of court held in the county in which the venue is laid, the judge presiding in such court may not, of his own motion and without any request from either of the parties, strike the case from the calendar simply because it appears that both parties are residents of another county: Phillips v. Tietjen, 108 App. Div. 9; 95 N. Y. Supp. 469.

h. **Stipulation.**—Where a stipulation between a loan association and certificate-holder provides that any action brought by the latter shall be commenced in a certain county, the remedy when commenced elsewhere is by motion to change the venue and not to dismiss the complaint: Benson v. Eastern Bldg. & Loan Assn., 174 N. Y. 83, rev'g 67 App. Div. 319; 74 N. Y. Supp. 506.

i. **Extension.**—The ten days given by § 986 to a defendant in which to move for a change of venue in case the plaintiff does not consent to such a change within five days after service of a demand for such change, is extended to twenty days by virtue of § 798 where the demand is served by mail: Binder v. Metropolitan Street R. Co., 68 App. Div. 281; 74 N. Y. Supp. 54.

j. **Foreclosure.**—A motion for a temporary receiver, made by the plaintiff in an action brought in the county of New York to foreclose property situate in the counties of Otsego and Herkimer, was denied when it appeared that the defendant had before answer duly demanded, under § 986, that the action be tried in the proper county and that the five days allowed the plaintiff to consent to such demand had not expired; an order appointing a receiver in a foreclosure action must be made in the county where the action is triable: Knick. T. Co. v. C. & R. S. R. Co., 41 Misc. 204; 83 N. Y. Supp. 930.

§ 987. When court may change the place of trial.

See rule 48 (Sup. Ct.), Affidavits to change venue.

See § 218, ante, Supreme court may change place of trial of actions pending in other courts.

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a. **Impartial trial.**—The fact that plaintiff's son had been elected sheriff of the county where the venue is laid is not sufficient ground on which to change the venue, under § 987, subd. 2: Weiant v. Rockland Lake Trap Rock Co., 74 App. Div. 24; 76 N. Y. Supp. 699.

b. To obtain a change of place of trial under subd. 2 of § 987 it is not necessary "conclusively" that an impartial trial cannot be had in the proper county. The statute authorizes a change where there is "reason to believe" that an impartial trial cannot be had in the proper county: Jacob v. Town of Oyster Bay, 119 App. Div. 503.

c. **Defective affidavits.**—Affidavits used in opposition to a motion to change the venue of an action for the convenience of witnesses, which fail to show the advice of the counsel that the testimony of the witnesses enumerated is material and necessary for the establishment of the plaintiff's case, are fatally defective and cannot countervail the allegations of the moving party: Fish v. Fish, 61 App. Div. 572; 70 N. Y. Supp. 900.

d. It is not absolutely necessary in the third department that an affidavit, used on a motion for a change of venue for the convenience of witnesses, which states that the witnesses referred to will testify to certain material facts, should also state the reason why the affiant believes they will so testify: Ballston Storage Co. v. Defeo, 67 App. Div. 341; 73 N. Y. Supp. 772.

e. Upon a motion to change the place of trial for the convenience of witnesses, affidavits which state that the moving party expects to prove certain facts by the witnesses named, without stating or disclosing grounds showing that such facts can be proved by them, are insufficient: Mole v. New York, Q. & W. R. R. Co., 53 Misc. 22.

f. **Convenience of witnesses.**—The venue in an action will be changed from New York county to Albany county for the convenience of witnesses, where it appears that the services rendered by the plaintiff, the subject of the action, were performed in Albany county: Roberts v. Lansing, 60 App. Div. 81; 69 N. Y. Supp. 736.

g. Where the answer contains a long and confusing statement of facts and the issues raised thereby are in doubt, the venue should not be changed for the convenience of the defendant's witnesses as their materiality cannot be determined. Neither will the venue be changed for the convenience of possible witnesses to the facts alleged in a defective counterclaim as their convenience is best served by leaving them at home: Hurley v. Roberts, 117 App. Div. 837.

h. When in an action for the value of goods sold and delivered the plaintiff shows four necessary witnesses whose convenience will be subserved by retaining the place of trial, while the defendant, making a general denial, has no witnesses, the place of trial will not be changed, although the goods were sold and delivered in the defendant's county: Lewis Co. v. Phoenix Cap Co., 115 App. Div. 189.

i. The place of trial should be changed to the county where a contract was made and goods sold thereunder, and the examination of the goods on delivery was made, even though each party had witnesses in their respective counties; two or three witnesses each, as to the condition of goods when delivered, are sufficient: Shaff v. Rosenberg, 116 App. Div. 366.

j. The venue of an action will not be changed for the convenience of witnesses where a fair trial cannot be nad in the county where they reside: Tuomey v. Kingsford, 68 App. Div. 180; 74 N. Y. Supp. 13.

k. The change of venue in an action must be denied where the defendant's witnesses were his own employees and the plaintiff's were laborers who could attend in another county only with serious loss: Sparks v. United Traction Co., 66 App. Div. 204; 73 N. Y. Supp. 108.

l. The venue of an action will not be changed from Saratoga to New York county because of the condition of the calendar in that county; an action should not be changed to a county adjacent to the county of New York, as the trial of an action will not be changed to a county in which neither of the parties nor any of the witnesses reside unless under unusual circumstances; that on a motion to change the place of trial for the convenience of witnesses, the convenience of the defendants in the action will not be considered: Kavanaugh v. Mercantile Trust Co., 94 App. Div. 575; 88 N. Y. Supp. 113.

m. § 897 does not limit to the defendant the right of having the place of trial changed for convenience of witnesses, and the method of applying for the change is by motion: Lindsley v. Sheldon, 43 Misc. 116; 88 N. Y. Supp. 192.

n. It is not necessary to serve a demand to change the place of trial "with or before service of the answer" where the motion is to be made on the ground of the convenience of witnesses under § 987, subd. 3: Larkin v. Watson Wagon Co., 68 App. Div. 86.

o. **Discretionary.**—A motion to change the place of the trial of an action upon the ground of the convenience of the witnesses is addressed to the discretion of the court and will not be granted merely because the defendant swears to the greater number of necessary witnesses: O'Beirne v. Miller, 35 Misc. 337; 71 N. Y. Supp. 946.

p. The disposition to be made of a motion to change the venue of a transitory action rests largely in the discretion of the special term: Pattison v. Hines, 105 App. Div. 282.

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a. **Reference.**—The court has no power, as a condition of granting a change of venue for the convenience of witnesses, to require the moving party to consent to a reference: L'Amoureux v. Erie R. R. Co., 62 App. Div. 505; 71 N. Y. Supp. 70.

b. **Malicious prosecution.**—In an action for malicious prosecution where the plaintiff was arrested at his home in Queens county, it cannot be said that the cause of action arose in Oswego county to which county he was taken after his arrest: Santoro v. Trimble, 63 App. Div. 413; 71 N. Y. Supp. 785.

c. **False imprisonment.**—Where one of the defendants in an action for an alleged false imprisonment is a justice of the peace residing in Ithaca, Tompkins county, and the alleged wrongful acts were done by him under color of his office in Ithaca, where both the plaintiff and the defendants then resided, he is entitled to have the venue of the action changed from the county, to which the plaintiff has thereafter moved, to the county in which such defendant resides: Hankins v. Hanford, 61 App. Div. 341; 70 N. Y. Supp. 433.

d. A police officer sued for false imprisonment, whose answer does not allege facts showing that the arrest was made in virtue of his office, is not entitled to a change of venue so that the trial may be had in the county where the arrest was made, as provided in subd. 2 of § 983: Philips v. Leary, 114 App. Div. 871.

e. The trial of a cause of action for false imprisonment should be changed to the county where the arrest was made and a large number of necessary witnesses reside, when the plaintiff is unable to name witnesses residing in the county where the venue is laid: Lutfy v. Sullivan, 119 App. Div. 506.

f. **Employees.**—In an action for the breach of warranty on the sale of goods where the plaintiffs reside in the county where the contract was made and executed, the place of trial should not be changed to another county where the defendant has thirteen witnesses, all employees, while the plaintiff has sixteen witnesses, six of whom are not employees; the convenience of witnesses not employees will be given greater consideration than those who are employees: Hays v. Reynolds Felting Co., 112 App. Div. 487.

g. **Affidavit of merits.**—A change of place of trial to the county where the statute requires an action to be tried is a matter of right and an affidavit of merits, upon the motion to change the venue, is unnecessary: Packard v. Hesterberg, 48 Misc. 30.

h. **Condition.**—When the defendants have shown that a larger number of necessary and material witnesses reside in the county to which they desire the trial changed, a condition imposed by the special term in refusing the change of venue that the plaintiffs admit the validity of signatures to certain instruments is not sufficient to destroy the necessity of the witnesses, because a party should not be compelled on such a motion to disclose his evidence to his adversary: Nichols v. Riley, 112 App. Div. 102.

i. **Non-residents.**—Where a transitory action is brought on for trial at a term of court held in the county in which the venue is laid, the judge presiding at such court may not, of his own motion and without a request from either of the parties, strike the case from the calendar simply because it appears that both the parties are residents of another county: Phillips v. Tietjen, 108 App. Div. 9; 95 N. Y. Supp. 469.

j. **Counsel.**—An affidavit to change the place of trial for the convenience of witnesses is defective unless it alleges that plaintiff is advised by counsel that the testimony of such witnesses is material: Rieger v. Pulaski Glove Co., 114 App. Div. 174.

k. **Foreign corporation.**—When a foreign corporation doing business in this state, sues resident defendants in an action upon contract not specified in §§ 982 or 983, the trial should be laid in the county in which one of the defendants resides; the residence of a citizen of this state is not affected by the place of his business interests of official position. When such defendant moves to change the venue to the county of his residence, the court is without authority to consider the convenience of witnesses at the instance of the plaintiff: Mills & Gibb v. Starin, 119 App. Div. 336.

l. **Motion.**—Although the defendant, after having served a demand for the change of venue by mail, failed to make a motion therefor within the statutory time owing to a reliance upon decisions of doubtful authority, the court nevertheless has inherent power to change the venue to the proper county: State Board of Pharmacy v. Rhinehardt, 116 App. Div. 495; 101 N. Y. Supp. 769.

§ 988. Effect of changing the place of trial.

See rule 2 (Sup. Ct.), Filing papers after change of venue.

See § 218, ante, Supreme court may change place of trial of actions pending in other courts.

See § 344, ante, Effect of removal.

n. **Complaint.**—The service of a complaint, subsequent to the service of the summons, stating a different place of trial from that stated in the summons, operates, particularly where the defendant's attorney admits service of such

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complaint and retains it without objection, to change the place of trial to the county named in the complaint: Tolhurst v. Howard, 94 App. Div. 439; 88 N. Y. 235.

§ 989. Effect of order changing place of trial.

a. **Affidavit.**—An affidavit submitted in opposition to a motion to change the place of trial, on the ground of the convenience of witnesses, need not show that the opposing party has talked with the witnesses on whom he relies and has so received their assurances that they will testify as he expects: Avery v. Allen, 78 App. Div. 540; 79 N. Y. Supp. 886.

§ 990. Issues of law, where triable.

See § 1021, post, Decision of court or report of referee, upon trial of demurrer.
See § 1222, post, Final judgment, how taken after issue of law only.

§ 992. What rulings may be excepted to.

b. **Reference.**—Under the provisions of §§ 992 and 993 where a case is tried before a referee or the court without a jury, an exception is not necessary to the report or decision in order to enable the appellate division to review the questions of fact presented on an appeal, but it seems that an exception to the report or decision is necessary to enable the court of appeals to review the decision below upon an appeal from the judgment as the jurisdiction of the court of appeals is restricted to questions of law: Henderson v. Dougherty, 95 App. Div. 346; 88 N. Y. Supp. 665.

c. **Waiver.**—The legal effect of the failure of defendant at close of his testimony to move either for a dismissal of the complaint or for the direction of a verdict is to consent to the submission of the case to the jury; where defendant at close of plaintiff's case moves for a dismissal of the complaint and takes an exception to the court's ruling, he waives such exception by proceeding and putting in his evidence: Wangner v. Grimm, 169 N. Y. 421, aff'g 53 App. Div. 626; 65 N. Y. Supp. 1145.

d. **Specific ground.**—The specific ground of objection to evidence should be stated as when evidence is immaterial it should be properly objected to on that ground: M. Groh's Sons v. Groh, 177 N. Y. 8, rev'g 80 App. Div. 85; 80 N. Y. Supp. 438.

e. **Repetition.**—An exception to the ruling of a trial judge in allowing an improper question to be propounded to a witness is, although not repeated, available with respect to a subsequent substantial repetition of the improper question: Davis v. Reflex Camera Co., 105 App. Div. 96; 93 N. Y. Supp. 844.

f. **Objection.**—When objection and exception to testimony is made only after a specific question is asked and answered, the objection is too late; the remedy is by motion to strike out the answer: Blake v. Mayer, 110 App. Div. 734.

g. An exception taken only on the return of the jury, and after an apparent acquiescence in the charge of the court, should receive a strict construction: Twaddell v. Weidler, 109 App. Div. 444; 96 N. Y. Supp. 90, aff'd 186 N. Y. 601.

h. When the court, in answer to questions of counsel, states that it will exclude certain named items of expense and an exception is taken thereto, the error is available on appeal and it is not necessary that the question of the admissibility of the items excluded be raised by exceptions to rulings on express questions put: Corrigan v. Funk, 109 App. Div. 846.

i. Where a mutual understanding between court and counsel appears, that defendant should be considered as taking the exceptions necessary to present the question of law in the case; or where the exceptions were inadvertently omitted from the printed case, the appellate court will consider the appeal as if the case showed that the proper exceptions had been taken: Hamilton v. Pelonsky, 48 Misc. 554.

j. **Reversal.**—The appellate division will reverse a judgment because of an erroneous charge of the trial judge even though no exception was taken thereto: Van Alstine v. S. L. H. & P. Co., 116 App. Div. 100.

§ 993. Exceptions to findings of fact.

Upon the trial of an issue of fact by a referee or by a court without a jury, a finding of fact without any evidence tending to sustain it, is a ruling upon a question of law within the meaning of the last section. The appellate division of the supreme court shall, on appeal from a judgment entered on the report of a referee, or the decision of a court on such trial, review

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all questions of fact and of law, and may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party the judgment which the facts warrant.

New.

Amended by chap. 688 of 1894.

Repealed by chap. 946 of 1895.

Added by chap. 85 of 1903.

See § 1022, post, Decision of court upon trial of the whole issue of fact.

a. **Court of appeals.**—Under the provisions of §§ 992 and 993 where a case is tried before a referee or the court without a jury, an exception is not necessary to the report or decision in order to enable the appellate division to review the questions of fact presented on an appeal, but it seems that an exception to the report or decision is necessary to enable the court of appeals to review the decision below upon an appeal from the judgment as the jurisdiction of the court of appeals is restricted to questions of law: Henderson v. Dougherty, 95 App. Div. 346; 88 N. Y. Supp. 665.

b. **Surrogate's court.**—Upon an appeal from a decree of the surrogate's court entered upon the report of a referee, the appellate division may, under §§ 993 and 2586, supply an essential finding of fact which was omitted from the referee's report and from the surrogate's decree: Matter of Snedeker, 95 App. Div. 149; 88 N. Y. Supp. 847.

§ 994. When and how exceptions may be taken, after close of trial by court or referee.

See rule 30 (Sup. Ct.), Exceptions to referee's report.

See § 1022, post, Decision of court upon trial of the whole issue of fact.

c. **Review of facts.**—No exception to the report of a referee or the decision of the court rendered after a trial is necessary to enable the appellate division to review the facts; if necessary an exception "to each and every finding of fact and conclusion of law" and "to each and every refusal of the said referee to find as requested" is open to the criticism that it is too general: Matter of Mosher, 103 App. Div. 459; 93 N. Y. Supp. 123, aff'd 185 N. Y. 556; 183 N. Y. 568.

d. **Decision.**—Where the court presiding at a jury trial reserves its decision on a motion to dismiss the complaint, made by the defendant when the plaintiff rested, and the defendant does not renew such motion after all the proof is in or request the court to submit any question of fact to the jury, whereupon the court directs a verdict for the plaintiff, to which the defendant takes no exception, no authority exists authorizing the court to file a decision and the defendant to file an exception to such decision: Murray v. City of New York, 60 App. Div. 541; 60 N. Y. Supp. 959.

e. **Short decision.**—Exception to a short decision is not necessary to a review of the exceptions taken on the trial; its function under § 1072 is the general function of an exception, which is to protest against the decision of the court: Piltz v. Yonkers Railroad Co., 83 App. Div. 29; 82 N. Y. Supp. 220.

f. **Specific questions.**—Where a plaintiff neither objected nor excepted to the submission of three specific questions to a jury he is deemed to have acquiesced in that mode of disposing of the case so far as the jury were concerned: Cooper v. N. Y., O. & W. Ry. Co., 180 N. Y. 12.

g. **Decree.**—§ 994 is not appropriate to an appeal by a municipality from a surrogate's decree which makes no provision for the payment of taxes assessed against the administrator: Matter of Sullivan, 84 App. Div. 51; 82 N. Y. Supp. 32.

§ 995. Id.; during the trial, or upon trial by jury.

h. **Direction of verdict.**—The denial of motions made by counsel on both sides for the direction of a verdict and the submission of the case to the jury cannot be held to have prejudiced either party, provided the jury decided the case as the court ought to have decided it, nor in such case is the conduct of the court in charging or refusing to charge the jury material: Nat. Revere Bank v. Nat. Bank of Republic, 172 N. Y. 102, aff'g 54 App. Div. 342; 66 N. Y. Supp. 662.

i. The direction of a verdict in any case where the parties are entitled to a jury trial constitutes reversible error if a question of fact is presented by the evidence: Sundheimer v. City of New York, 176 N. Y. 495, rev'g 77 App. Div. 53; 79 N. Y. Supp. 278.

j. **Refusal to charge.**—Refusal of judge to charge in action for alienation

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of husband's affections that if, at the time of the abandonment, the plaintiff's husband has no affection for her or that if it had been previously alienated by other causes she could not recover, is reversible error: Servis v. Servis, 172 N. Y. 438, rev'g 64 App. Div. 612; 71 N. Y. Supp. 1148.

a. **Charge.**—Erroneous charge in regard to sudden starting of street car which is claimed was cause of injury to passenger: Dambmann v. Metropolitan Street R. Co., 180 N. Y. 384, rev'g 91 App. Div. 612; 86 N. Y. Supp. 1133.

b. A party excepting to a charge to a jury must by some exception point to the specific proposition which the court has charged or refused to charge or to the specific ruling on the refusal to charge to which counsel supposed himself entitled; where several requests are made, some of which are charged and some refused, the attention of the court must be called to the ruling refusing a specific request by an exception taken to that ruling; an exception generally to the refusal of the court to charge as requested is not sufficiently specific: Connor v. Metropolitan Street Ry. Co., 77 App. Div. 384; 33 Civ. Pro. R. 269; 79 N. Y. Supp. 294.

c. An objectionable statement in a charge of the trial judge should be considered in connection with the entire charge, and it is only possible to predicate error where it is clear that the jury was misled in their consideration of the facts: Continental Nat. Bank v. Tradesmen's Nat. Bank, 173 N. Y. 272.

A refusal to charge is not error where the subject has been sufficiently covered by the charge already given. Id.

d. An instruction that the plaintiff must satisfy the jury by "clear, convincing and conclusive" evidence of the justice of his claim, while technically erroneous, as violating the rule that in such a case the jury must be satisfied by a fair preponderance of the evidence only, does not constitute reversible error, where the charge, considered as a whole, fairly and correctly stated such rule and required the jury to base its verdict upon the preponderance of evidence: Roberge v. Bonner, 185 N. Y. 265, aff'g 94 App. Div. 342; 88 N. Y. Supp. 91.

e. **No charge.**—When the jury is not charged at all upon the law of the case, the judgment should be reversed: Winter v. Interurban Street Ry. Co., 49 Misc. 131.

f. **Requests for direction of a verdict.**—The request by both parties for the direction of a verdict amounts to a submission of the whole case to the trial judge, and his decision in plaintiff's favor upon the facts has the same effect as if the jury has found a verdict in the plaintiff's favor after the case was submitted to it: Sigua Iron Co. v. Brown, 171 N. Y. 488, aff'g 58 App. Div. 436; 69 N. Y. Supp. 295.

g. **Specific questions.**—The failure to object and except to the submission to the jury of specific questions requiring a special verdict, as to plaintiff's intestate's freedom from negligence, as to the defendant's negligence, and as to the damages, is not cured by an exception to the direction of a general verdict based thereon, and in the absence of any other exception, a judgment entered upon a verdict adverse to plaintiff must be affirmed: Cooper v. N. Y., O. & W. Ry. Co., 180 N. Y. 12.

h. Where each party asks that a verdict be directed in its favor, without requesting the submission of any specific questions of fact, the right to go to the jury is waived and the verdict is one in form only; the finding is in reality by the court and the jury is merely its mouthpiece to announce the decision, and where there is evidence to support such finding, the judgment must be affirmed: Westervelt v. Phelps, 171 N. Y. 212, aff'g 54 App. Div. 244; 66 N. Y. Supp. 517.

i. **Nonsuit.**—A judgment of nonsuit is a decision by the court that the plaintiff has produced no evidence upon which facts may be found, and where no facts are found and the case is disposed of upon defendant's motion, the decision will be deemed to be a nonsuit: Lindenthal v. Ger. Life Ins. Co., 174 N. Y. 76; Veasey v. Allen, 173 N. Y. 359; Ware v. Dos Passos, 162 N. Y. 281.

j. Where a defendant moves for a nonsuit at the close of plaintiff's case and excepts to the denial of the motion therefor, proceeds to put in its evidence and then renews the motion and again excepts, the refusal of nonsuit at the close of plaintiff's case is not available provided, at the close of the whole case the evidence presents a question for the jury: Bopp v. N. Y. El. Vehicle Transp. Co., 177 N. Y. 33, aff'g 78 App. Div. 337; 79 N. Y. Supp. 1035.

k. **Decision reserved.**—The authority of the court to dismiss the complaint after a verdict has been rendered in favor of the plaintiff upon a prior motion therefor on which decision was reserved, cannot be questioned on appeal in the absence of an exception to the reservation of the decision; an exception to the final disposition of such motion is not sufficient: Antes v. Watkins, 112 App. Div. 861.

l. Where the court presiding at a jury trial reserves its decision on a motion to dismiss the complaint, made by the defendant when the plaintiff rested, and the defendant does not renew such motion after all the proof is in or request the court to submit any question of fact to the jury, whereupon the court directs a verdict for the plaintiff, to which the defendant takes no exception, no authority exists

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authorizing the court to file a decision and the defendant to file an exception to such decision: Murray v. City of New York, 60 App. Div. 541; 69 N. Y. Supp. 959.

a. **Summing up.**—Upon the trial of an action, if the summing up passes the proper legal bounds, it is the duty of counsel to object specifically and request the court to rule and admonish counsel, and except to the refusal of the court to so proceed: Dimon v. N. Y. C. & H. R. R. Co., 173 N. Y. 356, aff'g 74 App. Div. 626; 77 N. Y. Supp. 1130.

b. **Presentation of case.**—On the trial of an action the counsel for each party has a right to present his theory of the case, or at least to offer to present it, without being accused of duplicity, ignorance or bad faith, and where the trial court transgresses this right of counsel and judgment is rendered against the latter's client, it is the duty of the appellate courts to reverse the judgment and grant a new trial of the action: Kleinert v. Federal Brewing Co., 107 App. Div. 485.

c. **Value.**—When, in an action to recover certain shares of stock at the value thereof, the court charges that the defendant must return the stock or pay the value thereof, "which, on the evidence, I charge you is $1,740," the defendant cannot, on appeal, raise the point that the value was not the proven value at the time of trial, when he has taken no exception to such charge: Macdonald v. Macdonald, 112 App. Div. 330.

d. **Understanding.**—Where a mutual understanding between court and counsel appears, that defendant should be considered as taking the exceptions necessary to present the question of law in the case; or where the exceptions were inadvertently omitted from the printed case, the appellate court will consider the appeal as if the case showed that the proper exceptions had been taken: Hamilton v. Pelonsky, 48 Misc. 554.

e. **Question of fact.**—When a request is made to go to the jury upon a question of fact, and it is denied and an exception taken, it is unnecessary to go through the idle ceremony of excepting to the direction of a verdict under penalty of being deprived of the exception to the erroneous ruling: Benedict v. Pincus, 109 App. Div. 20; 95 N. Y. Supp. 1042.

f. **Negligence.**—In an action by a passenger to recover damages for personal injuries against a street railway company, the refusal of the court to charge, as requested by the defendant, that it was not negligent as a matter of law to permit overcrowding, but was a circumstance to be submitted to and considered by the jury, is error for which a judgment in favor of the plaintiff will be reversed where the verdict is excessive: Tischler v. Shurman, 49 Misc. 255; 97 N. Y. Supp. 390.

g. **Proper remedy.**—When objection and exception to testimony is made only after a specific question is asked and answered, the objection is too late; the remedy is by motion to strike out the answer: Blake v. Meyer, 110 App. Div. 734.

h. **Return of jury.**—An exception taken only on the return of the jury, and after an apparent acquiescence in the charge of the court, should receive a strict construction: Twaddell v. Weidler, 109 App. Div. 444; 96 N. Y. Supp. 90, aff'd 186 N. Y. 601.

i. **Change of ruling.**—A court, after submission of the case for decision, in the absence of acquiescence in such course or agreement that it be done, cannot change its rulings as to the admission or exclusion of evidence: Gottler v. Dole, 109 App. Div. 583.

j. **Performance.**—Where, after the amendment of a complaint allowing proof of substantial instead of complete performance of a building contract, the defendant has consented to submit the case upon the evidence erroneously admitted under the former pleading without objections or exceptions to such evidence under the amended pleading, and such evidence shows substantial performance, the defendant cannot question a judgment for the plaintiff: Rowe v. Gerry, No. 1, 109 App. Div. 153; 95 N. Y. Supp. 857.

k. **Appeal.**—When the court, in answer to questions of counsel, states that it will exclude certain named items of expense and an exception is taken thereto, the error is available on appeal and it is not necessary that the question of the admissibility of the items excluded be raised by exceptions to rulings on express questions put: Corrigan v. Funk, 109 App. Div. 846.

§ 996. Ruling excepted to; how reviewed.

l. Where the trial court severs a single cause of action by directing a verdict for part and dismissing the complaint as to the rest, and neither party appeals from the judgment for the plaintiff and the latter appeals from the judgment of dismissal, it will be deemed that both parties acquiesced in the practice of the trial court, however erroneous; the plaintiff had the right to take the appeal he did, and the appellate courts have the power to hear and decide such appeal: Wilson v. Mechanical Orguinette Co., 170 N. Y. 542, rev'g 57 App. Div. 158; 68 N. Y. Supp. 173.

m. A court, after submission of a case for decision, in the absence of acquiescence in such course or agreement that it be done, cannot change its rulings as to the admission or exclusion of evidence: Gottler v. Dole, 109 App. Div. 583.

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§ 997. Case, when necessary; how made and settled.

See rules 31-35 (Sup. Ct.), Rules relating to cases and exceptions.

a. **Newly discovered evidence.**—A new trial for newly discovered evidence will not be denied because the evidence is cumulative, if it is of such probative force that it might probably change the result; and a motion for a new trial upon newly discovered evidence can only be heard on a case settled and signed by the judge who tried it, as prescribed in the general rules of practice, and should only be granted on terms: Solowye v. Hazlett, 35 Misc. 197.

b. A motion by plaintiff for a new trial upon the ground of newly discovered evidence should be denied, in a case where the plaintiff had failed to recover the price of certain steel bars because they were shown to have been smaller than ordered, where the plaintiff expressed no surprise at the trial respecting the proof of the size of the bars, and where the newly discovered evidence consists of the result of measurement of the bars since the trial which does not show the bars to have been of the size ordered: Froment v. Muglet, 51 Misc. 68.

c. A motion for a new trial upon the ground of newly discovered evidence may be made, in the absence of objection, upon the pleadings and affidavits; and an objection that a settled case is necessary under § 997 cannot be raised for the first time upon appeal from the order entered on such motion: Rosenthal v. Bell Realty Co., 53 Misc. 265.

d. A motion for a new trial upon the ground of newly discovered evidence must be made upon a case: Bridenbecker v. Bridenbecker, 75 App. Div. 6; 77 N. Y. Supp. 802.

e. **Opponent's exceptions.**—A defeated party in preparing a case is entitled to exclude all the exceptions, motions and requests of his opponents: Ives v. Ellis, 169 N. Y. 85, at page 108, rev'g 50 App. Div. 399; 64 N. Y. Supp. 147.

f. **Evidence.**—A bill of exceptions which contains the evidence relating to the negligence of defendant's servants, but not certain other evidence as to which the record shows no issue was raised, is a "case" within § 997: Stiasny v. Metropolitan Street R. Co., 65 App. Div. 268.

g. **Mandamus.**—Where the issues raised by an alternative writ of mandamus are tried before a jury, a motion for a new trial under the provisions of § 999 is entirely proper, and it is not necessary to make a motion at special term upon a case and exceptions: People ex rel. Wieland v. Knox, 78 App. Div. 344; 79 N. Y. Supp. 989.

h. **Referee.**—Exceptions to the refusal of a referee to make the findings proposed to him by counsel, the remedy is on the statement of case on appeal: Underwood v. Greenwich, 45 Misc. 62.

i. **Judgment roll.**—An appellant who desires to present upon appeal only questions arising upon the judgment roll, need not serve a case upon appeal, but if he desires to present any additional questions, he must serve such a case upon all the parties to the appeal under penalty of being declared in default and to have waived his right thereto: McIlvaine v. Steinson, 85 App. Div. 562; 83 N. Y. Supp. 285.

j. **Qualification.**—A party is entitled to have the qualification of an exception taken on the trial inserted in the case on appeal; it is improper for the trial judge on his own motion to strike out the qualification: Csatlos v. Metropolitan R. R. Co., 63 App. Div. 271; 71 N. Y. Supp. 254.

k. **New trial.**—A new trial may not be granted except upon a motion made at the term before the justice who tried the case as prescribed by § 999, or upon a case and exceptions as prescribed by § 997: Wilcox v. Fox, 112 App. Div. 560.

l. **Certificate.**—When no motion has been made for a nonsuit on the ground that the evidence does not establish a cause of action, and there is no certificate that the case contains all the evidence, the appellate court is limited to a review of the exceptions and cannot review the questions of fact: Ceballos v. Munson Steamship Line, 112 App. Div. 352.

m. **Certificate refused.**—Where a certificate that a case contains all the evidence is refused by the justice who tried the case, the appellate court cannot consider the merits, but can only determine whether the conclusions of law were justified by the findings of fact and pass upon the exceptions taken: Voss v. Smith, 110 App. Div. 104; 97 N. Y. Supp. 3; appeal dis. 183 N. Y. 536.

n. The rule that the action of the trial justice in settling a case on appeal cannot be reviewed applies only when it appears that he decided the disputed matter upon his recollection or understanding of the proceedings had before him. When a trial justice, since deceased, signed a case on his sick bed as stipulated by the parties, an error which was overlooked may be subsequently corrected: McMahon v. Delaware, Lackawanna & Western R. R. Co., 116 App. Div. 532.

o. **Exceptions.**—When, in an action to recover services rendered, the defendant introduces a receipt signed by the plaintiff and the plaintiff's explanation as to why he signed the paper is excluded on the objection of the defendant, the plaintiff is entitled to have the excluded question contained in the printed case

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in order that the defendant cannot reverse the judgment on the ground that there was a failure of evidence when the same was excluded on his own objection. This is so, although the plaintiff's exceptions to the exclusion of the evidence were not well taken: Selah v. New York Times Co., 118 App. Div. 384.

a. When an exception is taken to the court's refusal to charge specifically and in the language requested certain written requests submitted and the court states that the requests will be given to the stenographer to copy in the record, a specific exception to each of such request should not be stricken from the printed case upon the theory that the "exceptions" did not appear in the stenographer's minutes; a case should be made up so as to state the truth as to what took place at the trial, and substance should not be sacrificed to form: People v. Browne, 118 App. Div. 38.

b. **Default.**—The preparation, settlement and filing of a case or bill of exceptions is part of the record of the court below and the opening of a default in these respects is with the special term; but after the case is settled, and filed, the filing and service of the printed papers upon which an appeal is heard are part of the appeal and the opening of any default therein lies with the appellate division: Hansen v. Walsh, 117 App. Div. 39.

§ 998. When appeal, etc., may be heard without a case.

c. Upon an appeal from an order denying an application for the revocation of letters of administration, heard upon the moving papers and those submitted in opposition, where no issues were tried, the appellant should print the papers recited in the order, which should either be certified by the surrogate's court or stipulated to be the papers in accordance with the rules governing such matters; in such case, an application to settle a case on appeal or to pass upon requests to find will be denied: Matter of Sprathoff, 50 Misc. 109.

d. When parties stipulate that the jury may seal its verdict and deliver it to the officer in charge, to be delivered to the clerk and by him to be opened and recorded in the minutes in the absence of the presiding justice and the jury, the parties are bound by such stipulation and cannot thereafter have the verdict set aside as irregular: Chichester v. Winton Motor Car Co., 110 App. Div. 78.

§ 999. Motion for new trial upon judge's minutes; appeal from order thereupon.

See § 1003, post, Application of Code to trial of specific questions by jury.

e. **Weight of evidence.**—A motion to set aside a verdict for the plaintiff as against the weight of evidence should be denied where an issue of fact was presented for the jury to determine and the appellate division had set aside previous verdicts as against the weight of evidence by divided court: McCann v. N. Y. & Queens Co. R. Co., 73 App. Div. 305; 76 N. Y. Supp. 684.

f. Although the appellate division affirms the order of the trial court made in an action for negligence setting aside a verdict for the plaintiff as against the weight of evidence, and granting a new trial, when such affirmance was made on the condition that the defendant pay the costs of trial or judgment be entered on the verdict, it is tantamount to a decision that the verdict was warranted by the evidence and it is error for the trial court to nonsuit on the same evidence at the second trial: Larsen v. United States Mortgage and Trust Co., 113 App. Div. 483.

g. In an action to recover for injuries from a fall on a sidewalk by reason of the absence of a step leading into a depression left by the removal of a section of the sidewalk, a verdict is against the weight of evidence when the only evidence of the absence of the step is the testimony of the plaintiff and her husband, who are contradicted by many disinterested witnesses: Benjamin v. Village of Tupper Lake, 110 App. Div. 426.

h. Although a court has the power to set aside a verdict for the plaintiff as against the weight of evidence, and to grant a new trial, it has no power to reduce the verdict to nominal damages and direct judgment therefore: Howard v. Bank of Metropolis, 115 App. Div. 326.

i. A court errs in refusing to set aside a verdict on the sole ground that when the appellate court set aside a former verdict it held that there was some evidence of negligence, because both the trial court and the appellate division may set aside verdicts as contrary to evidence when a nonsuit could not be granted: Fish v. Utica Steam and Mohawk Valley Cotton Mills, 109 App. Div. 326.

j. Verdicts should not ordinarily be set aside as against the weight of evidence unless there is something in the record which indicates that the jury was influenced by bias, passion, prejudice or corruption: Kingsley v. Finch, Pruyn & Co., 54 Misc. 317.

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a. § 254 of the Municipal Court Act is identical with the grounds specified in § 999 of the Code of Civil Procedure, and it includes power to grant new trial on the ground that the verdict was against the weight of evidence: Newbound v. Interurban St. R. Co., 42 Misc. 525; 86 N. Y. Supp. 68.

b. An order made by a judge presiding at a jury trial, setting aside the verdict and granting a new trial, must, where it is not made conditional on the payment of costs by the moving party, be presumed to have been based upon exceptions taken during the trial and not because the verdict was against the weight of evidence: Robinson v. Lampel, 97 App. Div. 198.

c. **Excessive damages.**—The language of § 999 indicates that a verdict for excessive damages is contrary to evidence: Lane v. Brooklyn Heights R. R. Co., 85 App. Div. 85, at 95; 82 N. Y. Supp. 1057.

d. Where a new trial is granted, because of a mistake on the part of the jury in rendering an excessive verdict in favor of the plaintiff, the defendant should be required to pay the costs and disbursements of the original trial: Helgers v. Staten Island Midland R. R. Co., 69 App. Div. 570; 75 N. Y. Supp. 34.

e. § 999, which permits the granting of a new trial for excessive damages, announces a rule, apparently of general application, but a court will not interfere with the verdict of a jury unless such damages were so outrageous as to strike every one with the enormity and injustice of them: Crane v. Bennett, 77 App. Div. 102; 33 Civ. Pro. R. 229.

f. Damages of $4,000 are not excessive when the defendant has maintained a factory for reducing salt and has for three years discharged chlorine gas and lime dust on the plaintiff's premises, whereby vegetation was damaged, the paint, wood work and metal work on the premises corroded, and the air rendered uncomfortable and unwholesome to breathe: Rock v. Acker Process Co., 112 App. Div. 695.

g. When an order setting aside a verdict for $1,000 in an action for libel does not disclose that it was not granted because the verdict was excessive, the appellate court will not reverse such order if it would not reverse it if granted on such ground: Rose v. Imperial Engine Co., 110 App. Div. 437.

h. A verdict of $1,500 for injuries received in a collision, by which plaintiff's arm was broken in three places and which caused internal congestion, etc., is not excessive, and an order requiring the plaintiff to stipulate to reduce such verdict to $500 will be reversed: McGahie v. Sproat, 111 App. Div. 445.

i. A verdict for $15,000 recovered in an action for negligence causing the death of plaintiff's intestate will be reduced to $7,500 where it appears that the intestate was thirty-two years of age and was earning twelve dollars a week: Walsh v. Riesenberg, 110 App. Div. 883.

j. In an action to recover damages for the negligent killing of plaintiff's intestate, who was a dentist, a verdict of $40,000 will not be held to be excessive where it appears that the deceased was earning from $17,000 to $20,000 yearly: Morhard v. Richmond Light & R. R. Co., 111 App. Div. 353.

k. In an action by a passenger to recover damages for personal injuries against a street railway company the refusal of the court to charge, as requested by the defendant, that it was not negligent as a matter of law to permit overcrowding, but was a circumstance to be submitted to and considered by the jury, is error for which a judgment in favor of the plaintiff will be reversed where the verdict is excessive: Tischler v. Shurman, 49 Misc. 255; 97 N. Y. Supp. 390.

l. Where, in an action for the conversion of the model of a typewriter, it appears that the typewriter was of the reasonable value of about fifty dollars, but that as a model it had cost two or three thousand dollars, a verdict of $1,500 was held to be excessive: Scharndorf v. Alten, 49 Misc. 123; 63 N. Y. Supp. 71.

m. A verdict of $12,500 for the breaking of a patella, though a serious and permanent injury, is excessive and should be reduced to $7,702, including interest and costs: Walsh v. City of New York, 109 App. Div. 541.

n. A verdict of $1,500 for injuries producing neurasthenia is not excessive: Bach v. Brooklyn Co. & Sub. R. R. Co., 109 App. Div. 654.

o. When in an action to recover for personal injuries, the verdict is based on a condition of hysteria in the plaintiff, and it appears that shortly prior to the accident she underwent a surgical operation which might have produced the hysteria and the only other injuries shown were trifling, the plaintiff has failed to sustain the burden of showing that the hysteria was the result of the accident, and a new trial will be granted unless the plaintiff reduce the judgment: Des Moineaux v. N. Y. City R. Co., 118 App. Div. 848.

p. A verdict of $3,000 for injuries received by plaintiff caused by the premature starting of a surface car as she was entering the door thereof is excessive, when the evidence shows that the plaintiff received only bodily bruises and had her teeth loosened, and that hemorrhages which subsequently developed, were caused not by the blow, but by a malignant internal growth and such damages should be reduced to $1,000: Schierloh v. Int. St. Ry. Co., 115 App. Div. 455.

q. **Inadequate verdict.**—Motion denied because of inadequate verdict for

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death of child: Terhune v. Cody Contracting Co., 72 App. Div. 1; 76 N. Y. Supp. 255.

a. The court has power on a motion for a new trial, under § 999, not only to set aside a verdict as excessive but also on the ground that it was inadequate: Stuart v. Press Publishing Co., 83 App. Div. 467.

b. **Newly discovered evidence.**—Motion for a new trial based on newly discovered evidence after five trials must be exceptionally strong: Hagen v. N. Y. C. & H. R. R. R. Co., 100 App. Div. 218.

c. It seems that the appellate term has no statutory authority to grant a new trial for newly discovered evidence in an action brought in the municipal court of the city of New York where the appeal is from the judgment, and will not seek authority to relieve the defeated party, where his affidavits for the new trial present evidence which is merely cumulative: Tarder v. Bezozi, 34 Misc. 551; 69 N. Y. Supp. 1047.

d. A motion for a new trial on the ground of newly discovered evidence may be made, in the absence of objection, upon the pleadings and affidavits; and an objection that a settled case is necessary under § 997 cannot be raised for the first time upon appeal from the order entered on such motion: Rosenthal v. Bell Realty Co., 53 Misc. 265.

e. **Facts.**—Where an order denying a motion for a new trial, under § 999, appears in the record and an appeal was taken therefrom, the appellate court has the right to review all the facts as well as all the exceptions taken on the trial: Hall v. Whiton, 37 Misc. 756; 76 N. Y. Supp. 509.

f. **Compromise verdict.**—Where it is clear that the verdict of a jury was a compromise it would seem that the court should set it aside on its own motion, under § 999, and the appellate division on appeal will, within its inherent power, set aside the verdict and judgment; a delay to make the motion, under § 999, will not affect the party's rights, and the error is one which cannot be waived by a party to the suit: Wiegand v. Fee Brothers' Co., 73 App. Div. 139; 76 N. Y. Supp. 872.

g. **Another ground.**—A new trial sustained on another ground than that stated by the court granting motion for new trial: Voisin v. Commercial Mutual Ins. Co., 60 App. Div. 139; 70 N. Y. Supp. 147.

h. An order granting a new trial under § 999 will not be set aside on appeal because a wrong reason was given for granting it, if it appears that the defendant was entitled to have the verdict set aside upon any of the other grounds urged by him: Ross v. Metropolitan Street Railway Co., 104 App. Div. 378.

i. **Surprise.**—Where in an action for negligence, a permanent injury is alleged and one is proven which was not mentioned by plaintiff in a medical examination made at defendant's request, and on the trial defendant made no application for an adjournment or to withdraw a juror and a motion is made on all grounds in § 999 for a new trial, it is error to grant such a motion on the ground of surprise: Dixon v. Brooklyn Heights R. R. Co., 68 App. Div. 302; 74 N. Y. Supp. 49.

j. **Nonsuit.**—Where a complaint is dismissed upon the trial of the action, there can be no motion for a new trial, and the questions presented upon such a motion are not before the appellate division in appeal: Griffiths v. Metropolitan St. Ry. Co., 63 App. Div. 86; 32 Civ. Pro. R. 184.

k. **Evidence.**—On an appeal from an order denying a motion for a new trial under § 999, unless the case shows that it contains all the evidence, the appellate division is limited to a consideration of the exceptions taken at the trial: Laquinto v. Bauer, 104 App. Div. 56; 93 N. Y. Supp. 388.

l. Where the plaintiff is the only witness in her own behalf, but testifies to facts sufficient to constitute a cause of action, and her testimony is clear and not inherently improbable, either in itself or taken in connection with circumstances detailed therein, a court or jury has no right to disregard it, and a judgment for the defendant will be reversed: Lewis v. New York City Railway Co., 50 Misc. 535; 99 N. Y. Supp. 462.

m. Where the plaintiff's cause of action is supported only by his own testimony, but there is no inherent improbability in his story and he is not contradicted, impeached or discredited, the jury may not disregard his testimony and find a verdict for the defendant: Kahl v. N. Y. City Ry. Co., 53 Misc. 569.

n. Where the plaintiff testifies to facts that constitute a cause of action in his favor, though his testimony is the only evidence in support of his cause of action, if it is not improbable or suspicious and there is nothing in the case to impeach his veracity, the court may not arbitrarily reject his testimony and render judgment against him; and if it does, the judgment should be reversed: Madden v. New York City Railway Co., 50 Misc. 555.

o. **Specified grounds.**—Where an order setting aside a verdict and granting a new trial does not specify the particular grounds upon which it was granted, this court is bound to assume on appeal from such order that it was granted upon exceptions taken upon the trial: Badanes v. Feder, 47 Misc. 91.

p. **Absence of judge.**—A new trial will be granted where the verdict was taken by the clerk by the consent of counsel in open court, but in the absence of the judge, even though the defeated party had appealed to the appellate division and an appeal from the judgment affirming the judgment below: Dubuc v. Lazell,

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Dalley & Co., 105 App. Div. 533; 94 N. Y. Supp. 1144, rev'd 182 N. Y. 482.

a. **Case reopened.**—The failure of the defendant to move for a second time after the case has been reopened and one of the witnesses sworn, does not waive the benefit of such motion; even if the defendant had waived the benefit of a motion for the direction of a verdict, yet the question whether there was sufficient evidence to justify the jury in rendering a verdict in favor of the plaintiff is presented on appeal from the order denying the motion made by the defendant for a new trial upon the minutes and exceptions taken at the trial and upon all the grounds specified in § 999: Weizinger v. Erie Railroad Co., 106 App. Div. 411.

b. **Settlement of order.**—A motion for the settlement of an order denying motion for a new trial should not be appeal: Sidmond v. Brooklyn Heights R. appeal· Sidmond v. Brooklyn Heights R. Co., 75 App. Div. 295; 78 N. Y. Supp. 129.

c. **Costs.**—Costs allowed on an appeal granting new trial and "costs of motion:" Cohen v. Krulewitch, 81 App. Div. 147; 80 N. Y. Supp. 689.

d. In an action for conversion it is proper for the court, under § 999, to grant defendant's motion for a new trial unless plaintiff reduce the amount of the verdict to a sum supported by the evidence, but the defendant should be required to pay the costs as a condition of obtaining the favor: Lawrence v. Wilson, 86 App. Div. 472; 83 N. Y. Supp. 821.

e. **Municipal court.**—The rule requiring an order granting a new trial in the municipal court of the city of New York to recite the grounds upon which it is based is sufficiently complied with, where the facts are disputed on the trial and the defeated plaintiff took many exceptions thereat in regard to the admission or exclusion of evidence, where the new trial is stated to be granted "upon the ground that errors were committed upon the trial, prejudicing the above-named plaintiff:" Gitelson v. Weisberg, 36 Misc. 214; 73 N. Y. Supp. 195.

f. Chap. 746 of 1896, providing that a motion to vacate a judgment may be made for the causes specified in § 999, does not empower a justice of the municipal court to vacate a judgment rendered after a trial before such justice without a jury because of the failure of one of the moving party's material witnesses to appear at the trial, as § 999 does not authorize the setting aside of a verdict upon that ground: Erichson v. Sidlo, 76 App. Div. 347.

g. **Court of appeals.**—Where in the trial of an action before a jury, after the granting of a motion to dismiss the complaint at the close of plaintiff's case, to which no exception was taken, a motion for a new trial, made without specifying any grounds, was denied, but no order was entered and no foundation laid for an appeal therefrom, the appellate division, upon an appeal from the judgment dismissing the complaint, has no power to review or reverse upon the facts, and where there are no exceptions taken to rulings relating to the admission or exclusion of evidence that would authorize the reversal of the judgment of the trial court, the court of appeals must reverse the order of the appellate division and affirm the judgment of the trial court: Collier v. Collins, 172 N. Y. 99.

h. **Costs** should not be imposed upon a party to whom a new trial is granted for error of the jury: Duffy v. City of New York, 55 Misc. 25.

i. **Mandamus.**—Where the issues raised by an alternative writ of mandamus are tried before a jury, a motion for a new trial under the provisions of § 999 is entirely proper, and it is not necessary to make a motion at special term upon a case and exceptions: People ex rel. Wieland v. Knox, 78 App. Div. 344; 79 N. Y. Supp. 989.

j. **Will.**—A general verdict against the validity of a will where there are several grounds of attack will not be sustained if any of the grounds is untenable: Buchanan v. Belsey, 65 App. Div. 58; 72 N. Y. Supp. 601.

k. **Order.**—Where a motion is denied under § 999, a formal order should be drawn and signed by the judge and entered in the clerk's office: People v. Wells, 178 N. Y. 411.

l. **No charge.**—When the jury are not instructed at all upon the law of the case, the judgment should be reversed and a new trial granted: Winter v. Interurban Street Ry. Co., 49 Misc. 131.

m. **Condition.**—Costs cannot be imposed on the moving party as a condition for granting a new trial when the verdict has been set aside on the grounds of a mistrial: Terriberry v. Mathot, 110 App. Div. 370; 97 N. Y. Supp. 20.

n. **New trial.**—A new trial may not be granted except upon a motion made at the term before the justice who tried the case, as prescribed by § 999, or upon a case and exceptions as prescribed by § 997: Wilcox v. Fox, 112 App. Div. 560.

o. **Failure to move.**—If a defendant fails to move for a new trial upon the minutes, and no order therefor is granted, only questions of law are raised on appeal and the evidence will be construed in plaintiff's favor: Bannon v. N. Y. C. & H. R. R. R. Co., 112 App. Div. 552.

p. **Appeal.**—An order denying a motion for a new trial upon the minutes, not entered until after the expiration of the time within which to appeal from the judgment, is appealable: Howe v. Noyes, 48 Misc. 356.

q. When an appeal is not taken from an order denying a motion for a new trial the appellate court is precluded from weighing the evidence and is confined to

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a consideration of exceptions: Prager v. Schafuss, 51 Misc. 647.

a. The appellate term will refer to the opinion of the court below to ascertain the grounds or reasons for its disposition of the case; and, where on appeal from an order granting a new trial, it thus appears that the motion was granted on the ground that the verdict was contrary to the evidence and the order should, therefore, have imposed the payment of the costs of the first trial upon the defendants, it will be modified accordingly: Israel v. Ury, 52 Misc. 525.

b. **Renewal of motion.**—Although the defendant moves at the close of the plaintiff's case for a dismissal upon various grounds and excepts to the court's refusal to dismiss, he must renew the motion on the entire evidence at the close of the case or he admits that there are questions for the jury; in the absence of such motion the facts found are not reviewable upon appeal: Biogioni v. Eglee Bunting Co., 112 App. Div. 338.

c. **Experts.**—A new trial will be granted upon the payment by the defendant of costs and trial costs where on appeal it appears that the opinions of experts as to the injuries of the plaintiff were not well founded: Fogel v. Interborough R. T. Co., 53 Misc. 32.

d. **Contrary to law.**—When an error to the charge is available under an exception to the denial of a motion for a new trial on the ground that the verdict was contrary to law: Goldman v. Swartout, 117 App. Div. 185.

e. **Instructions of court.**—When in an action on the breach of a contract the court fails to give any instructions as to the rule of damages and there is no evidence specifically indicating the amount of damage, the verdict will not be affirmed but a new trial should be granted: Barr v. Schefer, 118 App. Div. 834.

f. Where a verdict is found contrary to the instructions of the court, it will be set aside without regard to the legal accuracy of the instructions; but only the party aggrieved by the disobedience of the jury has a right to complain: Kaplan v. Shapiro, 53 Misc. 609.

g. **Damages insufficient.**—When on plaintiff's motion a verdict in her favor is set aside on the ground that the damages awarded are insufficient, the trial court is not required as a matter of law to award costs against the plaintiff, and in its discretion may refuse such costs when it does not appear that the verdict resulted from the fault or mistake of the plaintiff: Waltz v. Utica & Mohawk Valley Railway Co., 116 App. Div. 563.

h. The appellate division will reverse an order setting aside a verdict because of insufficient damages where it appears that by affirmance of the order palpable injustice will result: Ryckman v. Inter. Ry. Co., 114 App. Div. 914.

i. **Stay.**—Where, upon a trial, after motions to dismiss the complaint were denied, the jury brought in a general verdict for the plaintiff and the judge entertained a motion to set aside the verdict and for a new trial on the grounds and ordered that, in the event of his denial of the motion, the defendant should have the usual stay of thirty days and thirty days to make case after decision, but, before the judge decided the motion, he was duly designated a justice of the appellate division; and where the plaintiff entered judgment in accordance with the verdict and the defendant moved to set the judgment aside; held, that the entry of judgment was not in violation of the stay; that the trial was complete and not a mistrial; that the motion under § 999 should be denied and the defendant left to move for a new trial under § 1002: Stern v. Wabash R. R. Co., 52 Misc. 12.

§ 1001. Motion for new trial at the appellate division, when trial was by court or referee.

j. When motion granted: Levine v. Goldsmith, 71 App. Div. 611; 75 N. Y. Supp. 1128.

k. An order of the appellate division denying a motion for a new trial made upon exceptions pursuant to this section between the interlocutory and final judgments is not a final order and is not reviewable by the court of appeals unless an appeal is allowed by the appellate division: Young v. Gilmour, 167 N. Y. 500, dismissing appeal, 59 App. Div. 612; 69 N. Y. Supp. 214.

§ 1002. When motion for new trial to be made at special term. Restrictions thereupon.

l. **Newly discovered evidence.**—A motion for a new trial on the ground of newly discovered evidence should not be denied because the evidence is cumulative, provided it might change the result; such a motion should be heard on a case settled and signed by a trial judge; such a motion should only be granted on terms: Solowye v. Hazlett, 35 Misc. 197; 71 N. Y. Supp. 486.

m. A new trial should be granted for newly discovered evidence which, though corroborative of the defendant's witnesses, would very possibly change the result of the trial, especially where plaintiff's case was extremely weak and suspicious: Schnitzler v. Oriental Metal B. Co., 47 Misc. 356.

n. When motion for new trial on ground of newly discovered evidence in

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nature of reduction of damages will be granted in action for wrongful discharge: Kantrowitz v. Silverman, 50 Misc. 608.

a. Newly discovered evidence upon questions which were properly withheld from the jury does not warrant a new trial: Ware v. Guatemalan & Mex. Mahogany & E. Co., 119 App. Div. 262.

b. A motion for a new trial on the ground of newly discovered evidence should not be denied merely because such evidence is cumulative, if it is of such a character that it is likely to produce a different result upon a new trial; nor was it necessary that the counsel for the defeated party should have pleaded surprise at the trial and have asked for a postponement in order to procure evidence, if he had made diligent efforts to do so before the trial and had failed: McCreery R. Corp. v. Equitable Nat. Bank, 54 Misc. 508.

c. **Absent witnesses.**—A motion to set aside a verdict and for a new trial on the ground that such relief should be granted in furtherance of justice need not, under § 1002, be made at a special term of the justice who presided at the trial; a new trial should be granted where it is shown that the defendant's counsel requested an adjournment on the ground that four disinterested witnesses had promised to attend, but that he had been prevented from notifying them of the time of the trial, as it had lasted a much shorter time than previous trials, etc.: Smith v. Lidgerwood Manufacturing Co., 60 App. Div. 467.

d. **Surprise.**—Where a new trial is granted on the ground of surprise, it is addressed to the discretion of the court with power to impose terms, should not be granted upon terms providing for an extra allowance of five per cent upon the amount claimed: Simpson v. Hefter, 46 Misc. 67.

e. **Coercion.**—When verdict must be regarded as the effect of coercion and should be set aside: Twiss v. Lehigh Valley R. R. Co., 61 App. Div. 286; 70 N. Y. Supp. 241.

f. **Referee.**—An error committed by a referee in receiving incompetent testimony is not cured by a declaration of the referee, in his opinion, that he did not consider such evidence in reaching his conclusion, where there is nothing in the record proper to show that it was excluded: Dougall v. Dougall, 61 App. Div. 282; 70 N. Y. Supp. 336.

g. Upon appeal from a judgment entered upon a decision of the court of the report of a referee, the court can examine the case *de novo* upon the evidence and order a new trial, not only where the judgment is contrary to the evidence, but where there is a preponderance of evidence against it; but, upon a motion for a new trial after a verdict of a jury, a new trial can only be granted where the weight of the evidence against the verdict is so great that the court can see it must have been the result of passion, prejudice, mistake, ignorance or corruption: Dambmann v. Met. St. Ry. Co., 55 Misc. 60.

h. **Negligence.**—Where a new trial is granted because the plaintiff testified falsely as to her health, the defendant should not be required to admit its negligence and the plaintiff's freedom therefrom: Crane v. Brooklyn Heights R. R. Co., 68 App. Div. 202; 74 N. Y. Supp. 117.

i. **Mistrial.**—Costs cannot be imposed on the moving party as a condition for granting a new trial when the verdict has been set aside on the grounds of a mistrial: Terriberry v. Mathot, 110 App. Div. 370; 97 N. Y. Supp. 20.

j. **Irregular verdict.**—When parties stipulate that the jury may seal its verdict and deliver it to the officer in charge, to be delivered to the clerk and by him to be opened and recorded in the minutes in the absence of the presiding justice and the jury, the parties are bound by such stipulation and cannot thereafter have the verdict set aside as irregular: Chichester v. Winton Motor Car Co., 110 App. Div. 78.

k. **Designation of judge.**—Where, upon a trial, after motions to dismiss the complaint were denied, the jury brought in a general verdict for the plaintiff and the judge entertained a motion to set aside the verdict and for a new trial on the grounds and ordered that, in the event of his denial of the motion, the defendant should have the usual stay of thirty days and thirty days to make case after decision, but, before the judge decided the motion, he was duly designated a justice of the appellate division; and where the plaintiff entered judgment in accordance with the verdict and the defendant moved to set the judgment aside; held, that the entry of judgment was not in violation of the stay; that the trial was complete and not a mistrial; that the motion under § 999 should be denied and the defendant left to move for a new trial under § 1002: Stern v Wabash R. R. Co., 52 Misc. 12.

l. **Experts.**—A new trial will be granted upon the payment by the defendant of costs and trial costs where it appears on appeal that the opinions of experts as to the injuries of the plaintiff were not well founded: Fogel v. Interborough R. T. Co., 53 Misc. 32.

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§ 1003. Application of this article to trials of specific questions by jury; special provisions applicable thereto.

See § 990, ante, When issues of law may be tried.

See § 999, ante, Motion for new trial upon judge's minutes; appeal from order thereupon.

a. **Divorce.**—A verdict rendered upon issues framed in an action for divorce to try an allegation of adultery disputed by the defendant, is not one to enlighten the conscience of the court but is governed by the same rules as apply to a verdict in any action at law triable by a jury and is conclusive unless set aside for some proper reason: Fries v. Fries, 34 Misc. 478; 70 N. Y. Supp. 295.

b. **Equity.**—When an issue of fact in an equity case is sent to a jury "an error in the admission or exclusion of evidence, or in any other ruling or direction of the judge upon the trial may, in the discretion of the court which reviews it, be disregarded, if that court is of the opinion that substantial justice does not require that a new trial be granted:" Covert v. Brinkerhoff, 41 Misc. 230; 84 N. Y. Supp. 4.

§ 1005. Final judgment, etc., not stayed, by motion for a new trial. Motion may be heard afterwards.

c. The power of a court to stay executions of its own judgments is recognized by §§ 773 and 1005 and made applicable to the city court by § 3343, subds. 4, 6 and 7: Margolies v. Ernst, 34 Misc. 405.

§ 1007. Notes of stenographer may be treated as minutes of the judge.

See § 83, ante, General duty of stenographers; notes, when to be filed.

See § 84, ante, Notes, how preserved; when written out.

d. Where a motion for a new trial upon the minutes was made on a copy of the stenographer's minutes, substituted for the judge's minutes, pursuant to § 1007, it is not necessary under rule 3 (Sup. Ct.), that the copy of such stenographer's minutes shall be filed in the clerk's office where the minutes were obtained at an expense of several hundred dollars: Schlotterer v. Brooklyn & N. Y. F. Co., 102 App. Div. 363; 102 App. Div. 622, 628; 92 N. Y. Supp. 674.

§ 1009. Trial by jury; how waived.

e. **Evidence.**—A statement by the plaintiff's counsel on the trial at special term should not be deemed "the production of any evidence" within the meaning of § 1009 which provides that a party entitled to a jury waives such right by failing to claim it "before the production of any evidence upon the trial:" Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

f. **Mechanic's lien.**—In the absence of any motion to settle the issues or of any demand or suggestion upon the trial that a jury trial is desired, in the event of the lien being invalid, the parties will be deemed to have waived their right to a jury trial in that case: Hawkins v. Mapes-Reeve Construction Co., 82 App. Div. 72; 81 N. Y. Supp. 794.

§ 1010. Decision upon trial by the court, when to be filed; consequence of failure.

g. **Decision.**—At the termination of a trial before the court without a jury, the court orally announced his decision which was transcribed by the stenographer and on which a judgment was entered; *held*, that the defendant against whom the judgment was entered was entitled to have the judgment vacated on his motion and that the order denying the motion to vacate the judgment should be reversed and the question of a new trial be remitted to the special term for action under § 1010: Dobbs v. Brinkerhoff, 98 App. Div. 258.

h. **Demurrer.**—An order overruling a demurrer and directing the entry of an interlocutory judgment is a sufficient "decision in writing" to meet the requirements of §§ 1010 and 1021, though the more correct practice is to make and file a decision which shall be such in form as well as in effect: Vincent v. Stearns, 47 Misc. 95.

i. **Interlocutory judgment.**—§ 3239, subd. 2, contemplates an order granting or refusing a new trial on the merits, when an appeal from both the judgment and order are unnecessary and does not

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apply to an appeal from an interlocutory judgment and an appeal from an order denying a motion for a new trial made under § 1010: Garrett v. Wood, 61 App. Div. 293.

a. **Designation appellate division.**—Where the trial judge has announced his decision in an equity case, but has not signed nor filed it, and has then been appointed to the appellate division, he is disqualified from proceeding further in the case and the cause cannot await the time when his designation expires, as the decision must be filed within twenty days according to the provisions of this section: Williamson v. Randolph, 111 App. Div. 539.

b. **Prerequisite.**—In cases tried without a jury, whether in equity or at law, there must be a decision signed by the court directing the judgment to be entered. Such a decision, signed and filed by the trial judge, is the basis for the judgment and a necessary prerequisite to the entry thereof: Wise v. Cohen, 113 App. Div. 859; 99 N. Y. Supp. 663.

§ 1011. Reference by consent; when and how made.

c. **Jurisdiction.**—An order of reference made at special term by a justice, who, at the time, had been appointed to the appellate division, is a nullity and in violation of art. 6, § 2 of the New York Constitution; parties cannot, by consent, confer jurisdiction to make such an order on such justice: Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

d. **Professional services.**—A reference in an action by an attorney for professional services cannot be ordered against objection, even though ninety items of service are claimed; and when the claim involves services rendered in three causes of action, the court cannot require the defendant to consent that the claims be tried as a whole as a condition for not ordering a reference: Moyer v. Village of Nelliston, 110 App. Div. 602.

e. **Fees.**—Where a cause is referred by stipulation, each of the parties is liable for the fees of the referee: Keeler v. Bell, 48 Misc. 427.

f. **Resignation.**—If a referee appointed to hear and determine resigns after having served for a long time but before he has completed his work, such resignation constitutes a "refusal" within the meaning of § 1011 and a new referee should be appointed by the court: Brooklyn H. R. R. Co. v. Brooklyn C. R. R. Co., 105 App. Div. 88.

g. **Municipal court.**—The parties to an action pending in the municipal court of the city of New York cannot, by stipulation, confer jurisdiction on the court to appoint a referee to hear and determine the action: Barber v. Lane, 60 App. Div. 87; 69 N. Y. Supp. 739.

§ 1012. Qualification of the last section.

h. Where a husband sues for a divorce and his wife obtains and is paid temporary alimony and counsel fee, and, after a protracted trial before a referee, the husband succeeds, his motion for judgment on the report should not be denied for the irregularity, at most, that the court appointed the referee by consent of the parties and upon their written stipulation, as the wife is estopped from such an objection: Young v. Young, 38 Misc. 109.

§ 1013. Compulsory reference for the trial of issues; in what cases it may be made.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

i. **Long account.**—Where the gravamen of a complaint is on contract, a reference will be ordered where it appears that a long account must be examined: Price v. Parker, 44 Misc. 582; 90 N. Y. Supp. 98.

j. The court is justified in directing a reference of the issues where the trial would necessarily involve the examination of a long account: Fisher v. Haynes, 62 App. Div. 66; 70 N. Y. Supp. 787.

k. In an action by stockbrokers against a client on an account for stock transactions, issues raised by the pleadings were referable, as the trial would involve the examination of long accounts, and it was proper for the court, over the objection of defendant, to refer the action to a referee to hear and determine: Ames v. French, 83 App. Div. 452; 82 N. Y. Supp. 452.

l. A compulsory reference cannot be ordered merely because the case may possibly involve the examination of a long account, but it must appear with reasonable certainty that it will require such an examination: Leary v. Albany Brewing Co., 66 App. Div. 407; 72 N. Y. Supp. 657.

m. A compulsory reference should not be ordered unless it clearly appears that the trial will necessarily involve the examination of a long account: Malone v. St. Peters and Paul's Church, 172 N. Y. 269.

n. **Equity.**—A compulsory reference cannot be granted in an equitable action unless the trial will require the examination of a long account on either side,

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and the account must be the immediate object of the action or ground of the defense and be involved directly and not merely collaterally: Fromer v. Ottenberg, 36 Misc. 631.

a. **Compulsory reference.**—A compulsory order of reference is not authorized in an action brought by an executrix of a deceased attorney to recover for professional services where the pleadings do not raise the issue as to the performance of such services and only the value is denied: Cantine v. Russell, 168 N. Y. 484, rev'g 62 App. Div. 630; 71 N. Y. Supp. 1139.

b. **Accounting.**—A reference to hear and determine the issue, arising in an action for an accounting, cannot be ordered prior to the entry of an interlocutory judgment directing an accounting: Gibson v. Widman, 106 App. Div. 388.

c. Where an answer interposed in an action in equity for an accounting puts in issue the plaintiff's right to an accounting, the defendants are entitled to have such issue determined upon the trial at special term before a reference can be ordered to take the account: Knox v. Gleason, 63 App. Div. 99; 71 N. Y. Supp. 213.

d. In an action in equity to obtain an accounting a reference will not be ordered until after an issue as to the existence of a contract is determined: Weldon v. Brown, 84 App. Div. 482; 82 N. Y. Supp. 1051.

e. The complaint in an action for an accounting alleged that the parties were copartners and the answer denied the existence of the partnership, and until the issue thus raised is determined, an order of reference under § 1013 cannot be granted: Jones v. Lester, 77 App. Div. 174.

f. Where the complaint in an action alleges the existence of a copartnership between the plaintiff and the defendant, which is denied by the answer, and demands an accounting, the court has no power to order an interlocutory judgment directing an accounting before determining whether or not there existed between the parties a partnership or some other relation entitling the plaintiff to an accounting, and the interlocutory judgment directing the accounting cannot be upheld as an order of reference under § 1013 or § 1015: Kirkwood v. Smith, 72 App. Div. 429; 75 N. Y. Supp. 1016.

g. In an action for an accounting on the breach of a contract by the defendant to pay royalties to the plaintiff for the manufacture and sale of a patented article, and for an injunction restraining the further manufacture of the article by the defendant, the court, against objection, has no power to establish the defendant's liability by an interlocutory judgment, appoint a referee to take proof upon question of damage and direct final judgment upon the coming in of such report: Russell Hardware Co. v. Utica Drop Forge Co., 112 App. Div. 703.

h. **Accounting.**—When a reference will be granted in an action for an accounting: Hill v. Reynolds, 119 App. Div. 689.

i. When, in an action for a partnership accounting, the defendant alleges an adjustment and settlement for accounts, a referee should not be appointed prior to the determination of that issue, for until such determination the court cannot say that a long accounting is involved or that the plaintiff is entitled to a reference: Wynkoop v. Wynkoop, 119 App. Div. 679.

j. In an equitable action for the specific performance of an alleged agreement and for an accounting, when the execution of the agreement is in issue there can be no compulsory reference on the ground that the examination of a long account is involved until the right to the accounting is determined by trial at special term: Cayard v. Texas C. O. & M. Co., 118 App. Div. 299.

k. **Long account.**—When plaintiffs claim on *quantum meruit* for services as accountants for a period of five years, and the services were all performed under one employment and are of the same character, the fact that an itemized daily record thereof is long does not render the case one involving the examination of a long account within the meaning of the statute, and a compulsory reference is not authorized: Smith v. London Assurance Corporation, 114 App. Div. 868; 100 N. Y. Supp. 194, appeal dis. 186 N. Y. 541.

l. A compulsory reference on the ground that a long account is involved is only granted when such account is the immediate object of the action and is directly involved; when it is only to be examined collaterally to fix the amount of damages, a reference will not be ordered against objection: Bentz v. Carleton & Hovey Co., 114 App. Div. 865.

m. Although when the plaintiff sues on contract for a definite sum and the cause of action is denied, the case will not be referred by reason of anything set up in the answer, yet when the defendant admits the allegations of the complaint, but counterclaims for moneys loaned, consisting of 340 items, a reference upon the ground that the examination of a long account is involved is proper: Kindberg v. Chapman, No. 2, 115 App. Div. 154.

n. When a long account is not involved within the meaning of this section: Fowler v. Peck, 51 Misc. 645.

o. To authorize the compulsory reference of the issues in an action upon the ground that the trial will require the examination of a long account, it must be shown that the account is the primary object of the action; that it is made up of the dealings of the parties with one another and that it is not collaterally involved: Aronin v. Phil. Cas. Co., 54 Misc. 630.

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a. **Attorney's services.**—In an action by an attorney for services rendered, a reference should not be ordered where the only questions were the value of the attorney's services and certain issues relating to a counterclaim: Prentice v. Huff, 98 App. Div. 111; 90 N. Y. Supp. 780.

b. In an action by attorneys to recover for professional services where items of disbursements numbered forty-five, the items of services numbered forty, a compulsory reference might be directed upon the application of the plaintiffs pursuant to § 1013: Lewis v. Snook, 88 App. Div. 343; 84 N. Y. Supp. 634.

c. In an action by an attorney against his client for services rendered, a reference will be refused when the defendant has filed a stipulation admitting the rendition of all the items of the account, with the exception of two, and contests only the value of the services: Hoff v. Reid & Co., 110 App. Div. 95.

d. A reference in an action by an attorney for professional services cannot be ordered against objection, even though ninety items of service are claimed; and when the claim involves services rendered in three causes of action, the court cannot require the defendant to consent that the claims be tried as a whole as a condition for not ordering a reference: Moyer v. Village of Nelliston, 110 App. Div. 602.

e. **Default.**—If an action be one to recover money only, the reference is authorized even if the defendant should make default: Black v. Vanderbilt, 70 App. Div. 16, at 25; 74 N. Y. Supp. 1095.

f. **Counterclaim.**—An order denying defendant's motion for a settlement of the issues arising on the counterclaim is an intermediate order which "necessarily affects the final judgment" within the meaning of § 1316, and therefore is reviewable on the appeal from the final judgment particularly as the defendant's time to appeal from such order had not expired when the final judgment was entered: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

g. **Fees.**—A referee appointed to hear, try and determine the issues in an action may decline to deliver his report until he has received payment of his fees, or he may deliver it without receiving such fees and resort to an action at law to obtain what he has earned: Russell v. Lyth, 66 App. Div. 290; 72 N. Y. Supp. 615.

h. **Jurisdiction.**—An order of reference made at special term by a justice, who, at the time, had been appointed to the appellate division, is a nullity and in violation of art. 6, § 2 of the New York Constitution; parties cannot, by consent, confer jurisdiction to make such an order on such justice: Owasco Lake Co. v. Teller, 110 App. Div. 450.

i. **Liquor tax certificate.**—The court has power to order a reference of the issues in a proceeding to cancel a liquor tax certificate: Matter of Cullinan, 109 App. Div. 816; 96 N. Y. Supp. 751.

§ 1014. Proceedings where the reference is for trial of part of the issues.

See § 1226, post, Judgment after determination of specific questions on reference.

j. **Compulsory reference.**—Provisions relating to compulsory reference reviewed; where independent issues are raised by the pleadings they should first be determined as it then may appear that a compulsory reference is not necessary: Malone v. Saints Peter and Paul's Church, 172 N. Y. 269, dismissing appeal, 69 App. Div. 420; 74 N. Y. Supp. 1005.

§ 1015. Compulsory reference upon questions incidentally arising.

See rule 30 (Sup. Ct.), Practice before referee.

See § 969, ante, What issues are triable by court or referee.

See § 3160, post, Certain sections not to apply to New York city court; who a non-resident.

k. The practice of directing references to determine controverted questions of fact arising upon motions, except in very exceptional cases where the facts are complicated and it is manifest that the truth cannot be ascertained with reasonable certainty without an examination of the witnesses, disproved by the court: Weinberger v. Metropolitan Traction Co., 63 App. Div. 240; 71 N. Y. Supp. 289.

l. **Accounting.**—Where the complaint in an action alleges the existence of a copartnership between the plaintiff and the defendant, which is denied by the answer, and demands an accounting, the court has no power to order an interlocutory judgment directing an accounting before determining whether or not there existed between the parties a partnership or some other relation entitling the plaintiff to an accounting, and the interlocutory judgment directing the accounting cannot be upheld as an order of reference under § 1013 or § 1015: Kirkwood v. Smith, 72 App. Div. 429; 75 N. Y. Supp. 1016.

m. In an action in equity to obtain an accounting a reference will not be ordered until after an issue as to the existence of the contract is determined: Weldon v. Brown, 84 App. Div. 482; 82 N. Y. Supp. 1051.

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a. **Motion.**—A reference ordered on a motion construed to be to hear and report and not one to hear and determine: Rovnianek v. Kossalko, 61 App. Div. 486; 70 N. Y. Supp. 36.

b. **Liquor tax certificate.**—In a proceeding to revoke a liquor tax certificate, if the certificate holder defaults on the return of the order to show cause, the court may order a reference to take proof and report: Matter of Cullinan (Watson certificate), 93 App. Div. 540; 87 N. Y. Supp. 817.

c. A report of a referee appointed to take and state the accounts of an assignee for the benefit of creditors, which is filed after the death of the assignee, is a nullity, but the administrator or sureties of the deceased assignee may avail themselves of § 1019 and elect to end the reference, on the ground that the referee's report was not filed or delivered to the attorneys of one of the parties within sixty days from the time the case was finally submitted: Matter of Venable, 111 App. Div. 508.

d. **Liquor tax certificate.**—An application to cancel a liquor tax certificate under the provisions of § 28 of the Liquor Tax Law is a special proceeding, and when an issue of fact has been raised by the answer, the court may appoint a referee to take proof of matters alleged in the petition and answer and report the evidence to the court: Matter of Lawson, 109 App. Div. 195; 96 N. Y. Supp. 33.

e. The court has power to order a reference of the issues in a proceeding to cancel a liquor tax certificate: Matter of Cullinan, 109 App. Div. 816; 96 N. Y. Supp. 751.

f. **Transfer tax.**—In a proceeding to appraise the estate of a decedent for the purpose of levying a transfer tax, the surrogate has power to appoint a referee to take testimony and report on the question of the residence of the decedent: Matter of Bishop, 111 App. Div. 545.

g. **Accounting.**—In an action for an accounting on the breach of a contract by the defendant to pay royalties to the plaintiff for the manufacture and sale of a patented article, and for an injunction restraining the further manufacture of the article by the defendant, the court, against the objection, has no power to establish the defendant's liability by an interlocutory judgment, appoint a referee to take proof upon the question of damages and direct final judgment upon the coming in of such report: Russell Hardware Co. v. Utica Drop Forge Co., 112 App. Div. 703.

h. **Partnership.**—When a complaint asks for a partnership accounting and the answer admits the facts which show that an accounting is necessary, the plaintiff is entitled to an interlocutory judgment appointing a referee, or the court may direct such reference under § 1015: Blun v. Mayer, 113 App. Div. 242; 99 N. Y. Supp. 22.

§ 1016. Referee to be sworn.

See § 1011, ante, Reference by consent; when and how made.

See § 1013, ante, Compulsory reference for the trial of issues; in what court it may be made.

§ 1018. General powers of a referee upon a trial.

See rule 30 (Sup. Ct.), Practice before referee.

See § 723, ante, Amendments by the court; disregarding immaterial errors, etc.

See § 993, ante, Exceptions to findings of fact.

See § 994, ante, When and how exceptions may be taken, after close of trial by court or referee.

i. Power of referee under chap. 69 of 1899, an act to prevent monopolies and to prohibit restraints of trade, considered: Matter of Davies, 168 N. Y. 89; 32 Civ. Pro. R. 163.

j. **Amendments.**—A referee appointed to hear and determine, has, upon the trial of the action, power to permit amendments to the complaint subject to the limitation that the amendment allowed does not change substantially the cause of action or set forth a new cause of action: Barnum v. Williams, No. 1, 91 App. Div. 464; 86 N. Y. Supp. 821.

k. A referee has the same power to permit amendments of pleadings upon the reference as the court has upon a trial: Perry v. Levenson, 82 App. Div. 94; 81 N. Y. Supp. 586.

l. **Partition.**—When, in an action for partition, the defendant consents that the referee pass upon a motion to conform the complaint to the proof, he cannot on appeal contend that that referee had no power to entertain the motion. Moreover, a referee has that power under §§ 723 and 1018: Perkins v. Stoors, 114 App. Div. 322.

m. When, in an action for an accounting, the referee has not yet signed his report, it is an abuse of discretion to deny an application by the defendant to open the case so as to allow him to introduce proof as to a certain item concerning which he had assumed there was no dispute: Gottler v. Dole, 109 App. Div. 583.

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§ 1019. Referee's report; when to be made; consequence of failure.

See § 994, ante, Exception to referee's report.

See § 1237, post, Referee's report to be inserted in judgment-roll.

See § 1346, post, Judgment rendered upon a trial by referee appealable.

See § 3296, post, Referee's fees.

a. **Report rendered.**—A report of a referee which was signed but which was not filed or delivered to the attorney for one of the parties to the action as required by § 1019, is not rendered within the meaning of §§ 763 and 765, providing that if either party dies after the report has been rendered, the court may enter final judgment in the names of the original parties: Clark v. Pemberton, 64 App. Div. 416; 72 N. Y. Supp. 232.

b. If an insufficient report is delivered by a referee within the sixty days allowed by § 1019, either party is entitled to have the reference terminate: Lederer v. Lederer, 108 App. Div. 228; 95 N. Y. Supp. 623.

c. A report of a referee appointed to take and state the accounts of an assignee for the benefit of creditors, which is filed after the death of the assignee is a nullity, but the administrator or sureties of the deceased assignee may avail themselves of § 1019 and elect to end the reference, on the ground that the referee's report was not filed or delivered to the attorneys of one of the parties within sixty days from the time the case was finally submitted: Matter of Venable, 111 App. Div. 508.

d. **Attorney.**—Where an attorney dies after the case has been submitted to a referee, there is no provision of § 65 which prevents such referee from delivering his report, particularly if the thirty days specified in § 65 would not expire until after the sixty days allowed the referee under § 1019 in which to make his report: Agricultural Insurance Co. v. Darrow, 70 App. Div. 413.

e. **Accounting.**—The court cannot compel executors to take up a referee's report on an accounting: Morrow v. McMahon, 71 App. Div. 171; 75 N. Y. Supp. 534.

f. When, in an action for an accounting, the referee has not yet signed his report, it is an abuse of discretion to deny an application by the defendant to open the case so as to allow him to introduce proof as to a certain item concerning which he had assumed there was no dispute: Gottler v. Dole, 109 App. Div. 583.

g. **Fees.**—A referee appointed to hear, try and determine the issues in an action may decline to deliver his report until he has received payment of his fees, or he may deliver it without receiving such fees and resort to an action at law to obtain what he has earned; each of the parties to the action, including those who protested against the ordering of a reference, is liable for the fees of the referee regardless of the fact that the judgment entered upon his report was reversed by the appellate division: Russell v. Lyth, 66 App. Div. 290; 72 N. Y. Supp. 615.

h. Where a contested application for an increase of the bond of administrators is referred by the surrogate for the taking of testimony and by stipulation the fees of the stenographer are made a part of the referee's fees and payable out of the estate, the administrators are not individually liable for the referee's fees: Bottome v. Neely, 54 Misc. 258.

i. **Termination of reference.**—A party may not, under § 1019, terminate a reference within sixty days after the time when he submits to the referee his proposed findings of fact and conclusions of law. As to him the time within which the referee is required to make his report will not begin to run before the date of such submission: Burritt v. Burritt, 53 Misc. 26.

§ 1021. Decision of court or report of referee, upon trial of demurrer.

j. **Demurrer.**—Where the appellate division sustains a demurrer to a complaint which the special term had overruled, but gives no direction for the final or interlocutory judgment, and the clerk enters an interlocutory judgment simply reversing the judgment appealed from and sustaining the demurrer, with leave to amend, no direction for final judgment having been given, a motion by the defendants who demurred, for an order directing judgment dismissing the complaint against them, is proper and should be granted: McCrea v. Robinson, 51 Misc. 330.

k. The decision of the court upon a demurrer to a counterclaim or a defense consisting of new matter contained in the answer on the ground that it is insufficient upon the fact thereof is prescribed by § 1021: Gabay v. Doane, 66 App. Div. 507; 73 N. Y. Supp. 381.

l. An order overruling a demurrer and directing the entry of an interlocutory judgment is a sufficient decision in writing to meet the requirements of §§ 1010 and 1021, though the more correct practice is to make and file a decision which shall be such in form as well as in effect: Vincent v. Stearns, 47 Misc. 95.

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§ 1022. Id.; upon trial of the whole issue of fact.

The decision of the court or the report of a referee upon the trial of the whole issues of fact, must state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, which decision so filed shall form part of the judgment-roll. In an action where the costs are in the discretion of the court the decision or report must award or deny costs, and if it awards costs it must designate the party to whom the costs to be taxed are awarded.

Co. Proc., §§ 267, 272.

Amended by chap. 416 of 1877, chap. 688 of 1894, chap. 946 of 1895 and chap. 85 of 1903.

See § 993, ante, Exceptions to finding of fact.

See § 994, ante, Exceptions to report, how taken.

a. **Effect.**—Effect of §§ 1022-1023 before the amendments to the sections by chap. 491 of 1904 — discussed: Mutual Milk and Cream Co. v. Tietjen, 89 N. Y. Supp. 391; 34 Civ. Pro. R. 29.

b. **Decision.**—Where, on a jury trial, the jury is discharged, and the trial proceeds before the court, no judgment can be entered until the court has made and filed, as required by § 1022, a decision disposing of the issues and directing the entry of judgment; neither an entry in the clerk's minutes to the effect that a verdict was directed for the defendant, nor an opinion of the trial court in which he states, "there must be judgment for the defendant," can take the place of the formal decision required by the Code of Civil Procedure: Electric Boat Co. v. Howey, 96 App. Div. 410; 89 N. Y. Supp. 210.

c. A decision under this section should not contain a long and detailed statement of the facts proved on the trial: Storm v. McGrover, 70 App. Div. 33; 74 N. Y. Supp. 1032.

d. Before the amendment by chap. 85 of 1903 of § 1022, there was the long and short form of a decision of the court or referee; on an appeal from the short form the court of appeals was required to assume that the facts necessary to support the judgment were found but, on appeal from the long form unanimously affirmed by the appellate division, the facts are established as found and the court of appeals must determine whether the facts authorize the decision: Ide v. Brown, 178 N. Y. 26, rev'g 87 App. Div. 609; 83 N. Y. Supp. 1108.

e. As provided by § 1022, the decision of the trial court states separately the facts found and the conclusions of law and directs judgment to be entered thereon: Dunlap v. Young, 174 N. Y. 327.

f. The decision of a court or the report of a reference to hear and determine must state all the facts found by the justice or referee, and a decision or report defective in this respect will be sent back for correction: Hudson & Manhattan R. R. Co. v. Jackson, 115 App. Div. 168; 100 N. Y. Supp. 737.

g. **Short form.**—Where a judge, who is no longer on the bench, handed down a decision in short form permitted by § 1022 which did not state, as required by § 1022, the ground upon which the complaint was dismissed, a new trial should be granted: Gein v. Little, 86 App. Div. 503.

h. A judgment based upon the short decision permitted by § 1022 of the Code should be upheld, notwithstanding the fact that the grounds specified in such decision are insufficient to warrant the judgment. Such a decision without findings was declared to be tantamount in fact to the general verdict of a jury: Gardner v. New York Mut. S. & L. Assn., 67 App. Div. 141; 73 N. Y. Supp. 604.

i. Upon an appeal from a judgment entered on a decision in the short form authorized by § 1022 as it stood prior to its amendment by chap. 85 of the Laws of 1903, the appellate division is required to review all questions of fact and of law, and may grant such judgment to either party as the facts may warrant without ordering a new trial: Multz v. Price, 91 App. Div. 116.

j. A decision by the trial court which does not state separately the facts found and the conclusions of law is the short form permitted by the amendment to § 1022 by chap. 688 of 1894: Jefferson County National Bank v. Dewey, 181 N. Y. 98.

k. Since the amendment of this section by chap. 85 of 1903, abolishing the short form of decision, such form is not proper, and a judgment based thereon must be reversed: Raymond v. Security Trust and Life Ins. Co., 111 App. Div. 189.

l. A report of a referee appointed to hear and determine the issues arising in an action which does not state separately the facts found and the conclusions of law as required by § 1022 is insufficient to constitute the basis of a valid judgment: Lederer v. Lederer, 108 App. Div. 228; 95 N. Y. Supp. 623.

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a. Even where the decision is in the short form provided for by § 1022, the appellate division will examine the findings and ascertain whether they were justified by the evidence: Kalish v. Higgins, 70 App. Div. 192; 33 Civ. Pro. R. 6; 75 N. Y. Supp. 397.

b. **Opinion.**—An unsigned opinion written by a justice who presided at the trial with a direction for relief at the end of such opinion cannot take the place of the decision required by § 1022, and, where the judgment was entered without such decision, the judgment will be reversed and the case remitted to the special term for a decision: Kent v. Common Council, 90 App. Div. 553; 86 N. Y. Supp. 411.

c. **Assumption.**—When a short decision is filed pursuant to § 1022, the appellate division is required to assume that the referee found every fact and conclusion of law necessary to sustain it which the evidence warranted: Payn v. Stokes, 62 App. Div. 624; 71 N. Y. Supp. 133.

d **Jurisdiction.**—While a case is pending, a referee has jurisdiction over the action, he has the right in connection with making his report and decision to settle the form of the judgment for, after the report has been taken up and filed, the referee is *functus officio* and has no further jurisdiction for the purpose of deciding any issue involved in the action: Schrady v. Van Kirk, 77 App. Div. 261; 33 Civ. Pro. R. 168.

e. **Surrogate.**—Where a surrogate appoints a referee to examine an executor's account and to hear the questions arising upon the objections thereto, the reference is governed by § 2546 and the report of the referee is subject to confirmation or modification by the surrogate, and the referee may, under § 1022, file a short decision: Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755.

f. Where the surrogate has failed to make and file findings as required by law, the proper practice for the appellate division is to remit the case to the surrogate as an undecided case in order that he may make such findings: Matter of Sherwood, 75 App. Div. 342; 78 N. Y. Supp. 186.

g. While a referee appointed by a surrogate to take and state an account must separately state and number his findings of fact and conclusions of law, yet when he has substantially done so by making a report with numbered paragraphs in which each successive issue is taken up, the facts stated and a conclusion reached, a subsequent motion to open the surrogate's decree thereon for the making of more formal findings and conclusions is properly denied: Matter of Schroeder, No. 2, 113 App. Div. 221.

h. **Appellate division.**—The appellate division has no power, where the trial justice has filed his decision stating concisely the grounds thereof, to incorporate into an order, modifying the judgment, certain findings of fact and conclusions of law since under this section the trial court or referee has the exclusive power to formulate the decision upon the issues: Cutter v. Gudebrod Bros. Co., 168 N. Y. 512, aff'g 44 App. Div. 605; 61 N. Y. Supp. 225.

i. **Statute of limitations.**—A finding in short form by a trial court that a cause of action was not barred by the statute of limitations, which was unanimously affirmed, precludes the court of appeals from determining when the cause of action did arise: Hutton v. Smith, 175 N. Y. 375, aff'g 74 App. Div. 284; 77 N. Y. Supp. 523.

j. **Equity.**—There is no statute or practice which requires insertion, in a decision in equity in favor of the plaintiff, of the reasons why defenses set up in the answer are not sustained, nor need the justice write an opinion in the case: Brady v. Williams, 35 Misc. 435; 71 N. Y. Supp. 972.

k. **Negligence.**—Where an action for negligence is tried before a court without a jury by consent of the parties, and the court files a short decision authorized by § 1022, exceptions taken on the trial may be reviewed on appeal to the appellate division, even though the defeated party did not file an exception to such short decision: Piltz v. Yonkers Railroad Co., 83 App. Div. 29; 82 N. Y. Supp. 220.

l. **Partition.**—The authority for the entry of an interlocutory judgment in an action of partition must be found in the decision of the court made upon the trial of the issues: Levine v. Goldsmith, 71 App. Div. 204; 75 N. Y. Supp. 706.

m. **Mandamus.**—Where an issue of fact, joined upon an alternative writ of mandamus, is tried before a judge without a jury, the parties having waived a jury trial, it is the duty of the trial judge to make and file findings or a short decision: People ex rel. Havron v. Dalton, 77 App. Div. 499; 78 N. Y. Supp. 1051.

n. A finding by the court that certain goods were ordered, but not "delivered," is not equivalent to a finding that the vendor has broken the contract, as such finding may mean only that the vendor refused to turn over the goods, which he had a right to do: Williams v. Wilson & McNeal Co., 111 App. Div. 442.

o. **Practice.**—It is commendable practice, for the purpose of preserving a continuity of statement, to include in the findings of fact a complete story of the transaction, so far as the same is material, and can be given from the facts admitted in the pleadings or determined upon the trial of the whole issues of fact, but the statutes do not require findings of fact, except upon the issues tried: Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, rev'g 101 App. Div. 609; 92 N. Y. Supp. 1130.

p. **Judgment.**—When judgment entered upon decision made at the close

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of plaintiff's case constitutes judgment on the merits: Keyes v. Smith, 183 N. Y. 376, aff'g 94 App. Div. 614; 88 N. Y. Supp. 1105.

a. Where the court, upon the trial of an action, instead of finding either way upon the crucial question of fact in the case, simply found the evidence as given by the witnesses upon that question and then drew a conclusion, which, upon the record as it stands, is unsupported by any finding of fact, the judgment entered thereon must be reversed: Dougherty v. Lion Fire Ins. Co., 183 N. Y. 302, rev'g 95 App. Div. 618; 88 N. Y. Supp. 1096.

b. **Insufficient.**—What decision was insufficient before the amendment of 1903: Miller v. N. Y. & N. S. Ry Co., 183 N. Y. 123, rev'g 92 App. Div. 613; 86 N. Y. Supp. 1141.

c. **Appeal.**—No appeal from a decision of a court is allowed by the Code of Civil Procedure, and such an appeal will be dismissed, with costs: Rees v. N. Y. Herald Co., 112 App. Div. 456.

d. **Refusal to find.**—When refusal to make findings as requested is not equivalent to finding to the contrary: Morehouse v. Brooklyn Heights R. R. Co., 185 N. Y. 520, rev'g 102 App. Div. 627; 92 N. Y. Supp. 1134.

e. **Insanity.**—Upon a motion to vacate a judgment for the insanity of the referee, where it appears that the referee, on the day he signed his decision, was duly adjudged a lunatic, in a proceeding instituted in the supreme court, upon the petition of his wife, and the certificates of two duly qualified medical examiners in lunacy, it is error to receive the affidavits of non-experts as to the mental condition of the referee prior to and including the date of the inquisition in lunacy; and an order denying the motion to vacate the judgment will be reversed: Schoenberg & Co. v. City T. & S. D. Co., 52 Misc. 104.

§ 1023. Parties may require court or referee to determine particular questions.

Before the cause is finally submitted to the court or the referee, or within such time afterwards, and before the decision or report is rendered, as the court or referee allows, the attorney for either party may submit, in writing, a statement of the facts, which he deems established by the evidence, and of the rulings upon questions of law, which he desires the court or the referee to make. The statement must be in the form of distinct propositions of law, or of fact, or both, separately stated; each of which must be numbered, and so prepared, with respect to its length, and the subject and phraseology thereof, that the court or referee may conveniently pass upon it. At or before the time, when the decision or report is rendered, the court or the referee must note, in the margin of the statement, the manner in which each proposition has been disposed of, and must either file, or return to the attorney, the statement thus noted; but an omission so to do does not affect the validity of the decision or report. An exception may be taken to a refusal of the court or referee to find any request thus submitted.

Repealed by chap. 688 of 1894.
Added by chap. 491 of 1904.

f. **Effect of §§ 1022-1023 before the amendments to the sections by chap. 491 of 1904 — discussed:** Mutual Milk and Cream Co. v. Tietjen, 39 N. Y. Supp. 291; 34 Civ. Pro. R. 29.

g. **Unanimous affirmance.**—An exception to the rule that the unanimous affirmance of a judgment by the appellate division precludes the court of appeals from looking into the record for facts not contained in the findings is not warranted by the fact that the plaintiffs, in an action decided before the re-enactment of this section, did not have an opportunity to obtain at special term a ruling upon additional facts which they deemed established by the evidence: Jacobson v. Brooklyn Lumber Co., 184 N. Y. 152, rev'g 101 App. Div. 609; 92 N. Y. Supp. 1130.

h. While the appellate division will review an exception taken under § 1023, the court of appeals will not review such exception where the fact which the trial court was requested to find is a fact directly in conflict with a fact actually found by the trial court as the

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basis of its decision, or a fact which would necessarily nullify such finding and where the finding of fact as made has the support of a unanimous affirmance by the appellate division: LeGendre v. Scottish Ins. Co., 183 N. Y. 392.

a. **Findings.**—In trials by the court or before a referee, the formal decision directing a judgment must contain every finding of fact made by the justice or referee, and no fact not thus incorporated in the decision forms any part of the judgment roll or the case on appeal, or can be considered for any purpose by the appellate court. A party has no right to incorporate in a judgment roll or case on appeal his requests to find submitted to the court or referee under § 1023 unless the court refuses to find, in which case the requests refused may be inserted in the appeal book, unless incorporated in the decision: Elterman v. Hyman, 117 App. Div. 519; 102 N. Y. Supp. 613.

§ 1024. Qualifications of a referee.

A referee, appointed by the court, must be free from all just objection; and no person shall be so appointed, to whom all the parties object, except in an action to annul a marriage, or for a divorce, or a separation. A judge cannot be appointed a referee, in an action brought in a court, of which he is a judge, except by the written consent of the parties; and, in that case, he cannot receive any compensation as referee. No person shall be appointed a commissioner of estimate and appraisement in condemnation or street opening proceedings or referee, in the first or second judicial districts, in an action or special proceeding, who holds the position of clerk, private secretary, secretary, or stenographer to any justice or judge of a court of record, or to any board of justices or judges of such a court in any department where such justice or judge is engaged in the discharge of the duties of his office.

Co. Proc., part of § 273.

Amended by chap. 435 of 1905.

See Art. VI, § 20, N. Y. Const., Certain judges not to act as referees.

See § 90, ante, Clerk of a court of record within the county of New York not to be appointed referee.

See § 2495, post, Surrogate of Monroe county not to be appointed referee.

See § 2509, post, Clerks in surrogate's courts not to act as referees.

§ 1027. Qualifications of trial jurors.

In order to be qualified to serve as a trial juror, in a court of record, a person must be:

1. A male citizen of the United States, and a resident of the county.
2. Not less than twenty-one nor more than seventy years of age.
3. Assessed, for personal property, belonging to him, in his own right, to the amount of two hundred and fifty dollars; or the owner of a freehold estate in real property, situated in the county, belonging to him in his own right, of the value of one hundred and fifty dollars; or the husband of a woman who is the owner of a like freehold estate, belonging to her, in her own right, except that in the county of Queens a person, to be qualified to serve as such trial juror, shall possess the property qualifications specified in subdivision 3 of section 1126.
4. In the possession of his natural faculties, and not infirm or decrepit.
5. Free from all legal exceptions; of fair character, of approved integrity; of sound judgment; and well informed.

From 2 R. S. 411 (Part 3, chap. 7, tit. 4), § 13.

Amended by chap. 321 of 1895 and chap. 194 of 1907.

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§ 1030. Persons entitled to claim exemption from service.

Each of the following persons, although qualified, is entitled to exemption from service, as a trial juror, upon his claiming exemption therefrom:

1. A clergyman, or a minister of any religion, officiating as such, and not following any other calling.

2. A resident officer of, or an attendant, assistant, teacher, or other person, actually employed in, a state asylum for lunatics, idiots, or habitual drunkards.

3. The agent or warden of the state prison; the keeper of a county jail; or a person actually employed in a state prison or county jail and the keeper of every almshouse.

4. A practicing physician or surgeon, having patients requiring his daily professional attention, a licensed pharmacist actually engaged in his profession as a means of livelihood, a duly registered veterinary surgeon actually engaged in his profession as a means of livelihood, and a duly licensed embalmer actually engaged in his profession as a means of livelihood.

5. An attorney or counsellor at law, regularly engaged in the practice of the law as a means of livelihood.

6. A professor or teacher, in a college or academy, or an editor, editorial writer, artist or reporter of a daily newspaper or press association regularly employed as such and not following any other vocation.

7. A person actually employed in a glass, cotton, linen, woollen, or iron manufacturing company, by the year, month, or season.

8. A superintendent, engineer, or collector, on a canal, authorized by the laws of the state, which is actually constructed and navigated.

9. A master, engineer, assistant engineer, or fireman, actually employed upon a steam vessel, making regular trips.

10. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company; or an operator, or assistant operator, employed by a press association or a telegraph company; who is actually doing duty in an office, or along the railroad or telegraph line of the company or association, by which he is employed.

11. An officer, non-commissioned officer, musician, or private of the national guard of the state, performing military duty; or a person, who has been honorably discharged from the national guard, after five years' service, in either capacity.

12. A person who has been honorably discharged from the military forces of the state, after seven years' faithful service therein. But in order to entitle a person to exemption, under this subdivision, his service must have been performed before the 23d day of April, 1862, either as a general or staff officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop of the militia of the state, and armed, uniformed, and equipped, according to law; or a

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portion thereof, during that period and in that capacity, and the remainder, since the 23d day of April, 1862, as a member of the national guard of the state.

13. A member of a fire company, or fire department, duly organized according to the laws of the state, and performing his duties therein; or a person who, after faithfully serving five successive years in such a fire company, or fire department, has been honorably discharged therefrom.

14. A duly licensed engineer of steam boilers, actually employed as such.

15. A person otherwise specially exempted by law.

2 R. S. 415 (Part 3, c. 7, tit. 4), § 33, subds. 4, 5, 6, 7, 8, and § 35, subd. 1; L. 1861, c. 215.

Amended by chap. 542 of 1879, chap. 400 of 1883, chap. 532 of 1895, chap. 566 of 1896, chap. 291 of 1902, chap. 416 of 1904, chap. 437 of 1905.

a. It is not necessary that a veteran should be a member of the fire department officially connected with the municipality; it is sufficient if he is a member of an incorporated fire company, the object of which is to render the public services in the extinguishment of fires: People ex rel. Kenny v. Folks, 89 App. Div. 171; 85 N. Y. Supp. 1100.

§ 1035. Certain town officers to make lists of trial jurors.

b. The commissioner of jurors in the county of Kings is not a county, but a local officer, aiding in the administration of justice within a prescribed territorial limitation by obtaining, under the supervision and direction of the court, qualified jurors for it: Matter of Brenner, 35 Misc. 212; 70 N. Y. Supp. 744.

§ 1042. When and how many jurors for courts of record to be drawn.

On a day designated by the county clerk, not less than fourteen nor more than twenty-one days before the day appointed for holding each trial term of the supreme court; or of the county court, except a term designated for the hearing and decision of motions and trial and other proceedings without a jury; or of a mayor's or recorder's court, at which issues are triable by a jury; or on the day to which the drawing is adjourned, as prescribed in section ten hundred and forty-five of this act, the clerk of the county, in which the term is to be held, in case such county contains less than one hundred thousand inhabitants, must draw the names of thirty-six persons, and in counties containing one hundred thousand inhabitants or over, the names of forty-eight persons, and any additional number ordered according to law, to serve as trial jurors at the term; provided, however, that in the county of Queens, unless otherwise directed by the judge designated to preside at or hold the term, forty trial jurors shall be drawn for services in each week of each and every trial or jury term of the supreme court and county court appointed to be held in said county; the presiding judge of any trial or jury term may also during the progress of such term order an additional panel of jurors to be drawn for service at such term or for any part or portion thereof. The forty trial jurors first drawn for a term, or such other number as the judge appointed to hold or preside at the term directs, must

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be notified to be present during the first six days of the term, and the forty trial jurors next drawn, or such other number as the judge directs, must be notified to be present during the next six days of the term, and a like number during each succeeding six days. The judge holding or presiding at the term, may in his discretion, on the application of a trial juror, excuse him from the whole, or a part of the time of service required of him. The judge may also change the time of service of a juror to a later day during the same, or a subsequent term of the court. Each juror whose time of service is changed to a day certain, must attend at the opening of court on that day, and thereafter until discharged, without further notice. If he fails so to do he is liable to the same punishment as if he had been personally notified by the sheriff to attend the term, and to be present on that day. The clerk of the court must enter in a book kept for that purpose the name of each juror who is so excused, or whose time of service is changed.

2 R. S. 413, § 24.

Amended by chap. 434 of 1894, chap. 946 of 1895, chap. 613 of 1904 and chap. 193 of 1907.

§ 1044. Sheriff and county judge to attend drawing.

At the time so appointed the sheriff of the county, or his under sheriff, and the county judge, or, if notice has been served upon any other officer, in the absence or illness of the latter, as prescribed in the last section, either the county judge or that officer or either of the other officers mentioned in the last section, must attend at the clerk's office of the county to witness the drawing of the jurors. In the counties of Queens and Richmond there must be allowed to each judge, including each justice of the supreme court, for the services performed by him, as prescribed in this article, such compensation, as the board of estimate and apportionment of the city of New York deems reasonable and proper. Such compensation at the sum allowed and established for justices of the supreme court prior to the year nineteen hundred and one is continued; except that from and after July first, nineteen hundred and six, it may be increased in amount to a sum not to exceed the amount now paid for additional compensation to the justices of the supreme court resident in the first judicial department. The board of estimate and apportionment of the city of New York may so fix the same, and shall raise and provide the money to pay the said compensation.

2 R. S. 413, § 26.

Amended by chap. 342 of 1896 and 629 of 1906.

§ 1063. What courts may order a special jury to be struck.

a. The proceeding relating to the selection of a special jury, under §§ 1063-1069, must be strictly followed and every direction must be complied with; the commissioners must strike a trial jury in the presence of the parties or their attorneys and must familiarize himself with the issue: Industrial & General Trust, Ltd., v. Tod, 104 App. Div. 517; 34 Civ. Pro. R. 287.

§ 1069. Party applying for special jury to pay expenses.

a. The proceedings relating to the selection of a special jury, under §§ 1063-1069, must be strictly followed and every direction must be complied with; the commissioners must strike a trial jury in the presence of the parties or their attorneys and must familiarize himself with the issue: Industrial & General Trust, Ltd., v. Tod, 104 App. Div. 517; 34 Civ. Pro. R. 287.

§ 1079. Qualifications of trial jurors.

b. Qualifications of a trial juror are prescribed by §§ 1079 and 1080: People v. Scannell, 37 Misc. 345; 75 N. Y. Supp. 500.

§ 1081. Persons exempt from service.

Either of the following persons, although qualified, is entitled, to an exemption from service as a trial juror, upon his claiming an exemption, as prescribed in this article:

1. A clergyman, or a minister of religion, officiating as such, and not following any other calling.

2. A practicing physician, surgeon, or surgeon dentist, having patients requiring his daily professional attention, not following any other calling; a licensed pharmaceutist or pharmacist, while actually engaged in his profession as a means of livelihood; a duly registered veterinary surgeon actually engaged in his profession as a means of livelihood, and a duly licensed embalmer actually engaged in his profession as a means of livelihood.

3. An attorney or counsellor at law, regularly engaged in the practice of the law as a means of livelihood.

4. A professor or teacher in a college, academy, or public school, not following any other calling, or an editor, editorial writer, or reporter of a daily newspaper or press association regularly employed as such and not following any other vocation.

5. The holder of an office under the United States, or the state, or the city or county of New York, whose official duties, at the time, prevent his attendance as a juror.

6. A consul of a foreign nation.

7. A captain, engineer, or other officer, actually employed upon a vessel, making regular trips; or a licensed pilot actually following that calling.

8. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railroad company; or a telegraph operator employed by a press association or a telegraph company, who is actually doing duty in an office, or along the railroad or telegraph line of the company or association by which he is employed.

9. A grand juror or a sheriff's juror, for the year, selected pursuant to law.

10. Any officer, non-commissioned officer, musician, or private, actually serving in a brigade, regiment, battalion, company, or troop, of the Old Guard of the city of New York or of the National Guard of the state, uniformed and equipped according to law and faithfully performing his

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duty by making the parades, and attending the drills, inspections, and reviews, required by law; or a general or staff officer, actually performing duties as such; or a person who has been honorably discharged from the National Guard after five years' service in either capacity.

11. A person who has been honorably discharged from the military forces of the State after seven years' faithful service therein. But in order to entitle a person to exemption under this subdivision, his service must have been performed before the 23d day of April, 1862, either as a general or staff officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop, of the militia of the state, and armed, uniformed, and equipped, according to law; or a portion thereof during that period and in that capacity, and the remainder, since the 23d day of April, 1862, as a member of the National Guard of the State.

12. A person who, after faithfully performing the duties of a fireman in a fire company or fire department, duly organized according to the laws of the State, for five successive years, has been honorably discharged therefrom.

13. A person who is physically incapable of performing jury duty by reason of severe sickness, deafness or other physical disorder.

14. A person, holding office under the fire or police department of the city, or otherwise specially exempted by law.

15. A duly licensed engineer of steam boilers, actually employed as such.

L. 1870, c. 539, §§ 6, 8; L. 1872, c. 535; L. 1873, c. 335, §§ 53, 77.

Amended by chap. 416 of 1877, chap. 542 of 1879, chap. 67 of 1880, chap. 296 of 1889, chap. 512 of 1890, chap. 318 of 1898, chap. 205 of 1899, chap. 291 of 1902, chap. 416 of 1904 and chap. 437 of 1905.

a. **Veteran.**—It is not necessary that a veteran should be a member of the fire department officially connected with the municipality; it is sufficient if he is a member of an incorporated fire company, the object of which is to render the public service in the extinguishment of fires: People ex rel. Kenny v. Folks, 89 App. Div. 171; 85 N. Y. Supp. 1100.

§ 1086. Juror to be excused from service; commissioner to provide additional box.

A person liable to serve as a trial juror may be excused from service during a time or times specified in writing and not exceeding in the aggregate three months in any one jury year when sufficient cause therefor is shown. At any time for which a juror is duly drawn and notified he may be so excused only by the judge presiding at the term and part for which he is drawn. At any other time he may be so excused by the commissioner of jurors. The commissioner of jurors shall provide a box in addition to the two boxes mentioned in section 1097 of this act and shall therein and in neither of the other boxes deposit all, and only, the ballots containing the names of jurors excused pursuant to this section. A ballot containing the name of any juror so excused shall not be kept in said box during the time for which he is so excused. The third box to be provided under this

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section shall be dealt with next after the non-voters box and all the ballots be drawn therefrom before any of the ballots in the box known as the voters box shall be drawn.

Id., remainder of § 1.
Amended by chap. 44 of 1905.

a. A challenge to a panel because the jurors were excused on their unsworn statements is properly overruled, although it is irregular under this section where it is not shown that such action was prejudicial to the defendant: People v. Schmidt, 168 N. Y. 568.

§ 1094. List of jurors to be prepared, etc.; commissioner to decide as to exemptions.

The commissioner must commence the preparation of lists of trial jurors, in the month of May, in each year. For that purpose, he must proceed as follows: He must prepare, or must cause to be carefully prepared, two separate lists, instead of the one list as heretofore required by law. Both of said lists shall be kept, in all respects, in the same manner as the one list heretofore required by law to be kept. One of said lists shall contain the names, alphabetically arranged, with the occupation, place of business and residence, as far as those particulars can be conveniently ascertained, of each of those persons, eligible as trial jurors, who have not duly registered in the last preceding election for city, county or state offices; and said list shall be distinctly marked and known as the "non-voters list." The other of the said lists shall contain the names, alphabetically arranged, with the occupation, place of business and residence, so far as those particulars can be conveniently ascertained, of each of those persons, eligible to serve as trial jurors, who have duly registered in the last preceding election for city, county or state offices, and said last mentioned list shall be distinctly marked and known as the "voters list." For the purpose of ascertaining whether any person, liable to serve as a trial juror, has registered as aforesaid, the said commissioner of jurors may consult the published lists of those who have so registered, or the said commissioner may consult any other available source, which shall furnish him with the requisite information. For the purpose of ascertaining the names of all persons eligible as trial jurors, the said commissioner of jurors must consult the last census enumeration, the last directory published for his respective territory, the records of the department of taxes and assessments, and any other available sources. Upon said commissioner of jurors being furnished by any citizen with the name and address of any other person, accompanied by a statement from the person so furnishing the same, that he believes that the said person is liable to serve as a trial juror, the said commissioner of jurors must deal with the said name and address, so furnished him, as with the name and address of any other person whom the said commissioner of jurors

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believes liable to serve as a trial juror. He must hear and determine all claims for exemption, and must keep a record of the persons exempted, and of the period of time for which the exemption of each is allowed.

L. 1870, c. 539, parts of §§ 7, 9.
Amended by chap. 491 of 1902 and chap. 145 of 1903.

§ 1103. Mode of drawing; minutes; lists.

The box known as the "non-voters box" shall be first dealt with, and all the ballots drawn therefrom, before any of the ballots in the box known as the "voters box" shall be drawn. After all the said ballots have been drawn from the said "non-voters box," then ballots may be drawn from the "voters box." In the event that it becomes necessary to use said ballots a second time, before new lists are furnished, the same order of drawing as between the "voters box" and the "non-voters box" shall be observed as when the ballots were first drawn respectively therefrom. In other respects the drawing must be conducted as follows:

1. The county clerk, or his deputy, must shake the box containing the ballots, so as to thoroughly mix them.

2. He must then, without seeing the name contained in any ballot, publicly draw out of the box one ballot; and continue to draw, in like manner, one ballot at a time, until the requisite number has been drawn.

3. A minute of the drawing must be kept by one of the attending officers, in which must be entered the name contained in each ballot drawn, before another ballot is drawn.

4. After drawing the requisite number, the minute of the drawing, containing the names of the persons drawn, and specifying for what court and for what term they were drawn, must be signed by the clerk or his deputy and the attending officers and filed in the office of the commissioner of jurors.

From 2 R. S. 414 (Part 3, c. 7, tit. 4), § 29.
Amended by chap. 491 of 1902 and chap. 76 of 1907.

§ 1108. Court may order new panel to be drawn during term.

See § 1149, post, Court may at any time order a new panel. How drawn.

§ 1112. Sheriff's jury; how selected, etc.

The sheriff of the county of New York shall select from the list of trial jurors for each jury year the names of not less than two hundred and fifty, nor more than four hundred and fifty persons, to constitute the sheriff's jurors, for that jury year, and he shall forthwith transmit to the commissioner of jurors a list, certified by him, containing the names of the persons so selected, with the proper additions of each, and showing that they have been selected as prescribed in this section. The sheriff must cause ballots to be prepared as prescribed in article second of title third of this chapter and to be deposited in a proper box. Where the sheriff is authorized, or required by law, to impanel a jury for any purpose, the requisite number

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of ballots must be drawn from the box, as prescribed in that article, by the sheriff, or by his under-sheriff, or deputy sheriff. But the sheriff may, in his discretion, divide the names contained in the list into three panels, each containing an equal number of names, as nearly as may be. In that case he must designate the months in which each panel will be used, so that the jury duty shall be distributed equally, as nearly as may be, among the jurors; and ballots shall be deposited in the box, at the beginning of each month, containing the names of the jurors designated for that month.

New.

Amended by chap. 570 of 1886 and chap. 22 of 1904.

§ 1126. Qualifications of trial jurors.

See § 1027, ante, Qualifications of trial jurors, generally.

See § 1079, ante, Qualifications of trial jurors in New York county.

§ 1127. Persons exempt from service.

Either of the following persons, although qualified, is entitled to an exemption from service, as a trial juror, upon his claiming an exemption, as prescribed in this article:

1. A clergyman, or a minister of any religion, officiating as such, and not following any other calling.

2. A practicing physician, surgeon or surgeon dentist having patients requiring his daily professional attention, not following any other calling; a licensed pharmaceutist or pharmacist, while actually engaged in his profession as a means of livelihood; a duly registered veterinary surgeon actually engaged in his profession as a means of livelihood, and a duly licensed embalmer actually engaged in his profession as a means of livelihood.

3. An attorney or counsellor at law, regularly engaged in the practice of the law, as a means of livelihood.

4. A professor or teacher in a college, academy, or public school, or in a private school for the instruction of pupils in the usual branches of education, not following any other calling, or an editor, editorial writer, artist or reporter of a daily newspaper or press association regularly employed as such and not following any other vocation.

5. The holder of an office, under the United States, or the state, or the county, or the city of Brooklyn, or a town of the county, whose official duties, at the time, prevent his attendance as a juror.

6. A captain, engineer, or other officer, actually employed upon a vessel, making regular trips; or a licensed pilot, actually following that calling.

7. A superintendent, conductor, or engineer, employed by a railroad company, other than a street railway company; or a telegraph operator, employed by a press association or a telegraph company, who is actually doing duty in an office, or along the railroad or telegraph line, of the company or association by which he is employed.

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8. An officer, non-commissioned officer, musician, or private, actually serving in a brigade, regiment, battalion, company, or troop, of the National guard of the State, uniformed and equipped, according to law, and faithfully performing his duty, by making the parades, and attending the drills, inspections, and reviews, required by law; or a general or staff officer, actually performing duty as such; or a person who has been honorably discharged from the national guard, after five years' service, in either capacity.

9. A person, who has been honorably discharged from the military forces of the state, after seven years' faithful service therein. But, in order to entitle a person to exemption, under this subdivision, his service must have been performed before the 23d day of April, 1862, either as a general or staff officer, or as an officer, non-commissioned officer, musician, or private, in a uniformed battalion, company, or troop, of the militia of the State, and armed, uniformed, and equipped according to law; or a portion thereof, during that period, and in that capacity, and the remainder, since the 23d day of April, 1862, as a member of the national guard of the State.

10. A person, who, after faithfully performing the duties of a fireman, in a fire company or fire department, duly organized, according to the laws of the State, for five successive years, has been honorably discharged therefrom; or who is, at the time, an officer or member of a fire company, duly organized, according to the laws of the State, and faithfully performing his duty therein.

11. A person, who is physically incapable of performing jury duty, by reason of severe sickness, deafness or other physical disorder.

12. A person belonging to the army or navy of the United States; or to the police force or fire department of the city of Brooklyn.

13. A person otherwise specially exempted by law.

14. A duly licensed engineer of steam boilers actually employed as such.

L. 1858, c. 322, § 10.

Amended by chap. 542 of 1879, chap. 358 of 1881, chap. 318 of 1898, chap. 241 of 1901, chap. 291 of 1902, chaps. 43 and 416 of 1904 and chap. 437 of 1905.

§ 1151. Compensation to judges, etc., for services under this article.

a. A claim of a county judge presented under § 1151 for the drawing of jurors in Kings county should be denied, where it appears that the services were rendered from year to year and no demand for compensation was made until two years from the close of his term; § 1151 contemplates that the compensation for such services shall be fixed in advance, and otherwise cannot be recovered: People ex rel. Hurd v. McClellan, 102 App. Div. 21.

§ 1153. Juror may also be arrested and compelled to serve.

See § 1110, ante, In New York county, juror may be arrested, etc.

§ 1161. Penalty for physician giving false certificate.

See § 1120, ante, In New York county, penalty for physician giving false certificate.

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§ 1163. Clerk to prepare ballots of jurors for trial.

See § 76 of Penal Code, as amended by chap. 692 of 1905, Misconduct of officers at drawing jurors and the formation of a jury.

§ 1164. Clerk to draw ballots.

See § 76 of Penal Code, as amended by chap. 692 of 1905, Misconduct of officers at drawing jurors and the formation of a jury.

§ 1165. Mode of drawing ballots.

See § 76 of Penal Code, as amended by chap. 692 of 1905, Misconduct of officers at drawing jurors and the formation of a jury.

§ 1166. Persons drawn, etc., to form the jury.

a. § 1166, in respect to the disqualification of jurors related by consanguinity, etc., with the part limiting the time within which the objection to such disqualification must be taken is made applicable to justices' courts by § 3347, subd. 14: Bradt v. Peck, 81 App. Div. 295.

§ 1171. When talesmen to be procured, or jurors drawn from third box.

See § 1052, ante, A third jury box to be kept.

See § 1054, ante, Jurors, when to be drawn from third box.

§ 1179. Challenges in penal actions.

In an action in a court of record, or not of record, wherein a city, town or county is a party, it is not a good cause of challenge to a trial juror, or to an officer who notified the trial jurors, that the juror or the officer is a resident of, or liable to pay taxes, in the city, town or county, which is a party to such action.

Id., § 58. See, also, 2 R. S. 551 (Part 3, c. 8, tit. 17), § 2.

Amended by chap. 294 of 1903.

§ 1180. Challenges, how tried. Exceptions to and review of the determination of the court, in reference thereto. Grounds for challenges.

b. § 992 provides that, except as provided in § 1180, an exception cannot be taken to a ruling upon a question of fact: Henderson v. Doherty, 95 App. Div. 346; 88 N. Y. Supp. 665.

§ 1182. Plaintiff cannot submit to nonsuit after jury retires.

c. Stipulation.—When parties stipulate that the jury may seal its verdict and deliver it to the officer in charge, to be delivered to the clerk and by him opened and recorded in the minutes, in the absence of the presiding justice and the jury, the parties are bound by such stipulation and cannot thereafter have the verdict set aside as irregular: Chichester v. Winton Motor Car Co., 110 App. Div. 78.

§ 1184. How double, treble, or increased damages, found and awarded.

See § 125, ante, Failure of sheriff to keep certain prisoners separate, punishable by treble damages.

See § 708, subd. 3, ante, A person withholding attached property is liable to double damages.

See § 863, ante, Person causing arrest of privileged witness liable for treble damages.

See § 1668, post, Treble damages for injuries to trees.

See § 1901, post, Treble damages for suing in the name of another.

See § 3282, post, Treble damages for extortion of increased fees.

d. Justice's court.—§ 1184, in regard to treble damages is, by § 2868, made applicable to an action brought in justice's court for a cause of action for injury to property brought under § 654 of the Penal Code: Layton v. McConnell, 61 App. Div. 447.

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§ 1185. When verdict to be taken, subject to the opinion of the court.

a. Verdict taken subject to the opinion of the court pursuant to § 1185: Tolmie v. Fidelity & Casualty Co., 41 Misc. 451; 84 N. Y. Supp. 1020, aff'd 95 App. Div. 352.

b. Where the court, presiding at a jury trial, reserves its decision on a motion to dismiss the complaint, made by the defendant when the plaintiff rested, and the defendant does not renew such motion after all the proof is in or request the court to submit any question of fact to the jury, whereupon the court directs a verdict for the plaintiff, to which the defendant takes no exception, no authority exists authorizing the court to file a decision and the defendant to file an exception to such decision: Murray v. City of New York, 60 App. Div. 541; 69 N. Y. Supp. 959.

§ 1186. General and special verdict defined.

c. Jury required only to find a general verdict upon the issues: Kurz v. Doerr, 86 App. Div. 507; 83 N. Y. Supp. 736.

§ 1187. General or specific verdict, when rendered; special finding with general verdict.

In an action to recover a sum of money only, or real property, or a chattel, the jury may render a general or special verdict, in its discretion. In any other action, except where one or more specific questions of fact, stated under the direction of the court, are tried by a jury, the court may direct the jury to find a special verdict, upon all or any of the issues. Where the jury finds a general verdict, the court may instruct it to find also specially, upon one or more questions of fact, stated in writing. The special verdict or special finding must be in writing; it must be filed with the clerk, and entered in the minutes. When a motion is made to nonsuit the plaintiffs or for the direction of a verdict, the court may, pending the decision of such motion, submit any question of fact raised by the pleadings to the jury or require the jury to assess the damage. After the jury shall have rendered a special verdict upon such submission or shall have assessed the damage, the court may then pass upon the motion to nonsuit or direct such general verdict as either party may be entitled to. On an appeal from the judgment entered upon such nonsuit or general verdict, such special verdict, or general verdict, shall form a part of the record, and the appellate division or the court of appeals may direct such judgment thereon as either party may be entitled to.

Id., § 261.

Amended by chap. 946 of 1895 and chap. 131 of 1904.

d. Because the plaintiffs will be deprived of their right to review, before the trial judge or in the appellate division, the verdict of the jury as against the weight of evidence or upon any other ground upon which they might challenge the verdict, is the reason the court has held practically inoperative the provisions of § 1187, authorizing the appellate division to grant to either party any judgment to which he may be entitled, when, in the court below, the decision upon a motion for a nonsuit or directed verdict has been reserved and the verdict of the jury taken upon special questions, which verdict of the jury has been included in the record upon appeal after the decision upon the motions reserved: Roosevelt v. Nusbaum, 75 App. Div. 117.

e. The court cannot in any case where the right of trial by jury exists and the evidence presents an actual issue of fact, properly direct a verdict; if in such a case it is dissatisfied with the verdict because against the weight or preponderance of evidence, it may be set aside, but a new trial must be granted befort another jury, and the direction of a verdict under such circumstances is reversible

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error: McDonald v. Metropolitan St. Ry. Co., 167 N. Y. 66.

a. **Nonsuit.**—Where the judge, under the authority of § 1187, reserves his decision on a motion for a nonsuit until he has submitted the whole case to the jury and they have rendered a general verdict for the plaintiff, he cannot, after receiving the jury's verdict, dismiss the complaint upon the merits: Levy v. Grove Mills Paper Co., 80 App. Div. 384; 80 N. Y. Supp. 730.

b. Under the provisions of § 1187, where a judgment was entered upon a nonsuit or general verdict, the case on appeal should contain the exceptions taken by the respondent as well as those taken by the appellant, and the appellate division should determine whether the verdict should be reinstated or a new trial should be awarded: Griffiths v. Metropolitan St. Ry. Co., 63 App. Div. 86; 32 Civ. Pro. R. 184.

c. **Specific questions.**—Where a judge presiding at a jury trial submits to the jury, under § 1187, certain specific questions of fact, with instructions to render a general verdict also, he has no power, after the jury have answered the specific questions of fact and rendered a general verdict, to dismiss the complaint upon the merits nor to set aside the answers, except one, made by the jury to the specific questions of fact submitted to them, or the general verdict; he may either nonsuit the plaintiff or direct the jury to render a general verdict: Hoey v. Metropolitan Street R. Co., 70 App. Div. 60; 74 N. Y. Supp. 1113.

d. **Effect of decision by jury of specific questions of fact thereafter submitted by the court:** Bank of New York v. Southern National Bank, 170 N. Y. 1.

e. **Election.**—A new trial will be granted when the plaintiff is compelled to elect between two causes of action and is nonsuited after a verdict on the cause elected: Zeiser v. Cohn, 113 App. Div. 9.

f. **Prior accidents.**—When a pedestrian injured by reason of a defect in a city street has, on a second trial, given clear and definite evidence of numerous prior accidents caused by the same defect it is error to dismiss the complaint: Corson v. City of New York, 113 App. Div. 679.

§ 1189. Entry of verdict; subsequent proceedings.

g. **Stipulations.**—When parties stipulate that the jury may seal its verdict and deliver it to the officer in charge, to be delivered to the clerk and by him to be opened and recorded in the minutes, in the absence of the presiding justice and the jury, the parties are bound by such stipulation and cannot thereafter have the verdict set aside as irregular: Chichester v. Winton Motor Car Co., 110 App. Div. 78.

h. A judgment in a civil action entered upon the verdict of a jury is not void because the verdict was received in the absence of the presiding judge, where it appears that it was stipulated in open court by counsel for both parties that the verdict should be received by the clerk in the absence of the justice: Dubuc v. Lazell & Co., 182 N. Y. 482, rev'g 105 App. Div. 533; 94 N. Y. Supp. 1194.

i. **Irregularity.**—When, after the submission of a case to a jury, the trial justice leaves the bench and the verdict is received by another justice, it is, at most, an irregularity which is waived by the defeated party when no objection is made to the reception of such verdict, and the counsel for the defeated party makes certain motions which stand over for the consideration of the justice who presided: Terriberry v. Mathot, 111 App. Div. 235.

§ 1190. Trials by jury to be as herein provided; juries of part aliens abolished.

A trial by a jury, of an issue of fact, joined in a civil action, in a court of record, must be had, as prescribed in this chapter; except in a case where it is otherwise specially prescribed by law. An alien is not entitled to a jury, composed in part of aliens or strangers, in an action or special proceeding civil or criminal. The court may, upon the application of either party, exclude from the court room the jurors sitting in an action during the argument of a motion for non-suit, dismissal of the complaint or direction of a verdict.

Amended by chap. 502 of 1907.

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§ 1200. Definition of judgment.

See § 1001, ante, Motion for new trial at the appellate division when trial was by court or referee.

See § 1015, ante, Compulsory reference upon questions incidentally arising.

See § 1021, ante, Decision of court or report of referee, upon trial of demurrer.

See § 1877, post, Receiver may be appointed.

a. **Final judgment.**—The mere fact that a provision was inserted in a judgment awarding costs and directing execution therefor does not make the judgment a final one, and the remedy for the improper insertion of the costs is by motion to strike out and not by appeal: Osborn v. Cardeza, 180 N. Y. 69, dismissing appeal 92 App. Div. 612; 87 N. Y. Supp. 1129.

b. A judgment, overruling a demurrer to a reply to a second separate defense of an answer, dismissing that defense with costs and granting the plaintiff execution therefor, is interlocutory and not final, and therefore may properly be entered before all the issues in the action have been determined; a final judgment would have provided for the recovery of the demand in the complaint: Maeder v. Wexler, 43 Misc. 19; 87 N. Y. Supp. 402.

c. **Counterclaim.**—In an action for goods sold and delivered, the defendant interposed a counterclaim alleging breach of warranty, defaulted in appearance at the trial, and as a result of his failure to appear in an action, a judgment was obtained against him, which is a nonsuit to a counterclaim and is not a bar to a subsequent action for a breach of the warranty: Spies v. National City Bank, 174 N. Y. 229, aff'g 68 App. Div. 70; 74 N. Y. Supp. 64.

d. **Interlocutory judgment.**—When a judgment expressly recites that it is an interlocutory judgment, it is an interlocutory judgment: Potter v. Rossiter, No. 2, 109 App. Div. 35; 95 N. Y. Supp. 1036.

e. Ordinarily the affirmance of an interlocutory judgment establishes the law respecting the final judgment, but where the interlocutory judgment is ambiguous it will not be so interpreted as to do manifest injustice: Hasell v. Buckley, 118 App. Div. 356.

f. **Order.**—It is perfectly proper for a judge, when after inadvertently signing two orders, to adopt the proper one; the first order is not appealable: Hill v. Muller, 53 Misc. 255.

§ 1204. Judgment may be for or against any of the parties.

See § 454, ante, When persons liable for the same demand may be sued together.

See § 456, ante, Proceedings in action against defendants severally liable.

See § 521, ante, When defendant to serve a copy answer on co-defendant.

See § 1543, post, Title to parties in action for partition may be determined.

g. **Co-defendants.**—A judgment determines all the issues presented and which might have been presented, and applies only to adverse parties and should not be extended to co-defendants claiming no relief against each other: Earle v. Earle, 73 App. Div. 300; 76 N. Y. Supp. 851, aff'd 173 N. Y. 480.

§ 1205. When a several judgment may be taken.

See § 456, ante, Proceedings in action against defendants severally liable.

h. **Appeal.**—If a defendant does not appeal and is not made a party to the appeal by the service on him of notice, an appeal by his co-defendant, followed by a reversal of the judgment, cannot authorize the re-trial of the cause as against the non-appealing defendant, and the new trial must be confined to the issues between the parties to the appeal: Newburg Savings Bank v. Town of Woodbury, 64 App. Div. 305, at 311; 72 N. Y. Supp. 222, aff'd 173 N. Y. 480.

i. **Complaint.**—Although a complaint sets out an action to recover for work, labor and services against joint defendants, a judgment against one of said defendants only is authorized by this section: Lawton v. Partrige, 111 App. Div. 8.

j. **Interlocutory judgment.**—When, in an action in equity brought by a creditor in behalf of himself and other creditors to enforce the statutory liability of directors of a corporation, an interlocutory judgment establishing the liability of directors has been reversed on an appeal by some of the directors and a new trial granted, which new trial has never been had, the interlocutory judgment cannot be enforced even as against those directors who did not appeal therefrom, unless the action be severed: Bauer v. Hawes, 115 App. Div. 492.

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§ 1207. When judgment for plaintiff not to exceed judgment demanded.

See § 504, ante, Judgment, when demand and counterclaim are equal or unequal.

See § 504, ante, Judgment for affirmative relief or counterclaim.

a. **Answer.**—§ 1207, providing that no judgment shall be taken more favorable to the plaintiff than that demanded in the complaint applies only when there is no answer served: Latimer v. McKinnon, 85 App. Div. 224; 83 N. Y. Supp. 320.

b. By the provisions of § 1207, the relief granted cannot be more favorable to the plaintiff than demanded unless an answer be served: Cody et al. v. First National Bank, 63 App. Div. 199; 32 Civ. Pro. R. 148.

c. Where an answer has been interposed the plaintiff is not limited to the precise relief claimed, but to any one consistent with the case set forth in the complaint: Redpath v. Redpath, 75 App. Div. 95; 77 N. Y. Supp. 668.

d. The prayer for relief is a limitation upon the right to require only where no answer has been interposed, but where the defendants have answered the plaintiff may have any judgment warranted by the proofs and embraced within the issues: Black v. Vanderbilt, 70 App. Div. 16, at 23; 74 N. Y. Supp. 1095.

e. **Consistent.**—Whether an action be legal or equitable in its nature, the judgment against the defendant should be one consistent with the case set forth in the complaint: Maher v. Home Ins. Co., 75 App. Div. 226; 78 N. Y. Supp. 44.

f. **Default.**—A judgment taken by default cannot be amended so as to provide for relief not asked for in the complaint: Jacobson v. Smith, 73 App. Div. 412; 77 N. Y. Supp. 49.

g. **Co-defendants.**—A judgment determines all the issues presented and which might have been presented, and applies only to adverse parties and should not be extended to co-defendants claiming no relief against each other: Earle v. Earle, 73 App. Div. 300; 76 N. Y. Supp. 851, aff'd 173 N. Y. 480.

h. **Salesman.**—In an action by a salesman for compensation for services he is entitled to a money judgment although the complaint demands an accounting: Gee v. Pendas, 66 App. Div. 566; 73 N. Y. Supp. 247.

i. **Equity.**—In an equitable action to set forth a bill of sale as fraudulent as to creditors, a money judgment cannot be granted where no such relief is demanded in the complaint: Harrison v. Obermeyer & Liebmann Co., 64 App. Div. 499; 72 N. Y. Supp. 270.

j. **Referee.**—A judgment directed by a referee which was embraced "within the issue" is permissible: Village of Bolivar v. Bolivar Water Co., 62 App. Div. 484, at 489; 70 N. Y. Supp. 750.

k. **Trespass.**—In an action for trespass on land and cutting timber thereon, a verdict that defendant did not cut timber and that the plaintiff owned the land does not sustain a judgment that defendant be barred of all claim to the land and that the plaintiff have costs: Hill v. McMahon, 81 App. Div. 324; 81 N. Y. Supp. 431.

l. **Nonsuit.**—Where a decision is in effect a nonsuit only because of failure of proof, a judgment upon the merits is improper: Weeks v. Van Ness, 104 App. Div. 7; 93 N. Y. Supp. 337.

m. **Merits.**—A judgment granted defendant upon a motion for a dismissal of the complaint on the ground that plaintiff had failed to establish a cause of action is not a judgment of nonsuit but a judgment on the trial of the issues and a decision of the same on the merits: Nonsuit v. Dismissal of the complaint. Deeley v. Heintz, 169 N. Y. 129, aff'g 40 App. Div. 612; 57 N. Y. Supp. 583.

n. Under this section, a judgment dismissing the complaint in an action in pursuance of a remittitur is not a bar to a subsequent action between the parties unless the judgment declares or it appears from the judgment roll or the remittitur that the decision was rendered on the merits: Genet v. Delaware & Hudson Canal Co., 170 N. Y. 278, 33 Civ. Pro. R. 14, rev'g 49 App. Div. 645; 63 N. Y. Supp. 230.

o. Where the decision was that the evidence was not sufficient to show a cause of action, the dismissal should not be upon the merits: Grace v. Fassott, 67 App. Div. 443; 73 N. Y. Supp. 906.

p. If a plaintiff has "wholly failed to establish the allegations contained in her complaint" there is no way of avoiding the conclusion of law that the complaint should be dismissed upon the merits: Edmondson v. Hamilton, 60 App. Div. 630; 69 N. Y. Supp. 857.

q. **Non-joinder.**—A dismissal for non-joinder of parties defendant should be without prejudice: Duff v. Gallo, 64 App. Div. 616; 72 N. Y. Supp. 156.

r. **Defective plea.**—A plea of former adjudication is fatally defective unless it alleges that the former judgment or decree was on the merits; the fact that the costs of a former action between the same parties and for the same subject matter have not been paid, does not deprive the court of jurisdiction when set in motion by the party resting under a

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stay: Patchen v. D. & H. C. Co., 62 App. Div. 543; 71 N. Y. Supp. 122.

a. **Trustee.**—The final determination of the appellate division on appeal from the decision of the surrogate, as to the liability of a trustee for funds misappropriated by his co-trustee, is *res adjudicata* and binding upon the referee and the supreme court, in an action subsequently brought therein to remove the trustees and to charge the interest of one of them in the trust estate with the amount of the defalcation: Westerfield v. Rogers, 174 N. Y. 230, rev'g 63 App. Div. 18; 71 N. Y. Supp. 401.

b. **Fraud.**—A decree denying support to a wife is not a bar to an action to set aside the judgment on the ground of fraud: Everett v. Everett, 75 App. Div. 369, at 375; 78 N. Y. Supp. 193.

c. **Foreclosure.**—When in an action to foreclose a junior mortgage covered prior, or already sold under a prior mortgage and a second mortgage declared the priority of the lien of the mortgage was not more favorable than that demanded in the complaint, and not in violation of § 1207: Hookey v. Greenstein, 119 App. Div. 209.

§ 1209. Effect of judgment dismissing the complaint.

d. In an action to recover damages for injury to shade trees by the erection of telephone poles, if the plaintiff has failed to give any evidence of damage, the complaint may properly be dismissed on the merits: Osborne v. Auburn Telephone Co., 111 App. Div. 702.

e. When judgment entered upon decision at the close of plaintiff's case constitutes judgment on the merits: Keyes v. Smith, 183 N. Y. 376, aff'g 94 A. D. 614.

f. When, in a suit in equity, the court has refused to allow an amendment to the complaint or grant an adjournment, and on its own motion has dismissed the complaint without taking evidence, it is error thereafter to make findings of fact and allow judgment dismissing the complaint on the merits; the proper judgment is nonsuit, and the plaintiff is entitled to have such record corrected: Freedman v. Sirota, 109 App. Div. 874.

§ 1210. Judgment against a dead person.

See § 763, ante, Death of party after verdict, etc.

See § 764, ante, Abatement of actions; seduction; action for wrong not to abate after verdict, etc.

See § 2717, post, Sale of personal property to pay debts.

§ 1211. Judgment to bear interest.

See § 1235, post, Interest on verdict, etc., to be included in recovery

g. **Common law.**—The provisions of § 1211, fixing the time for the running of interest upon judgments, are simply declarations of the rule at common law that damages are recoverable as an indemnity for the non-payment of liquidated pecuniary demands at maturity, when they should have been paid: Matter of City of New York, 91 App. Div. 532, at 534; 86 N. Y. Supp. 1035.

§ 1212. Judgment by default in certain actions on contract; how taken.

See § 419, ante, Service of copy complaint or notice with summons; consequence of failure.

See § 420, ante, Cases where such service must be made.

See § 422, ante, When defendant must answer before time to appear expires.

See § 434, ante, Proof of service of summons, etc., how made.

See § 479, ante, Copy complaint, when to be served.

See § 512, ante, Judgment where counterclaim only is interposed for less than plaintiff's claim.

See § 520, ante, Within what time pleadings to be served.

See § 543, ante, Failure to answer or demur to amended pleading.

See § 1218, post, When judgment cannot be taken against an infant defendant.

h. **Extension.**—An order extending the time of a defendant to answer or demur, for the period of twenty days, extends, *ipso facto*, defendant's time to appear in the action for that period, and where a copy of such order and of the affidavits upon which it was founded have been served upon plaintiff's attorney, the plaintiff is not authorized to enter judgment against defendant, as upon default in appearing, before the time to answer, as extended by such order, has expired: Littauer v. Stern, 177 N. Y. 233, aff'g 88 App. Div. 274.

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a. **Service.**—On an application to open a judgment taken by default on the ground of the failure of the defendant to answer, when the defendant shows, without contradiction, that he made due and timely service of an answer by mail, the default is properly opened: Auto Lighter Co. v. Wicks, Hughes & Co., 114 App. Div. 110.

b. **Good cause.**—A judgment by default in a case marked ready should not be opened, except upon good cause established by affidavit; it is not to be opened as a matter of course on payment of costs: Iron Clad Manufacturing Co. v. Steffen, 114 App. Div. 792; 100 N. Y. Supp. 196.

c. **Amended complaint.**—A defendant, against whom a judgment has been taken by default, is not entitled to have the judgment opened on the ground that after his default and prior to a severance of the action an amended complaint was served upon the defendants as to whom the action was severed, but not upon him, if the original complaint stated a good cause of action against him: Fuller Buggy Co. v. Waldron, 113 App. Div. 403.

d. **Terms.**—Judgment by default should not be vacated, except on terms, and then should be opened only when necessary to protect litigants from the misconduct of their counsel; the practice of opening defaults on motion before another judge after denial by the trial judge should be discontinued: Herbert Land Co. v. Lorenzen, 113 App. Div. 802; 99 N. Y. Supp. 937.

e. **Bankruptcy.**—A trustee in bankruptcy for a defendant corporation who by reason of a misunderstanding has defaulted in an action of foreclosure should not be required to give a personal undertaking to pay any deficiency that may arise by reason of the delay occasioned by the default as a condition for opening it: McLoughlin v. Collons Bldg. & Cons. Co., 119 App. Div. 300.

f. **Default.**—When a case is admittedly abandoned, a default should not be opened, and the order opening such default, will be reversed: Rosenfield v. Central Vermont Railway Co., 116 App. Div. 851.

§ 1213. Amount of judgment in such cases; how determined.

g. **Executor.**—Obligations signed by an executor with the word "ex" added, when presented to the clerk to assess the amount due, the judgment should be against him as an individual: Sutherland v. St. Lawrence county, 42 Misc. 38; 85 N. Y. Supp. 696.

§ 1214. Application to court for judgment by default; when necessary.

See rule 26 (Sup. Ct.), Where application to be made.

See rule 72, 73, Judgment by default in matrimonial actions.

See § 418, ante, Form of summons.

See § 421, ante, Appearance of defendant.

See § 479, ante, Copy complaint, when to be served.

See § 520, ante, Pleadings to be subscribed; within what time to be served.

See § 543, ante, Failure to answer or demur to amended pleading.

See § 777, ante, Subsequent application to court for judgment.

See §§ 1753, 1757, Matrimonial actions.

h. **Assessment.**—§ 1232 does not provide for an assessment of damages in the trial court, or for a review thereof, but only an assessment by a writ of inquiry out of the court; § 1215 does not provide for an assessment of damages in cases arising under § 194, but only in cases of default in answering or demurring under § 1214; there seems to be no special provision made in the Code of Civil Procedure as to the practice on the assessment of damages in cases arising under § 194, and the court is left to establish its own procedure: Yaw v. Whitmore, 66 App. Div. 317; 72 N. Y. Supp. 765.

i. **Writ of inquiry.**—Where, upon a default by the defendant in an action to recover damages for personal injuries sustained by the plaintiff, a writ of inquiry is issued to the sheriff of the county to assess the plaintiff's damages, the manner in which the writ shall be executed rests in the discretion of the court: Elsey v. International Railway Co., 93 App. Div. 115; 87 N. Y. Supp. 28.

j. **Demurrer.**—When the plaintiff is served with a copy of a judgment overruling his demurrer and giving him ten days in which to withdraw the same after notice of entry, and the notice of entry served therewith stated that such judgment has been duly entered in the office of the clerk, such notice is insufficient to set running the ten days

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within which the plaintiff must withdraw his demurrer; hence a final judgment, subsequently entered because of plaintiff's default in withdrawing such demurrer, should be set aside: Tudor v. Ebner, 109 App. Div. 521; 96 N. Y. Supp. 392.

§ 1215. Proceedings on such an application.

a. **Assessment.**—§ 1232 does not provide for an assessment of damages in the trial court, or for a review thereof, but only an assessment by a writ of inquiry out of the court; § 1215 does not provide for an assessment of damages in cases arising under § 194, but only in cases of default in answering or demurring under § 1214; there seems to be no special provisions made in the Code of Civil Procedure as to the practice on the assessment of damages in cases arising under § 194, and the court is left to establish its own procedure: Yaw v. Whitmore, 66 App. Div. 317; 72 N. Y. Supp. 765.

b. **Conversion.**—The conversion to defendant's own use of money collected by him as an agent constitutes an "injury to property" within the meaning of § 1215, and in an action based upon such conversion the court has no power to order a reference upon defendant's default: Fullerton v. Young, 46 Misc. 292.

c. **Interlocutory judgment.**—Where an interlocutory judgment provides that the defendant may answer and the defendant does not avail himself of the privilege the plaintiff must apply to the court for final judgment, as if defendant had originally made default in answering, and then the court, under the provisions of § 1223, has the same power and may make the same order as is permitted: Hasbrouck v. New Paltz, etc., Traction Co., 98 App. Div. 563; 90 N. Y. Supp. 977.

d. **Writ of inquiry.**—Where, upon a default by the defendant in an action to recover damages for personal injuries sustained by the plaintiff, a writ of inquiry is issued to the sheriff of the county to assess the plaintiff's damages, the manner in which the writ shall be executed rests in the discretion of the court: Elsey v. International Railway Co., 93 App. Div. 115; 87 N. Y. Supp. 28.

§ 1216. Application for judgment in case of service by publication.

See § 435, ante, Order for service of summons from court of record, when defendant not found, etc.

e. **Attachment.**—When a summons is served upon a non-resident by publication no judgment can be entered against him on default for failure to appear, unless a levy has been made under an attachment against his property: Gittings v. Russel, 114 App. Div. 405; 99 N. Y. Supp. 1064, aff'd 187 N. Y. 538.

§ 1217. Attachment and undertaking for restitution, required in certain actions.

f. The casual temporary visits of a non-resident to this state do not break the continuity of his absence so as to entitle him to the benefit of the statute; the difference between the status of an absent resident and that of a non-resident and the ability of the creditor to pursue them is marked: Conn. Trust Co. v. Wead, 172 N. Y. 497, at 503.

§ 1218. When judgment cannot be taken against an infant defendant.

See § 471, ante, Appointment of guardian ad litem.

See § 1858, post, Execution against infant heir.

§ 1220. When action may be severed, if issues of law and issues of fact presented.

See § 454, et seq., ante, Parties severally liable.

See § 497, ante, Amendments in certain cases after decision of demurrer.

See § 1205, ante, Judgment against two or more defendants.

g. **Consent.**—An order withdrawing certain issues, equitable in their nature, from the consideration of the jury and directing that they be tried before another judge without a jury is not justified where none of the parties to the action consent thereto: Reed v. Provident Sav. Life Assur. Soc., 79 App. Div. 163; 79 N. Y. Supp. 665.

h. **Interlocutory judgment.**— When, in an action in equity brought by a creditor in behalf of himself and other creditors to enforce the statutory liability of directors of a corporation, an interlocu-

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tory judgment establishing the liability of directors has been reversed on an appeal by some of the directors and a new trial granted, which new trial has never been had, the interlocutory judgment cannot be enforced even as against those directors who did not appeal therefrom, unless the action be severed: Bauer v. Hawes, 115 App. Div. 492.

§ 1221. Judgment how taken, after trial of issues of law and issues of fact, in the same action.

a. **Interlocutory judgment.**—A judgment sustaining a demurrer to a counterclaim interposed in an answer containing other issues should be interlocutory, and should not permit the collection of the costs until judgment is rendered on the other issues: Burnett v. Burnett, 86 App. Div. 386; 83 N. Y. Supp. 760.

b. Final judgment should not be entered after the trial of the issues of law arising upon a demurrer to a counterclaim where issues of fact remain to be tried; filing with the clerk an order sustaining a demurrer to a counterclaim signed by the judge without the order being signed by the clerk does not constitute an entry thereof, nor is the order an interlocutory judgment; and final judgment entered pursuant thereto will be vacated: Selley v. Irish Industrial Exposition, 53 Misc. 46.

c. **Designation of judge to appellate division.**—Where, upon a trial, after motions to dismiss the complaint were denied, the jury brought in a general verdict for the plaintiff and the judge entertained a motion to set aside the verdict and for a new trial on the grounds and ordered that, in the event of his denial of the motion, the defendant should have the usual stay of thirty days and thirty days to make case after decision, but, before the judge decided the motion, he was duly designated a justice of the appellate division; and where the plaintiff entered judgment in accordance with the verdict and the defendant moved to set the judgment aside; *held*: that the entry of judgment was not in violation of the stay; that the trial was complete and not a mistrial; that the motion under § 999 should be denied and the defendant left to move for a new trial under § 1002: Stern v. Wabash R. R. Co., 52 Misc. 12.

§ 1222. Final judgment, how taken after issue of law only.

d. **Interlocutory judgment.**— Where an interlocutory judgment provides that the defendant may answer, and the defendant does not avail himself of the privilege, the plaintiff must apply to the court for final judgment as if the defendant had originally made default in answering, and then the court, under the provisions of § 1223, has the same power and may make the same order as is permitted: Hasbrouck v. New Paltz, etc., Traction Co., 98 App. Div. 563; 90 N. Y. Supp. 977.

e. Final judgment should not be entered after the trial of the issues of law arising upon a demurrer to a counterclaim where issues of fact remain to be tried; filing with the clerk an order sustaining a demurrer to a counterclaim signed by the judge without the order being signed by the clerk does not constitute an entry thereof, nor is the order an interlocutory judgment; and final judgment entered pursuant thereto will be vacated: Selley v. Irish Industrial Exposition, 53 Misc. 46.

f. An order overruling a demurrer and directing an interlocutory judgment is a decision and effective as the basis of the interlocutory judgment; a judgment overruling a demurrer is erroneous in so far as it does not permit the withdrawal of the demurrer: Nachod v. Hindley, 118 App. Div. 658.

g. **Frivolous.**—When a party gives notice of motion for judgment on a demurrer as frivolous a decision overruling the demurrer as upon a trial of the issue of law may be made by consent; when the decision and judgment recite that the issue was brought on for trial and tried, counsel on both sides being heard, such recitation imports absolute verity: Peabody v. West, 119 App. Div. 103.

h. **Lien.**—In an action by an attorney to establish a lien on his client's papers, where the interlocutory judgment overruling the defendant's demurrer does not provide for the entry of final judgment, the practice to be followed by the plaintiff, upon the failure of the defendant to answer, is prescribed by §§ 1222 and 1223 of the Code: Mathot v. Triebel, 102 App. Div. 426.

i. **Appeal.**—A final judgment entered pursuant to this section upon an order of the special term sustaining a demurrer and dismissing the complaint upon the merits is not appealable to the court of appeals after a reversal by the late general term of a judgment overruling the demurrer, the order of reversal allowing the plaintiff to amend, which he did not do, but which did not provide for final judgment if plaintiff did not amend: Leonard v. Barnum, 168 N. Y. 41, s. c., 167 N. Y. 595.

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§ 1223. Proceedings upon application under the last two sections.

a. Where an interlocutory judgment provides that the defendant may answer and the defendant does not avail himself of the privilege, the plaintiff must apply to the court for final judgment as if the defendant had originally made default in answering, and then the court, under the provisions of § 1223, has the same power and may make the same order as is permitted: Hasbrouck v. New Paltz, etc., Traction Co., 98 App. Div. 563; 90 N. Y. Supp. 977.

b. **Lien.**—In an action by an attorney to establish a lien on his client's papers, where the interlocutory judgment overruling the defendant's demurrer does not provide for the entry of final judgment, the practice to be followed by the plaintiff, upon the failure of the defendant to answer, is prescribed by §§ 1222 and 1223 of the Code: Mathot v. Triebel, 102 App. Div. 426.

§ 1225. Judgment after trial by jury of specific questions of fact.

See § 970, ante, Order for trial by jury, of specific questions of fact; when of right.

See § 972, ante, Trial of the remainder of the issues.

c. **Counterclaim.**—Where there are no issues of fact arising on the complaint and the only issues of fact are those arising on the counterclaim, the defendant may notice such issues for trial at the trial term without having them settled: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

d. **Divorce.**—Where, after certain issues have been tried before a jury in an action for divorce, the case is to be read on the special term calendar for trial, the defendant fails to appear at the trial, the plaintiff cannot enter an interlocutory judgment without giving the defendant notice of the application therefor, and, in such a case, a decision must be filed before the interlocutory judgment can be entered: Boller v. Boller, 96 App. Div. 163; 89 N. Y. Supp. 200.

§ 1228. Id.; upon trial by court or referee of the whole issue of fact.

See § 1010, ante, Filing of decision upon trial by the court.

See § 1022, ante, Report of referee.

e. **Merits.**—Where, at the close of plaintiff's case defendant moved for a dismissal and the court made a finding that an alleged warranty sued on had not in fact been made, the dismissal should be on the merits: Deeley v. Heintz, 169 N. Y. 135.

f. **Decision.**—Where the entire issue involved in an action is one of fact which is tried before the court without a jury, the decision must be made before the judgment can be entered: Lentschner v. Lentschner, 80 App. Div. 43; 80 N. Y. Supp. 146.

g. Where a referee has been appointed to hear and determine, the report stands as the decision of the court and, under § 1228, the clerk is required to enter judgment upon it when its form has been settled by the referee: Schrady v. Van Kirk, 77 App. Div. 261; 33 Civ. Pro. R. 168.

h. **Clerk.**—Where, after the trial of issues of fact by a referee and a report thereon it has been the usual practice, in the absence of an agreement between the attorneys for the respective parties as to the form of the judgment, to have the same settled by the court; and while the duties of the clerk are wholly ministerial, nevertheless the clerk has power, under § 1228 of the Code of Civil Procedure, after such a trial and decision, to enter judgment as directed by the decision, upon the filing of such decision in his office: Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595; 88 N. Y. Supp. 368.

i. **Report of referee.**—A report of a referee, appointed to hear and determine the issues arising in an action, which does not state the facts found and conclusions of law as required by § 1022, is insufficient to constitute the basis of a valid judgment: Smith v. Irvin, 108 App. Div. 228; 95 N. Y. Supp. 623.

j. **Summary proceedings.**—§ 1228, providing for the entry of judgment upon the report of a referee, has no application to summary proceedings on the petition of the client to compel the attorney to pay over moneys: Matter of Cartier v. Spooner, 118 App. Div. 342.

§ 1229. In matrimonial causes, judgment can be rendered only by the court.

k. **Divorce.**—On the hearing of a motion to confirm the report of a referee authorizing the entry of a judgment of absolute divorce, it is the duty of the court to examine the testimony, and although the reference was to hear, try and de-

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termine, it may refuse to confirm the report, unless it is satisfied upon the whole case that the divorce should be granted: Galloway v. Galloway, 92 App. Div. 300; 86 N. Y. Supp. 1078.

a. In an action for a divorce, even though material errors have been committed by the referee, yet the court should not extend its power under § 1229 to a review of the rulings of the referee in the admission and exclusion of evidence: Goldie v. Goldie, 39 Misc. 389.

§ 1230. Final judgment upon decision or report awarding interlocutory judgment, etc.

b. **Notice.**—Notice of an application for the confirmation of the report of a referee, appointed pursuant to the terms of an interlocutory judgment, and for the entry of final judgment thereon, need not be given to an infant defendant as to whom the complaint was dismissed by the interlocutory judgment: Jewett v. Schmidt, 108 App. Div. 322; 95 N. Y. Supp. 631, aff'd 184 N. Y. 608.

§ 1231. Id.; how final judgment entered and settled in certain cases.

c. § 1231, providing that an interlocutory judgment entered upon a decision or report "may state the substance of the final judgment, to which the party will be entitled," does not require the interlocutory judgment to state the substance of the final judgment; the court, in directing the final judgment, is not confined to the interlocutory judgment or foreclosed by it: Hebblethwaite v. Flint, 83 App. Div. 163.

d. **Amendment.**—Amendment of a judgment which directs the payment of a sum stated less taxes, by directing that the cost of repairs and improvements be also deducted: Galligan v. Galligan, 73 App. Div. 71; 76 N. Y. Supp. 786.

e. A final judgment must follow the terms of the interlocutory judgment, and should be amended when it does not so follow the interlocutory judgment: Reilly v. Freeman, 109 App. Div. 4; 95 N. Y. Supp, 1069; 184 N. Y. Supp, 610.

f. A judgment cannot be modified on motion after its entry by deducting payments alleged to have been made after the suit was begun and before judgment was entered and which should have been proved at the trial, opportunity therefor having been offered; nor can an order be made providing for its discharge on the payment of a less sum than the amount of it: Ferguson v. Bièn, 54 Misc. 88.

§ 1232. Interlocutory reference or inquisition; how reviewed.

g. § 1232 does not provide for an assessment of damages in the trial court, or for a review thereof, but only an assessment by a writ of inquiry out of the court; § 1215 does not provide for an assessment of damages in cases arising under § 194, but only in cases of default in answering or demurring under § 1214; there seems to be no special provision made in the Code of Civil Procedure as to the practice on the assessment of damages in cases arising under § 194 and the court is left to establish its own procedure: Yaw v. Whitmore, 66 App. Div. 317; 72 N. Y. Supp. 765.

§ 1234. Id.; upon verdict subject to opinion of court.

See § 1185, ante, Verdict subject to the opinion of the court.

h. **Decision.**—Where the court presiding at a jury trial reserves its decision on a motion to dismiss the complaint, made by the defendant when the plaintiff rested, and the defendant does not renew such motion after all the proof is in or request the court to submit any questions of fact to the jury, whereupon the court directs a verdict for the plaintiff, to which the defendant takes no exception, no authority exists authorizing the court to file a decision and the defendant to file an exception to such decision: Murray v. City of New York, 60 App. Div. 541; 69 N. Y. Supp. 959.

§ 1235. Interest on verdict, etc., to be included in recovery.

i. Where an action is brought against a municipality, after the rejection of the claim by the proper authorities, the contractors are not entitled to interest from the time that they presented their claim to the city authorities but, under § 1235 are entitled, to interest from the time the report was made by the referee in the action brought by such contractors for such services: Sweeney v. City of New York, 69 App. Div. 80; 74 N. Y. Supp. 589.

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§ 1236. Entry of judgment.

See rule 8 (Sup. Ct.), Judgments shall be entered only during the hours when offices of the clerks are open to transact business.

a. An action upon a bond conditioned for the payment of any judgment that may be rendered for the enforcement of a mechanic's lien cannot be maintained until the judgment is entered as prescribed by the Code; and an action brought upon the bond, after a decision and judgment have been signed by the justice but before the judgment has been entered, is premature and the complaint must be dismissed: Dearing v. Boss, 55 Misc. 58.

§ 1237. Judgment-roll to be filed, of what it consists.

b. **Notice of trial.**—Notice of trial should not be inserted in a judgment roll: Sweeney v. Kellogg, 96 App. Div. 399; 89 N. Y. Supp. 314.

c. **Interlocutory judgment.**— When the appellate division has modified an interlocutory judgment, the entry thereof in the court below for the purpose of taxing costs is a mere formality and there is no authority in the attorneys for either party or in the county clerk to change or modify the order of the appellate division; when an interlocutory judgment requiring the severance of actions has been modified by the appellate division by granting leave to amend, the right to amend is effective without further action on the part of the clerk of the court below: Myers v. Lederer, 119 App. Div. 332.

d. **Notice of motion.**—The affidavits and notice of motion on which an order of reference was granted have no place in the judgment-roll in the action and will be stricken therefrom on motion: Schrader v. Fraenckel, 113 App. Div. 395.

§ 1238. Id.; by whom prepared.

See § 994, ante, When and how exceptions may be taken, after close of trial by court or referee.

§ 1240. When a judgment may be enforced by execution.

See § 1364, post, The different kinds of execution.

e. Where a purchaser at a judicial sale refuses to complete his purchase and the property is resold and an order made fixing the amount of the purchaser's liability, and execution could only be issued, if at all, by or in the name of the referee and a judgment entered in such order, is not one within section § 1240, which applies only to a judgment in favor of one party against another; the judgment could be enforced by contempt proceedings under § 1241, subd. 4: Rowley v. Feldman, 84 App. Div. 400; 82 N. Y. Supp. 679.

f. **Insolvent corporation.**—The owner of a judgment, which is a lien upon the lands of an insolvent corporation which has passed into the hands of a receiver, may proceed to execution and sell the realty subject to the order of the court, although his judgment was omitted from the list of liens enumerated in the final decree of dissolution, and subject to which the receiver was authorized to and did make sale of the realty: Matter of Coleman, 174 N. Y. 373, rev'g 77 App. Div. 496; 78 N. Y. Supp. 1052.

g. **Replevin.**—Where the complaint in an action brought to recover possession of chattels alleges that the defendant concealed, removed or disposed of said chattels so that they could not be found, and such allegations are proved upon an inquest and are incorporated in the decision, an execution against the person of the defendant may be issued in the event of the return unsatisfied of an execution against his property, although no order of arrest was granted in the action: Lehman v. Mayer, 68 App. Div. 12; 74 N. Y. Supp. 194.

h. **Interlocutory judgment.**— When, in an action in equity brought by a creditor in behalf of himself and other creditors to enforce the statutory liability of directors of a corporation, an interlocutory judgment establishing the liability of directors has been reversed on an appeal by some of the directors and a new trial granted, which new trial has never been had, the interlocutory judgment cannot be enforced even as against those directors who did not appeal therefrom, unless the action be severed: Bauer v. Hawes, 115 App. Div. 492.

§ 1241. When a judgment may be enforced by punishment for disobeying it.

See § 14, ante, Contempts punishable civilly.

See § 718, ante, When sheriff may take and convey, etc., property.

i. **Judicial sale.**—Where a purchaser at a judicial sale refuses to complete his purchase and the property is resold and an order made fixing the amount of the purchaser's liability, an execution could only be issued, if at all,

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by or in the name of the referee, and a judgment entered in such order is not one within § 1240, which applies only to a judgment in favor of one party against another; the judgment could be enforced by contempt proceedings under § 1241, subd. 4: Rowley v. Feldman, 84 App. Div. 400; 82 N. Y. Supp. 679.

a. An interlocutory judgment, which, among other things, directs the recovery of money is not like one directing money to be paid into court or ordering restitution of money paid out of court, and it cannot be enforced by contempt proceedings: Potter v. Rossiter, No. 2, 109 App. Div. 35; 95 N. Y. Supp. 1036.

b. **Contempt.**—An order to show cause why one should not be punished for contempt must be served personally, and service upon counsel is not sufficient: Matter of Weeks, 111 App. Div. 337.

c. Where a judgment directed the payment of money to the receiver, not as an officer of the court, but as a holder of the legal title to the property, such judgment cannot be enforced by contempt proceedings under § 1241, subd. 4, which permits a judgment requiring the payment of money to an officer of the court to be enforced by contempt proceedings: General Electric Co. v. Sire, 88 App. Div. 498; 85 N. Y. Supp. 141.

d. **Alimony.**—The enforcement of the payment of alimony by proceedings for contempt is governed by § 1773 and not by the general provisions of § 1241; after the personal service of a certified copy of the decree, a personal demand, and a failure of the defendant to comply therewith, he is in contempt: Stanley v. Stanley, 116 App. Div. 544.

§ 1245. Certain clerks to keep docket-books.

§ 1391 of the Consolidation Act formerly relating to this section was repealed by the Greater N. Y. Charter, chap. 378 of 1897, as amended by chap. 456 of 1901, and by the Municipal Ct. Act of New York city, chap. 580 of 1902.

See § 1236, ante, Judgment book.

See §§ 3140, 3141, post, Docket book of justice of the peace.

§ 1246. Id.; to docket judgments.

See § 1730, post, Docketing judgment in an action of replevin.

See § 1816, post, Action by or against an administrator.

See §§ 1845, 1846, post, Entry on docket to preserve lien.

See § 3017, post, Transcripts of judgments in justice's courts.

e. § 1247 and § 3017 provide that the county clerk to whom a transcript of the municipal court is presented must, upon payment of his fees therefor, immediately file it, and docket the judgment as prescribed in § 1246: Bernstein v. Schoenfeld, 81 App. Div. 171; 81 N. Y. Supp. 11.

f. **Foreclosure.**—There is no statutory limitation for the docketing of a deficiency judgment in an action for foreclosure; it may be docketed, although more than ten years have elapsed since the time of the referee's report of sale; although such judgment may have ceased to be lien upon real property, the judgment debtor is not prejudiced thereby: Brown v. Faile, 112 App. Div. 302.

§ 1247. Filing transcripts, and docketing judgments thereon.

See § 3017, post, Transcripts in justice's courts.

See § 3304, post, Fee of county clerk for filing transcript.

g. § 1247 and § 3017 provide that the county clerk, to whom a transcript of the municipal court is presented, must, upon payment of his fees therefor, immediately file it, and docket the judgment as prescribed in § 1246: Bernstein v. Schoenfeld, 81 App. Div. 171; 81 N. Y. Supp. 11.

§ 1249. Dockets to be public.

See rule 8 (Sup. Ct.), Judgment can only be entered during business hours.

§ 1250. Judgment not to be a lien until docketed.

See § 1874, post, Interest of judgment debtor in land contract may be reached

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§ 1251. Real property bound for ten years by a judgment thus docketed; name of debtor to be docketed.

Except as otherwise specially prescribed by law, and except also as in this section below provided, a judgment, hereafter rendered, which is docketed in a county clerk's office, as prescribed in this article, binds, and is a charge upon, for ten years after filing the judgment roll, and no longer, the real property and chattels real, in that county, which the judgment debtor has at the time of so docketing it, or which he acquires at any time afterwards, and within the ten years. Provided however that no judgment shall be a charge upon or bind the real property of any person unless and until he be designated by his name in a docket of such judgment in the office of the clerk in the county where such property is. Upon such notice to a judgment debtor as the court may direct the supreme court may order that any judgment heretofore or hereafter rendered therein against such debtor be amended so as to designate such debtor by his name and that the clerk of the county in which the judgment roll is filed redocket such judgment as so amended; and from the time of such redocket during the remainder of ten years from the filing of the judgment roll, such judgment shall bind and be a charge upon the real property and chattels real in that county which such judgment debtor may have at the time of such redocket or may thereafter within said ten years acquire, and a transcript of such new docket may be filed and docketed in the office of the clerk of any other county in the state in like manner and with like effect as a transcript of an original docket may be filed. Upon such notice to a judgment debtor as the court may direct any court other than the supreme court may order that any judgment heretofore or hereafter rendered therein against such debtor and any docket thereof in such court be amended so as to designate such debtor by his name, and at any time after such amendment shall have been made a transcript of the docket of such judgment as so amended may be filed and docketed in the office of the clerk of any county in this state in like manner and with like effect as a transcript of an original docket may be filed.

This and the next section are substitutes for 2 R. S. 359. (Part 3, c. 6, tit. 4), §§ 3, 4; L. 1840, c. 386, § 25; and Co. Proc., part of § 282.

Amended by chap. 318 of 1902, and chap. 432 of 1905.

See § 376, ante, Judgment presumed to have been paid after twenty years.

See § 1321, post, When judgment has been reversed.

See § 1823, post, Decedent's real property not bound by judgment against executor.

See § 1853, post, In a creditor's action against an heir, judgment is not a lien on land sold before judgment is entered.

See § 1936, post, Lien of judgment entered against joint debtors.

a. **Foreclosure.**—There is no statutory limitation for the docketing of a deficiency judgment in an action for foreclosure; it may be docketed, although more than ten years have elapsed since the time of the referee's report of sale; although such judgment may have ceased to be a lien upon real property, the judgment debtor is not prejudiced thereby: Brown v. Faile, 112 App. Div. 302.

b. **Misnomer.**—In an action brought against Zachariah K. Berlin, it was stated

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that the name Zachariah was fictitious and the judgment was entered against the name of that person. *Held*, the judgment did not warrant the taking of proceedings against the property of one Zax K. Berlin: Meurer v. Berlin, 80 App. Div. 294; 80 N. Y. Supp. 240.

a. **How docketed.**—To create a lien under this section the name at length of the judgment debtor must be entered in the proper docket book under the initial letter of the surname of the judgment debtor, and it is only a judgment, which is docketed as thus prescribed, that become a lien on the real property of defendant: Bernstein v. Schoenfeld, 81 App. Div. 171; 81 N. Y. Supp. 11.

b. **Receiver.**—Interpretation of this provision of the Code of Civil Procedure as applied to a lien upon property in the hands of a receiver in supplemental proceedings: Van Loan v. City of New York, 105 App. Div. 572; 94 N. Y. Supp. 221.

c. When a receiver in supplementary proceedings is appointed before an award made for lands taken by eminent domain, the judgment debtor ceases to have any interest in the lands, and the award vests in the receiver; as such award is personal property, the ten-year limitation as to lien of judgments upon real estate has no application: Fawcett v. City of New York, 112 App. Div. 155.

§ 1252. Real property may be levied upon after ten years.

d. **Execution.**—When an execution erroneously states the date of the filing of the transcript of the judgment as of the date of the filing of the judgment-roll when the transcript was filed ten years later, execution may be amended so as to limit the lien to the date of the filing and recording the notice: Burch v. Burch, 51 Misc. 232.

e. Where a judgment creditor after the lapse of ten years has served notice of motion on the heirs of the deceased judgment debtor for leave to issue execution on the lands owned by the judgment debtor, the lien of the execution when levied is superior to the rights of a mortgagee and grantee under mortgages and deeds made by the heirs subsequent to the notice of motion, but prior to the execution, when the mortgagee and grantee had knowledge of the motion: Lyons Nat. Bank v. Shuler, 115 App. Div. 859.

§ 1255. Certain time not to be included in the ten years.

f. The right of a receiver appointed in proceedings supplementary to execution to an award made on the condemnation of lands of the judgment debtor is not measured by the ten years, during which the judgment is a lien on the debtor's real estate, under § 1251, but for the twenty years during which the judgment is in force under § 376; *semble*, as such receiver could not enforce payment of the award for a period of four months after the confirmation thereof, the time, during which the judgment was a lien on real estate, was extended for said four months, by virtue of § 1255: Van Loan v. City of New York, 45 Misc. 482; 92 N. Y. Supp. 734, aff'g 105 App. Div. 572.

§ 1256. Court may order lien of judgment to be suspended upon appeal.

See § 1311, post, Levy upon personal property, when superseded by appeal.

§ 1263. Assignee who is receiver, etc., may file notice.

g. If there is any doubt as to the right of the plaintiff in an action to file a *lis pendens*, the question should not be decided on a motion to cancel such *lis pendens;* a notice of *lis pendens* filed by the plaintiff should not be vacated on motion. when it cannot be said that the action was not brought to recover a judgment affecting the title to or possession, use or enjoyment of the premises, or that it was clear that the plaintiffs would not be able on the trial to establish a lien as vendees: Smadbeck v. Law, 106 App. Div. 552; 94 N. Y. Supp. 797.

§ 1266. Sheriff to give copy of satisfied execution; clerk to enter satisfaction.

See § 1366, post, General requisites of executions.

See § 1388, post, When sheriff is qualified, execution may be enforced by under-sheriff.

§ 1268. Discharge of judgment against a bankrupt.

h. This section applies only to judgments entered before a discharge in bankruptcy, as any other holding would conflict with the doctrine of *res adjudicata:* Howe v. Noyes, 47 Misc. 338; 93 N. Y. Supp. 476.

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a. The fact that the docket of a judgment has not been cancelled, under § 1268, does not render a vendor's title unmarketable, because the purpose of said section is not to continue an obligation which the federal law has destroyed, but merely to provide a method by which a cancellation of the judgment may be had, and § 1268, if construed otherwise, would be in contravention of the federal law and void: Grosso v. Mark, 45 Misc. 500.

b. **Contract.**—A defendant in an action on contract who, after obtaining leave to set up by answer a discharge in bankruptcy, granted him after joinder of issue, declined to avail himself of the leave, it being accompanied by certain conditions, is, after recovery of judgment against him and the expiration of one year after his discharge, entitled as a matter of right to an order, under § 1268, cancelling the record of the judgment: Hussey v. Judson, 43 Misc. 370; 87 N. Y. Supp. 499.

c. **Lien on real estate.**—A lien, secured before the judgment debtor obtains a discharge in bankruptcy is within the saving clause of § 1268, and the order cancelling the judgment should provide that it should be allowed to stand for the purpose of enforcing any lien upon any real estate of the bankrupt: Arnold v. Treviranus, 78 App. Div. 589; 79 N. Y. Supp. 732.

d. A deed of real estate given as security for the performance of a certain agreement does not divest the owner of his title, and a judgment subsequently recovered against him becomes a lien upon such real estate, and such lien is not destroyed by the owner's subsequent bankruptcy and discharge, and a motion by the judgment creditor for leave to issue execution after the lapse of five years should be granted: Graves Elevator Co. v. Seitz, 54 Misc. 552.

e. When a judgment was filed after a deed of certain property of the judgment debtor was executed, but before it was recorded, and such debtor was subsequently adjudged a bankrupt, the interest of the judgment creditor in the real estate was not, either at the time of the adjudication in bankruptcy or at the time of his discharge, of such a character that it would be regarded as a lien, and consequently embraced within the saving clause of § 1268: Matter of David, 44 Misc. 516.

f. **False representations.**—The discharge in bankruptcy does not affect a judgment in an action based on false representations, subsequently entered on a stipulation withdrawing the allegations of fraud: Stevens v. Meyers, 72 App. Div. 128, 76 N. Y. Supp. 332.

g. **Criminal conversation.**—A person discharged in bankruptcy is not entitled to have cancelled of record a judgment recovered against him in an action for criminal conversation with the wife of the judgment creditor: Colwell v. Tinker, 65 App. Div. 20; 72 N. Y. Supp. 505.

h. **Breach of promise.**—A judgment rendered in favor of the plaintiff in an action to recover damages for a breach of promise of marriage is not, although the plaintiff pleaded and proved in aggravation of the damages that she had been seduced by the defendant, a judgment in an action "for willful and malicious injuries to the person and property of another," and is, therefore, within the operation of a discharge in bankruptcy obtained by the defendant: Disler v. McCauley, 66 App. Div. 42; 73 N. Y. Supp. 270.

i. **Notice.**—On a motion under § 1268 to cancel a judgment on the ground that the judgment debtor had been discharged in bankruptcy, the fact that no notice of the bankruptcy proceedings was sent either the judgment creditor or his attorney justifies the court in denying the motion: Feldmark v. Weinstein, 45 Misc. 329.

j. The discharge of a bankrupt who scheduled the residence of a judgment creditor as "unknown," though ascertainable by the exercise of reasonable diligence, does not extend to the creditor's judgment where, upon motion to cancel the same, it appears that the creditor had no notice or knowledge of the various steps in the bankruptcy proceeding: Schiller v. Weinstein, 47 Misc. 622.

k. A judgment will be discharged of record, although the notice required by the Bankruptcy Law was addressed to the judgment creditor, who died prior to the proceedings in bankruptcy, and whose name appeared in the schedule of creditors: Lent v. Farnsworth, 94 App. Div. 99; 87 N. Y. Supp. 1112.

l. **Misnomer.**—Where the schedules of a bankrupt describe a judgment creditor named George Liesum, as George Liesman, the bankrupt's discharge does not release the debt as against George Liesum, and therefore the judgment cannot be subsequently discharged of record as against him: Liesum v. Kraus, 35 Misc. 376.

m. **Supplementary proceedings.**—The title of a receiver in supplementary proceedings is not affected by the judgment debtor's discharge in bankruptcy, and an order made, under § 1268, discharging the lien of the judgment upon which the supplementary proceedings were based should provide, "but such cancellation of record is not to impair any rights or lien which the receiver may have acquired in the property of said judgment debtor:" Pickert v. Eaton, 81 App. Div. 423; 81 N. Y. Supp. 50.

n. **Cancellation of judgment.**—An order of the appellate division affirming, with leave to renew the application, an order of the special term denying a motion by the defendant in an action for criminal conversation, made under this section to have cancelled of record a judg-

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ment recovered therein because he had been subsequently discharged in bankruptcy, is proper and should be affirmed: Colwell v. Tinker, 169 N. Y. 531, aff'g 65 App. Div. 20; 72 N. Y. Supp. 505.

a. Where a bankrupt in his schedules fails to state the street number of the residence of a judgment creditor which with reasonable diligence he could have ascertained, and, owing to such failure, the creditor receives no notice of the bankruptcy proceedings and denies any knowledge thereof, a motion to cancel his judgment will be denied: Cagliostro v. Indelli, 53 Misc. 44.

b. On a motion made by a bankrupt pursuant to § 1268 to cancel a judgment against him, upon the ground that he has been granted a discharge in bankruptcy, the burden of proof is upon him to establish that the debt was duly scheduled or that the creditor had notice or actual knowledge of the proceedings in bankruptcy: Weidenfeld v. Tillinghast, 54 Misc. 90.

c. Circumstances which will warrant the granting of the motion to vacate the judgment, even though the plaintiff's residence was stated at a place where she had never resided: Vaughn v. Irwin, 49 Misc. 611.

d. **Sheriff.**—Where a debtor held by a sheriff within the liberties of a jail upon a body execution on a debt provable in bankruptcy, files a petition therein, procures a discharge, and thereupon, of his own motion, goes and remains beyond the liberties, the sheriff is not liable to the creditor in the execution as for an escape: Walker v. Harder, 39 Misc. 749; 80 N. Y. Supp. 948.

e. **Fraud.**—Where a bankrupt, in the schedule filed by him in the bankruptcy proceedings states that a certain judgment creditor's address is unknown to him, the fact that it subsequently appears that the bankrupt called at such judgment creditor's house over two years prior to the institution of the bankruptcy proceedings, will not render the discharge in bankruptcy ineffectual to bar the judgment creditor's claim, in the absence of evidence that the statement in the schedule, that the judgment creditor's address was unknown to the bankrupt, was fraudulently inserted, or that at the time the petition in bankruptcy was filed, the bankrupt knew that the judgment creditor still lived at the house at which he had called: Matter of Mollner, 75 App. Div. 441; 78 N. Y. Supp. 281.

f. **Partnership.**—A judgment on a partnership debt standing against a former partner is discharged as to him by an adjudication of bankruptcy when the judgment was listed in his schedules, and it appears that the firm has been dissolved and that there are no assets thereof remaining: Berry Brothers v. Sheehan, 115 App. Div. 488; 101 N. Y. Supp. 371.

§ 1269. Power of court respecting docket.

See § 3017, post, Docket of transcript in justice's court.

See § 2553, post, Surrogate's decree directing payment of money.

g. **Surrogate.**—The surrogate's court has power, independently of any statute to exercise control over its own records and to vacate its own decrees for mistake, fraud or clerical error: Matter of Regan, 167 N. Y. 338, at 343, rev'g 58 App. Div. 1; 68 N. Y. Supp. 527.

h. **Lien upon real estate.**—A deed of real estate given as security for the performance of a certain agreement does not divest the owner of his title, and a judgment subsequently recovered against him becomes a lien upon such real estate, and such lien is not destroyed by the owner's subsequent bankruptcy and discharge, and a motion by the judgment creditor for leave to issue execution after the lapse of five years should be granted: Graves Elevator Co. v. Seitz, 54 Misc. 552.

§ 1272. To what judgments and executions this article applies.

i. **Money judgment.**—The docketing of a judgment and the lien created thereby are provided for in art. 3 of title 1 of chap. 11 of the Code of Civil Procedure, and that article is applicable only in a case of a money judgment: French v. French, 107 App. Div. 107; 94 N. Y. Supp. 1026; appeal dis. 185 N. Y. 532.

§ 1273. Judgment may be confessed.

See § 2430, post, Confession of judgment void in proceedings to dissolve a corporation.

See §§ 2864, 3010, post, Confession of judgment in justice's courts.

j. Upon the judicial settlement of the account of an administratrix of her husband's estate, she must be charged with a judgment by confession entered against her in favor of her husband in the supreme court; the surrogate's court cannot adjudicate upon the validity of such judgment on the ground that it was confessed at the husband's request and without consideration; nor

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can the surrogate's court omit to charge the administratrix with the judgment on the ground that she has no property with which to pay it: Matter of Griffith, 49 Misc. 405.

§ 1274. Statement; form thereof.

a. **Promissory note.**—A confession of judgment will not be vacated on the ground that it fails to state the facts out of which the debt arose, as required by subd. 2 of § 1274, when the confession is stated to be made upon a promissory note attached thereto, and that the note was given by the defendants to the plaintiff "for money then due to the plaintiff from the said defendants, and theretofore had by said defendants from the said plaintiff, with interest:" Anderson v. Shutts, 114 App. Div. 308.

b. **Irregularity.**—The failure to annex to the acceptance of an offer of judgment an affidavit of the authority of the attorney signing such acceptance is a mere irregularity, of which third parties cannot take advantage: the objection, that the statement upon which a judgment was entered by confession was insufficient, is not available to fraudulent grantees of property belonging to the judgment debtor; judgment may be confessed upon a claim which is not yet due: St. John Woodworking Co. v. Smith, 82 App. Div. 348; 82 N. Y. Supp. 1025, aff'd 178 N. Y. 629.

§ 1278. Confession by one of several joint debtors.

See § 1932, et seq., post, Actions against and between joint debtors.

c. § 1278, which is closely related to §§ 1942-1946 in spirit and intent, is a remedial statute intended to abrogate the harsh and technical rule of the common law, which frequently operated to defeat a just claim: Siefke v. Minden, 40 Misc. 631; 83 N. Y. Supp. 71.

d. **Costs.**—The confession is not excessive in including costs as a part of the indebtedness, for the plaintiff is entitled to fifteen dollars costs and the disbursements taxable in an action under § 1275, and, although the record does not show that the clerk formally taxed the costs, such taxation will be assumed to have been made by reason of the certification of the judgment by the clerk: Anderson v. Shutts, 114 App. Div. 368.

§ 1279. Controversy, how submitted without process.

See rule 41 (Sup. Ct.), Plaintiff to furnish papers on submission to the appellate division.

e. **Insufficient statement.**—The court will not consider what purports to be a submission of a controversy upon an agreed statement of facts, where such statement of facts does not allege that a controversy exists between the parties, and the submission does not ask that a judgment determining such controversy be granted: Kelley v. Hogan, 69 App. Div. 251; 74 N. Y. Supp. 682.

f. A record purporting to be a submission of a controversy, under § 1279, is fatally defective, unless it contains a stipulation between the parties that it contains a statement of the facts agreed upon, and the defect is not cured by a memorandum opposite the title, to the effect that the record is a case agreed upon in a controversy submitted without action, pursuant to the Code of Civil Procedure: Begen v. Curtis, 81 App. Div. 91.

g. **Default.**—It seems that § 1279 in regard to the submission of a controversy upon an agreed statement of facts does not contemplate a judgment by default because the failure of one of the party to appear upon the argument either personally or by a written brief; in certain cases the appellate division will deem it proper to dismiss the submission: Heasty v. Lambert, 98 App. Div. 177.

h. **Appellate division.**—Upon the submission of a controversy under § 1279 upon an agreed statement of facts, a fact contained in that part of the instrument which sets out the plaintiff's contention will not be considered by the appellate division as one of the agreed facts: Kelly v. Kelly, 72 App. Div. 487.

i. Where a controversy, submitted upon an agreed statement of facts under § 1279 presents a pure question of law, the supreme court has power to decide it, and the Court of Appeals may review its decision; but if the question of law cannot be decided without first disposing of conflicting or equivocal inferences of fact, the supreme court is without jurisdiction, and a judgment entered upon such decision must be reversed and the proceeding dismissed: Marx v. Brogan, 188 N. Y. 431, rev'g 111 App. Div. 480.

j. **Mayor of New York.**—Submission of controversy in regard to power of mayor to appoint justices of the court of special sessions in the city of New York: People ex rel. Clarke v. Fitzgerald, 180 N. Y. 269; 34 Civ. Pro. R. 56.

k. **Trust.**—Submission of controversy under §§ 1279-1281 of the Code of Civil Procedure, upon which it was held

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that a trust depending for its vesting upon a term of years offends the statute of perpetuities: Hagemeyer et al. v. Saulpaugh, 97 App. Div. 535; 34 Civ. Pro. R. 66.

a. **Benefit society.**—Where two parties claiming the proceeds of a benefit certificate submit the controversy to the court under § 1279, and each demands judgment that the amount be paid to him, the court will dismiss the submission where it appears that the right of either party to the benefit depends upon a construction to be given to important provisions of the charter of a benefit society which is not a party to the action and that the fund is not in court; on a submission of the controversy the court cannot direct a judgment against an undisclosed defendant or grant any relief different from that asked for in the submission: Davin v. Davin, 105 App. Div. 580.

b. **Constitutionality.**—Assuming that the question of the constitutionality of § 8 of the Tax Law is raised by the submission of a controversy under § 1279, yet the statute is a valid exercise of legislative power, even though it results in double taxation: Woodruff v. Oswego Starch Factory, 177 N. Y. 23, aff'g 70 App. Div. 481; 74 N. Y. Supp. 961.

c. **Judgment.**—The appellate division cannot exercise any jurisdiction over a controversy submitted under § 1279, in which they are asked for their opinion upon three formulated questions, but are not authorized to direct judgment upon the determination of them: Matter of Ashley, 67 App. Div. 137; 73 N. Y. Supp. 592.

d. **Costs.**—While this section provides for the submission of a controversy, with costs discretionary with the court, yet either party may waive his right to have the court exercise its discretion in his favor, and when it is stipulated that the judgment rendered shall be without costs, a judgment granting costs will be modified by striking out such costs: Real Estate Corporation v. Harper, 174 N. Y. 123, mod'y 70 App. Div. 64; 74 N. Y. Supp. 1065.

§ 1281. Subsequent proceedings regulated.

e. **Additional statement.**—The court will not consider what purports to be a submission of a controversy upon an agreed statement of facts, where such statement of facts does not allege that a controversy exists between the parties and the submission does not ask that a judgment determining such controversy be granted; the court will not permit the parties to file an additional statement, under § 1281, where it appears that persons whose presence is necessary to enable the court to grant any judgment have not been made parties to the submission: Kelly v. Hogan, 69 App. Div. 251; 74 N. Y. Supp. 682.

§ 1282. Motion to set aside judgment for irregularity; when it may be heard.

See § 724, ante, Amendments to conform to proceedings.

See § 2481, post, Power of surrogate to set aside a decree.

f. **One year.**—The court has inherent power to vacate a judgment at any time in furtherance of justice, and §§ 724 and 1282 are not effective to limit the exercise of this power to a period of one year subsequent to the entry of the judgment: Riley v. Ryan, 45 Misc. 151; 91 N. Y. Supp. 952.

g. The court has power, independent of statute, to modify, vacate and set aside its orders and judgments and may exercise it in behalf of one in whose favor the order of judgment was entered: Weston v. Citizens' National Bank, 88 App. Div. 330; 84 N. Y. Supp. 743.

h. **Referee.**—The court has no power to direct a referee to decide a case one way or another or to change his report after it has been made; nor can it permit him to make a new report for the purpose of correcting a mistake inadvertently made therein unless the mistake is clearly and satisfactorily shown by competent evidence: Deagan v. King, 83 App. Div. 428; 82 N. Y. Supp. 817.

i. **Separation.**—A judgment of separation in favor of a defendant husband will be vacated where it appears that the plaintiff was an infant and no guardian *ad litem* had been appointed; the failure to appoint such guardian is an error for which judgment may be vacated at any time within two years under § 1290: Byrnes v. Byrnes, 109 App. Div. 535.

j. **Insufficient affidavit.**—A motion must be made upon clear proof in order to avoid the effects of the statute; when the moving affidavit is wholly upon information and belief, and does not disclose the sources of information nor the grounds of belief, it is insufficient: Eichner v. Metropolitan Street R. Co., 114 App. Div. 247.

k. **Summary proceeding.**—A motion to set aside a judgment in a summary proceeding to compel an attorney to pay over moneys erroneously entered on the report of a referee without confirmation by the court is not governed by § 1282, nor are the provisions of § 1290 and § 724 applicable: Matter of Cartier v. Spooner, 118 App. Div. 342.

l. **Default.**—When legal papers are served by mail without postage being fully prepaid, the attorney to whom they are addressed is under no obliga-

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tion to pay the postage due and may refuse to receive the package tendered by the postman; when after such attempted service of an answer, the plaintiff enters judgment by default, the court has no power to set aside the judgment as irregular. The remedy of the defendant is to apply to open the default and for leave to come in and defend: Kuh v. Goldman, 119 App. Div. 148.

a. An order requiring the service of a complaint, if regarded as the opening of the default, should only be granted on terms: Shenstone v. Wilson, 117 App. Div. 752.

§ 1283. Motion to set aside judgment for error in fact; when it may be made by party.

b. **Surrogate.**—It would seem that the overvaluation of real estate by a surrogate for the purpose of fixing the amount of the transfer tax constitutes an error of fact arising upon the trial, and hence is not within the purview of § 1283, made applicable to surrogate's courts by § 2481, authorizing the court to set aside a judgment for an error of fact not arising upon the trial: Matter of Lowry, 89 App. Div. 226.

c. **Separation.**—A judgment of separation in favor of a defendant husband will be vacated when it appears that the plaintiff was an infant and no guardian *ad litem* had been appointed; the failure to appoint such guardian is an error for which judgment may be vacated at any time within two years under § 1290: Byrnes v. Byrnes, 109 App. Div. 535.

d. **Promissory note.**—A judgment should not be opened where an action was brought upon a promissory note secured by collateral; it is no defense to allege that the holder of the note converted the collateral, if it be not set out as a set-off or counterclaim that the collateral was of value or that the defendants have sustained damage: Wills v. Rowland & Co., 17 App. Div. 122.

§ 1290. Within what time motion to be made.

e. **Surrogate.**—A surrogate has power, without limitation as to time, to vacate or modify a decree in a proper case, provided it is exercised in the same manner as in a court of record, and the two years' limitation of § 1290 does not apply to the surrogate's court, nor is he precluded from acting by expiration of the time to appeal: Matter of Mather, 41 Misc. 414; 84 N. Y. Supp. 1105.

f. **Separation.**—A judgment of separation in favor of a defendant husband will be vacated when it appears that the plaintiff was an infant and no guardian *ad litem* had been appointed; the failure to appoint such guardian is an error for which judgment may be vacated at any time within two years under § 1290: Byrnes v. Byrnes, 109 App. Div. 535.

g. **Summary proceeding.**—A motion to set aside a judgment in a summary proceeding to compel an attorney to pay over moneys erroneously entered on the report of a referee without confirmation by the court is not governed by § 1282, nor are the provisions of § 1290 and § 724 applicable: Matter of Cartier v. Spooner, 118 App. Div. 342.

§ 1291. Exceptions in cases of disability.

h. **Separation.**—A judgment of separation in favor of a defendant husband will be vacated where it appears that the plaintiff was an infant and no guardian *ad litem* had been appointed; the failure to appoint such guardian is an error for which the judgment may be vacated at any time within two years under § 1290: Byrnes v. Byrnes, 109 App. Div. 535.

§ 1292. Restitution; when directed.

See § 1323, post, Restitution awarded when judgment is reversed or modified on appeal.

i. **Foreclosure.**—Where a judgment of foreclosure was entered after an answer was overruled as frivolous, and subsequently the order overruling the answer was reversed on appeal, the special term must vacate the judgment, and the question as to what effect should be given to the sale should be determined after the trial of the issues raised by the answer and in a proceeding to which the purchaser is a party: Hidden v. Godfrey, 92 App. Div. 373; 87 N. Y. Supp. 14.

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§ 1294. When party may appeal.

See §§ 724, 783, ante, Relief against omissions.

a. **Default.**—Where the plaintiffs appeared at the trial and declined to proceed, they cannot appeal from the judgment entered on their default: Delmar v. Delmar, 65 App. Div. 582; 77 N. Y. Supp. 959.

b. No appeal lies from a final judgment entered on the default of the defendant after an entry of an interlocutory judgment overruling a demurrer but granting the defendant the right to answer, which he failed to do: Forgotson v. Becker, 39 Misc. 813; 81 N. Y. Supp. 321.

c. A mortgagor who fails to answer in an action to foreclose a mortgage cannot appeal from the judgment: N. Y. Co-operative Building & Loan Assn. v. Brennan, 62 App. Div. 610; 70 N. Y. Supp. 916.

d. **Municipal court.**—The Municipal Court Act, chap. 580 of 1902, contains no provision permitting an appeal from a judgment taken by default; such an appeal is no longer permissible: Brown v. Bouse, 43 Misc. 72; 86 N. Y. Supp. 240.

e. **Executor.**—An executor is a "party aggrieved" within the meaning of §§ 1294 and 2568 by a decree refusing to admit a codicil to probate: Matter of Stapleton, 71 App. Div. 1; 75 N. Y. Supp. 657.

f. A person nominated as executor in a will offered for probate is a party aggrieved by a decree of a surrogate denying probate to such instrument, and is, therefore, entitled to appeal from such decree to the appellate division: Matter of Rayner, 93 App. Div. 114; 87 N. Y. Supp. 23.

g. When the executors and all the parties interested under a will have united in submitting a question in controversy to the appellate division, and none of the latter have appealed from its judgment, the executors have no such direct interest in the controversy as will entitle them to take an appeal to the court of appeals: Isham v. N. Y. Assn. for Poor, 177 N. Y. 218.

h. **Decree.**—The administrator with the will annexed should require the personal representative of the executor to render an accounting of the latter's proceedings, but he is not entitled to an appeal from the decree of such accounting on the ground that the surrogate erroneously determined such questions, where it appears he was not injuriously affected by the decree: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

i. **Mortgagor.**—Where the purchaser at a mortgage foreclosure sale procured an order to show cause why a writ of assistance should not be issued commanding the sheriff to place him in possession and the mortgagor failed to show cause, an appeal by the mortgagor will be dismissed: Title Guarantee & T. Co. v. Am. P. & C. Co., 95 App. Div. 192; 88 N. Y. Supp. 502.

j. **City.**—The city of Yonkers is not a party aggrieved within the meaning of § 1294 by an order made in a proceeding instituted under title 7 of the city charter for a change of the grade of one of the public streets therein, refusing to confirm the report of the commissioners of estimate and assessment appointed in the proceedings to assess the damages occasioned thereby: Matter of Nepperhan Street, 71 App. Div. 534; 75 N. Y. Supp. 923.

k. **Proof.**—Where a defendant moves for a dismissal of the complaint and the direction of a verdict in his favor, after he has rested his case without introducing any proof, he may not appeal from an order granting his motion to set aside a verdict directed for plaintiff as contrary to law and the evidence: Carmichael v. John Hancock Mut. L. Ins. Co., 49 Misc. 461.

l. **Decision of the court.**—No appeal from a decision of the court is allowed by the Code of Civil Procedure, and such an appeal will be dismissed, with costs: Rees v. N. Y. Herald Co., 112 App. Div. 456.

m. **Taxpayer's action.**—Aldermen of a city are proper parties to an appeal in an action by a taxpayer to restrain the holding of special election: Koster v. Coyne, 110 App. Div. 742; 97 N. Y. Supp. 433, aff'd 184 N. Y. 494.

§ 1296. When a person entitled to become a party may appeal.

See § 1920, post, Proceedings in case of death of member of unincorporated association.

See § 1930, post, Successor of public officer may be substituted.

See § 2569, post, When person not a party may appeal.

§ 1298. Proceedings, when party dies pending appeal.

See § 755 et seq., ante, Proceedings upon death of party.

§ 1300. Appeal, how taken.

See § 1325, post, Time in which to appeal to court of appeals.

See §§ 1341, 1351, post, Time in which to appeal to the appellate division.

See § 1359, post, Time in which to appeal from a determination in a special proceeding.

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a. **Notice.**—A notice of appeal may only call up part of a particular judgment or decree entered in the action or special proceeding: Newburg Savings Bank v. Town of Woodbury, 64 App. Div. 305; 72 N. Y. Supp. 222.

b. When, in an action to construe a will, some defendants contend that the will is valid, and others that it is invalid, and on appeal by certain defendants from a judgment determining that the will is valid, the appellants have served notice of appeal upon the plaintiff, the county clerk and such co-defendants as have served notice of entry of judgment, the appeal should not be dismissed on the plaintiff's motion for failure to serve notice of appeal on co-defendants who have not served notice of entry of judgment, but the motion should be denied on condition that the appellants serve the notice of appeal on defendants not served: Smith v. Havens Relief Soc., 115 App. Div. 185.

c. **Order.**—§ 1300 distinctly allows appeals from specified parts of orders or judgments, and while it is generally true that a party cannot take the benefit of an order and at the same time have an appeal therefrom, the rule invariably applies where the benefits or advantages of the order are conditional: Ziadi v. Interurban Street Ry. Co., 97 App. Div. 137; 89 N. Y. Supp. 606.

§ 1301. When notice of appeal to specify interlocutory judgment, etc.

See § 1317, post, Appellate court may review or modify each interlocutory judgment, etc.

See § 1316, post, Interlocutory judgment or intermediate order may be reviewed.

See § 1350, post, Appeal from final judgment after affirmance of interlocutory judgment.

d. This section relates to all appeals provided for in chapter 12, and authorizes the review by the court of appeals of those intermediate orders which are specified in the notice of appeal: N. Y., L. & W. Ry. Co. v. Erie R. R. Co., 170 N. Y. 448, aff'g 67 App. Div. 625; 74 N. Y. Supp. 1139.

e. When a final order is entered, the interlocutory judgment and the intermediate orders upon which the final judgment is based merge in such final judgment, and no right to review the interlocutory judgment or the intermediate orders survives the entry of final judgment, except so far as a review of the interlocutory judgment and intermediate orders is allowed on an appeal from the final judgment: Bates v. Holbrook, 89 App. Div. 548; 85 N. Y. Supp. 673.

f. **Notice.**—An intermediate order will not be reviewed on an appeal from a judgment unless it is referred to in the notice of appeal: Sterns v. Shepard, 91 App. Div. 56; 86 N. Y. Supp. 391.

g. Where a defendant neglects to appeal from an interlocutory judgment, although he appeals from the final judgment without specifying in the notice of appeal that he intends to bring up for review the interlocutory judgment, the appellate division has no power to review the interlocutory judgment: Koehler & Co. v. Brady, 87 App. Div. 326; 84 N. Y. Supp. 457.

h. **Final order.**—A special proceeding terminates not in a judgment, but in a final order: Fenlon v. Paillard, 46 Misc. 151.

i. The order authorizing the construction of a temporary crossing is not a final order in a special proceeding, the specification in the notice of appeal of an intention to bring up the intermediate orders for review is not effective for that purpose: Oneonta, C. & R. S. R. Co. v. C. & C. V. R. R. Co., 85 App. Div. 284.

j. An order of the appellate division modifying a decree of the surrogate's court is not reviewable by the court of appeals upon an appeal taken directly from a decree of the surrogate's court made and entered after, and in accordance with such order, notwithstanding the notice of appeal gives notice of an intention to bring up such order for review, since the order is not only not an intermediate order of the appellate division, but is a final order, and can only be brought up by direct appeal therefrom or by appeal from a final judgment or order of the appellate division affirming the decree of the surrogate's court entered after and in accordance with the order sought to be reviewed: Matter of Union Trust Co., 172 N. Y. 494.

k. **Foreclosure.**—An order denying a defendant's motion for a settlement of the issues arising on a counterclaim is an intermediate order and is reviewable on an appeal from a judgment of foreclosure, particularly where the defendant's time to appeal from such order had not expired when the judgment of foreclosure was entered: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

l. **Equity.**—In the absence of a statement, in a notice of appeal from a judgment rendered in an action in equity, that the appellant intends to bring up for review an order denying his motion for a jury trial of the issues of fact arising in the action, the appellate division cannot review such order: McIlvaine v. Steinson, 90 App. Div. 77; 85 N. Y. Supp. 889.

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§ 1303. Defects in proceedings may be supplied.

See § 784, ante, Time in which to appeal cannot be extended.

a. **Notice.**—Where a defendant serves a notice of appeal upon the plaintiff, and the clerk of the court, but fails to serve it on her co-defendant, the court has power under § 1303 to permit such defendant, upon terms, to perfect her appeal: Cooper v. Cooper, 76 App. Div. 221; 78 N. Y. Supp. 397.

b. **Nunc pro tunc.**—An order made under § 1303, authorizing service of a notice of appeal upon the clerk of the court *nunc pro tunc,* does not render the appeal effective as to the parties who have not been served with the notice of appeal within the time fixed by statute: Hall v. City of New York, 79 App. Div. 102; 79 N. Y. Supp. 979.

c. **Undertaking.**—An undertaking given under §§ 2577 and 2581 on an appeal to the appellate division from a decree or order of the surrogate is not governed by § 1335 providing for the justification of sureties. Such latter section relates only to the appeals to the court of appeals and is not applicable to the surrogate's court. Hence, when such undertaking has been filed with the surrogate and has been allowed and approved by him, an exception to the sureties is not well taken, and a motion to perfect an appeal under § 1303 will be dismissed: Matter of Sheldon, 117 App. Div. 357.

d. **Perfecting appeal.**—An order may be made perfecting an appeal under this section although the appellants have inserted costs and allowances in judgment: Smith v. Havens Relief Soc., 115 App. Div. 185.

§ 1304. Order appealed from must be entered; proceedings to compel entry.

e. The indorsement of the word "filed" on an order establishes its entry: O'Connor v. McLaughlin, 80 App. Div. 305; 80 N. Y. Supp. 741.

§ 1310. When appeal stays proceedings; effect thereof.

f. In an action by a husband to annul a marriage where the appellate division reverses its judgment in the husband's favor and grants a new trial, the stay obtained by the husband under § 1310, by perfecting an appeal to the court of appeals, will not prevent the wife from making a motion for the payment of alimony and the application for alimony is not to be regarded as having been made after final judgment but rather before trial, and the right to the relief sought is within the express provisions of § 1769: Di Lorenzo v. Di Lorenzo, 78 App. Div. 577.

§ 1311. Levy upon personal property, when superseded by appeal.

See § 1256, ante, Court may order lien of judgment to be suspended upon appeal.

g. **Undertaking.**—In what amount an undertaking must be given so that the municipal court may have jurisdiction to make an order discharging a levy, on the personal property of the judgment debtor, made under an execution issued on the judgment before a notice of appeal was filed: Hyman v. Segal, 44 Misc. 226.

§ 1312. Court may limit amount of security in certain cases.

h. **Stay execution.**—The aggregate sum of undertakings to stay execution of a judgment on an appeal to the appellate division of the supreme court may be limited, as prescribed in § 1312, to not less than $50,000, whether or not the appellant is an executor, administrator, trustee or other person acting in another's right: Nat. Contracting Co. v. H. R. W. P. Co., 47 Misc. 491; 94 N. Y. Supp. 187, rev'd 110 App. Div. 133.

i. Under § 1312, the court has jurisdiction, in its discretion, to entertain a motion to limit the amount of an undertaking to stay execution upon a judgment: National Contracting Co. v. Hudson River Water Power Co., 34 Civ. Pro. R. 315; 47 Misc. 491.

§ 1313. No security necessary, on appeal by the people, etc.

See § 1990, post, When people, municipal corporations, etc., not required to give security.

§ 1314. Id.; on appeal by a domestic municipal corporation.

j. An appeal by the fire commissioner of the city of New York from an order granting a peremptory writ of mandamus compelling him to reinstate the relator is to be considered as an appeal taken by the municipality within § 1314

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and the service of the notice of appeal stays the proceedings without giving an undertaking, and there is no warrant for applying to § 2089 the characteristics of a special provision which should prevail over the provisions of § 1314, for the latter is likewise special in its nature and may be read in harmony with the former: Matter of Croker v. Sturgis, 38 Misc. 596.

§ 1315. Papers to be transmitted to appellate court.

See § 1339, post, Preparation of case on judgment upon verdict subject to the opinion of the court.

See § 3301, post, When a case to be prepared, etc., for the appeal.

See § 1353, post, On what papers appeal to appellate division is to be heard.

§ 1316. Interlocutory judgment, or intermediate order, may be reviewed.

See § 1301, ante, When notice of appeal to specify interlocutory judgment.

See § 1347, post, From what orders party may appeal.

See § 1350, post, When interlocutory judgment may be reviewed on appeal from final judgment.

a. **Referee.**—An intermediate order, which may be renewed under § 1316 upon an appeal from a final judgment, is one between the commencement and termination of an action, and as the filing of a report of a referee to hear and determine terminates the action, an order made subsequent to the filing of such report but before the entry of judgment is not an intermediate order and can only be reviewed by direct appeal: Spencer v. Huntington, 100 App. Div. 463; 34 Civ. Pro. R. 30, aff'd 183 N. Y. 506.

b. **Foreclosure.**—An order denying a defendant's motion for a settlement of the issues arising on a counterclaim is an intermediate order and is reviewable on appeal from a judgment of foreclosure, particularly where the defendant's time to appeal from such order had not expired when the judgment of foreclosure was entered: Herb v. Metropolitan Hospital, 80 App. Div. 145; 80 N. Y. Supp. 552.

c. **Order.**—An order substituting the assignee of a cause of action as plaintiff, though interlocutory, does not fall within the class specified in § 1316, had no relation to the final judgment, did not in any way affect it and cannot be reviewed on an appeal from such judgment: Rogers v. Ingersoll, 103 App. Div. 490; 93 N. Y. Supp. 140, aff'd 185 N. Y. 597.

d. **Damages.**—In a special proceeding to appraise damages caused by the change of the grade of a street, the practice of reviewing intermediate orders, specified in the notice of appeal from the final order, or judgment, is justified under § 1316: N. Y., L. & W. Ry. Co. v. Erie R. R. Co., 170 N. Y. 448.

e. **Final judgment.**—When a final order is entered, the interlocutory judgment and the intermediate orders upon which the final judgment is based merge in such final judgment, and no right to review the interlocutory judgment or the intermediate orders survives the entry of final judgment, except so far as a review of the interlocutory judgment and the intermediate orders is allowed on an appeal from the final judgment: Bates v. Holbrook, 89 App. Div. 548; 85 N. Y. Supp. 673.

f. **Notice.**—Where the plaintiff serves a notice of appeal from a judgment dismissing the complaint and includes therein an appeal from orders, not necessarily affecting the final judgment and the time to appeal from which has expired, and the defendant returns the notice on the ground that the time had expired, a motion to compel its acceptance will be denied: Armstrong v. Heide, 49 Misc. 430.

g. **Contempt.**—A defendant who, by an interlocutory judgment, has been ordered to transfer and deliver to plaintiffs certain stock and bonds, which, by stipulation of parties, have been deposited with a trust company to be held subject to the order of the court, and who intends to appeal from the final judgment thereon, should not be adjudged to be in contempt of court for failing so to deliver the stock; the defendant has a right to review the interlocutory judgment on an appeal from the final judgment: Potter v. Rossiter, No. 1, 109 App. Div. 32; 95 N. Y. Supp. 1037.

h. **Supplemental answer.**—Where, after a denial of a motion to serve a supplemental answer, the cause is tried before the time to appeal from the order expires, and before such time the defendant appeals both from the judgment and the order, the order is before the court on a direct appeal: Gleason v. Northwestern Mut. L. Ins. Co., 113 App. Div. 186.

i. **Corporation.**—When, in an action in equity brought by a creditor in behalf of himself and other creditors to enforce the statutory liability of directors of a corporation, an interlocutory judgment establishing the liability of directors has been reversed on an appeal by some of

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the directors and a new trial granted, which new trial has never been had, the interlocutory judgment cannot be enforced even as against those directors who did not appeal therefrom unless the action be severed: Bauer v. Hawes, 115 App. Div. 492.

§ 1317. Judgment or order on appeal.

a. Where a judgment in an action at law or in equity consists of distinct and separate parts, which are independent adjudications, the appellate division may, under § 1317, affirm one part and reverse another and grant a new trial as to that part: City of Buffalo v. D., L. & W. R. R. Co., 176 N. Y. 308, aff'g 81 App. Div. 655.

b. **Verdict.**—Under § 1317, the appellate division may restore a verdict to the amount it was before reduced by the trial court: Cullen v. Uptegrove & Brother, 101 App. Div. 147; 34 Civ. Pro. R. 181.

c. **New trial.**—On an appeal from a judgment of nonsuit when the appellate division is not satisfied with the verdict of the jury as to specific questions of fact, it will not reinstate the same but order a new trial: Howell v. N. Y. C. & H. R. R. R. Co., 68 App. Div. 409; 73 N. Y. Supp. 994.

d. **Decision.**—Where a trial justice has filed his decision stating concisely the grounds upon which the issues of the case were decided by him, the appellate division has no power to incorporate them into an order modifying the judgment since under § 1022 the trial court has the exclusive power to formulate decisions upon the issues: Cutler v. Gudebrod Bros. Co., 168 N. Y. 512.

e. **Notice.**—When the notice of appeal expressly states that the appeal is not taken on a certain part of the judgment, that part of the judgment cannot be reviewed: Deering v. Schreyer, 110 App. Div. 200; 97 N. Y. Supp. 14.

f. **Court of claims.**—The appellate division has the same power to affirm, reverse or modify a judgment of the court of claims that it has in respect to judgments of the supreme court: Crowley v. State of New York, 112 App. Div. 872; 98 N. Y. Supp. 1094.

§ 1318. When no appeal lies from judgment of reversal.

g. Where a judgment of a trial court is reversed and a new trial granted, an appeal cannot be taken from the judgment of reversal, but it must be reviewed upon an appeal from the order granting the new trial (§ 1318), and if the judgment is not entered until after the order, the time within which an appeal must be taken from the order does not commence to run until the entry of the judgment: Wingert v. Krakauer, 180 N. Y. 265; 34 Civ. Pro. R. 146.

§ 1321. Mode of cancelling docket of reversed or modified judgment.

See § 1236, ante, Entry of judgment.

See § 1245 et seq., ante, Docketing a judgment.

§ 1323. Restitution; when awarded.

See § 1005, ante, Restitution directed when new trial is granted.

See § 1292, ante, Restitution directed when judgment is set aside.

See § 2263, post, Restitution on reversal in summary proceedings.

h. Where, in a creditor's action to compel an executor to sell real estate for the payment of debts, the judgment is reversed, the appellant is entitled under § 1323 to a restitution of the property and, though the judgment of reversal orders a new trial, such appellant is entitled to the immediate restitution of the property and also an accounting with respect to the mesne profits: Holly v. Gibbons, 177 N. Y. 401.

i. **Foreclosure.**—The court should not determine whether the mortgagee is entitled to compel the purchaser at a foreclosure sale to make restitution of the property and account for the rents until it is finally determined that the plaintiff is not entitled to the judgment of foreclosure and sale: Schieck v. Donohue, 81 App. Div. 168; 80 N. Y. Supp. 739.

j. **Specific performance.**—When in an action to recover a deposit paid on a contract to convey lands on the ground that the title was unmarketable, the plaintiff may ask the defendant for a specific performance as a counterclaim; when the plaintiff is defeated and takes an appeal, the defendant, by selling the lands to third parties, is not in contempt; the provision of § 1323 allowing the owner to sell in cases of appeal applies where the owner is a defendant asking specific performance as a counterclaim, for such counterclaim is a cause of action: Bloomgarden v. Hoffman, 116 App. Div. 719.

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§ 1324. What appeals may be taken.

See §§ 190, 191, ante, Jurisdiction of the court of appeals.

See § 1337, post, What questions maybe brought up for review.

§ 1325. Limitation of time to appeal.

See § 784, ante, Time in which to appeal cannot be extended.

See § 1300, ante, How the appeal is taken.

§ 1326. Security to perfect appeal.

See § 1305, ante, Security may be waived.

See § 1306 et seq., ante, Undertaking.

See §§ 1313, 1314, ante, Not required of people or of domestic municipal corporation.

a. **Stay.**—An undertaking, under this section, may be given to perfect an appeal to the court of appeals, and not to stay proceedings and, then only should provide that the sureties would pay the costs and damages which may be awarded; otherwise when the undertaking is given to stay proceedings: Bennett v. American Surety Co., 73 App. Div. 468; 77 N. Y. Supp. 207.

b. An undertaking in the sum of $500, given in pursuance of § 1326 upon an appeal by the defendant corporation from a judgment requiring it to remove certain obstructions from defendant's premises, does not stay the execution of the judgment, and a stay can only be granted upon notice to the adverse party upon such terms as may seem to the court just: Sagehomme v. Pugh Co., 53 Misc. 1 and 41.

c. **Discharge.**—The sureties on a bond furnished under §§ 1326 and 1327 for the purpose of perfecting an appeal to the court of appeals, conditioned that the appellants will pay all costs and damages which may be awarded on the appeal, are discharged by the reversal of the judgment of the court of appeals directing a new trial, with "costs to abide the event:" Jackson v. Lawyers' Surety Co., 95 App. Div. 368; 88 N. Y. Supp. 576.

d. **Consideration.**—In an action on an undertaking, if the undertaking bears a seal, it becomes incumbent upon the sureties to rebut the presumption of a consideration arising therefrom: Gein v. Little, 43 Misc. 421; 89 N. Y. Supp. 488.

§ 1327. Security to stay execution on judgment, etc., for money.

See § 1310, ante, When appeal stays proceedings.

e. **Discharge.**—The sureties on a bond furnished under §§ 1326 and 1327 for the purpose of perfecting an appeal to the court of appeals, conditioned that the appellants will pay all costs and damages which may be awarded on the appeal, are discharged by the reversal of the judgment of the court of appeals directing a new trial, with "costs to abide the event:" Jackson v. Lawyers' Surety Co., 95 App. Div. 368; 88 N. Y. Supp. 576, aff'd 184 N. Y. 521.

f. **Foreclosure.**—Where an undertaking to stay proceedings in a foreclosure case, instead of providing for the payment of a deficiency under § 1331, was in the form prescribed by § 1327 to stay execution on a money judgment, no recovery can be had upon the undertaking beyond the costs inserted in the judgment appealed from, even though there was finally a deficiency upon the mortgage which the defendant was liable to pay: Bristol v. Graff, 79 App. Div. 426; 80 N. Y. Supp. 39.

g. **Replevin.**—When in an action of replevin the chattel has been sold pending action and cannot be restored, the plaintiff, upon appeal to the court of appeals, in order to obtain a stay of execution, may give the undertaking required by § 1327 instead of that required by § 1329, which ordinarily applies on appeals in actions of replevin: Gilroy v. Everson-Hickok Co., 120 App. Div. 207.

§ 1328. Id.; on judgment, etc., for delivery of property.

See § 1311, ante, When levy of personal property is superseded by appeal.

h. **Stock.**—A judgment directing the delivery of certain stock by one defendan to the plaintiff is clearly a judgment directing the delivery of a document or of personal property within the meaning of § 1328, providing that an appeal from such a judgment does not stay execution until the thing directed to be delivered is placed in the hands of an officer designated by the court. The provisions of § 1331 are so analogous to those of § 1328 that the same construction must be applied to both: Dady v. O'Rourke, 65 App. Div. 465.

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§ 1329. Id.; on judgment for a chattel.

a. A judge, to whom an application is made to fix the amount of an undertaking, cannot prevent an appellant from obtaining a stay by refusing to fix any amount at all: Dady v. O'Rourke, 65 App. Div. 465.

b. **Enforcement.**—Where on an appeal from a judgment in replevin, an undertaking, instead of being in the form of an undertaking to stay proceedings on appeal of such an action, as provided for by § 1329, was in the form prescribed by § 1327, an action upon the undertaking may be enforced: Bristol v. Graff, 79 App. Div. 426, at 432; 80 N. Y. Supp. 39.

c. **Replevin.**—When in an action of replevin the chattel has been sold pending action and cannot be restored, the plaintiff, upon appeal to the court of appeals, in order to obtain a stay of execution, may give the undertaking required by § 1327 instead of that required by § 1329, which ordinarily applies on appeals in actions of replevin: Gilroy v. Everson-Hickok Co., 120 App. Div. 207.

§ 1331. Id.; on judgment, etc., for the possession of real property.

See § 1616, post, No stay, unless undertaking is given.

d. **Personal property.**—A judgment directing the delivery of certain stock by one defendant to the plaintiff, is clearly a judgment directing the delivery of a document or of personal property within the meaning of § 1328, providing that an appeal from such a judgment does not stay execution until the thing directed to be delivered is placed in the hands of an officer designated by the court. The provisions of § 1331 are so analogous to those of § 1328 that the same construction must be applied to both: Dady v. O'Rourke, 65 App. Div. 465.

e. **Foreclosure.**—Where an undertaking to stay proceedings in a foreclosure case, instead of providing for the payment of a deficiency under § 1331, was in the form prescribed by § 1327 to stay execution on a money judgment, no recovery can be had upon the undertaking beyond the costs inserted in the judgment appealed from, even though there was finally a deficiency upon the mortgage, which the defendant was liable to pay: Bristol v. Graff, 79 App. Div. 426; 80 N. Y. Supp. 39.

§ 1334. Undertakings may be in one instrument; form and service thereof.

See §§ 810, 816, ante, Provisions regulating bonds and undertakings.

§ 1335. Exceptions to sureties; justification.

f. **Municipal court.**—An undertaking to procure a stay on appeal from a judgment of the municipal court of the city of New York is expressly required by the first clause of § 3050 to be approved by the justice rendering judgment or by a judge of the appellate court, and this requirement is not affected by the last clause of said section making § 1335 applicable to such an undertaking, which latter section, among other things, provides that "it is not necessary that the undertaking should be approved:" Howley v. Kraemer, 35 Misc. 444.

g. **Surrogate's court.**—An undertaking given under §§ 2577 and 2581 on an appeal to the appellate division from a decree or order of the surrogate is not governed by § 1335 providing for the justification of sureties. Such latter section relates only to the appeals to the court of appeals and is not applicable to the surrogate's court. Hence, when such undertaking has been filed with the surrogate and has been allowed and approved by him, an exception to the sureties is not well taken, and a motion to perfect an appeal under § 1303 will be dismissed: Matter of Sheldon, 117 App. Div. 357.

§ 1336. Appeal from final judgment rendered after affirmance of interlocutory judgment, or denial of for new trial.

See § 1316, ante, When an interlocutory judgment may be reviewed on an appeal from a final judgment.

See § 1350, post, Appeal from final judgment, after affirmance of interlocutory judgment, etc.

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a. An error of the special term in entering, on confirmation of a referee's report, a final judgment which fails to conform to the decision of the appellate division reversing in part and modifying, so as to make interlocutory, a final judgment previously entered by the court below, cannot be cured on appeal therefrom directly to the court of appeals, even if the determination of the appellate division be considered an affirmance of an interlocutory judgment within § 1336, authorizing such an appeal where a final judgment is rendered in the court below after affirmance, upon appeal to the appellate division, of an interlocutory judgment, since such an appeal brings up for review only the determination of the appellate division affirming the interlocutory judgment; the remedy of appellant is either by an appeal to the appellate division or by an application to the special term to enter such an order as the interlocutory judgment of the appellate division calls for: Hollister v. Simonson, 170 N. Y. 357, dismissing appeal, 36 App. Div. 63; 55 N. Y. Supp. 372.

Where the appellate division reverses part of a judgment and so modifies it in other respects as to make it an interlocutory judgment, the judgment rendered by the special term upon the report of the referee appointed under such interlocutory judgment is not appealable directly to the court of appeals, under § 1336, authorizing such an appeal where a final judgment is rendered in the court below after affirmance, upon an appeal to the appellate division, of an interlocutory judgment. Id.

b. A final judgment entered on an order of the special term after the reversal of a final judgment overruling a demurrer is not appealable to the court of appeals: Leonard v. Barnum, 168 N. Y. 41.

§ 1337. What questions are brought up for review.

See § 190, ante, The jurisdiction of the court of appeals in civil actions.

c. **Errors of law.**—Where the appellate division states in its order that the judgment and order appealed from were reversed upon questions of law only, the court of appeals in their review are confined to errors of law to which exceptions were duly taken: Cooper v. N. Y., O. &. W. Ry. Co., 180 N. Y. 12.

d. Where the appellate division, by a divided court, reverses a judgment and orders a new trial "upon questions of law only, the facts having been examined and no errors found therein," the court of appeals upon an appeal from the order of reversal can review the questions of law that were before the appellate division, since such order means that the appellate division did not permit the judgment to stand because it reached the conclusion that the most favorable view of the evidence, accepting it as true, fell short of supporting the judgment: Serano v. N. Y. C. & H. R. R. Co., 188 N. Y. 156, rev'g 114 App. Div. 684.

A determination of the appellate division upon the question whether the damages found by the jury are excessive or not is not reviewable in the court of appeals, since the court cannot consider the weight of the evidence or questions relating to an excessive verdict. Id.

e. **Question of fact.**—When the trial court made no finding on the question whether the statute of limitations barred plaintiff's claim in an action, and the reversal by the appellate division is not stated to be on the facts, the question is not reviewable in the court of appeals: Matteson v. Palser, 173 N. Y. 404, mod'y 56 App. Div. 91; 67 N. Y. Supp. 612.

f. When findings of fact are contradictory and irreconcilable, the defeated party is entitled to the benefit of those most favorable to himself: Nickell v. Tracy, 184 N. Y. 386.

g. **Lien.**—Where the appellate division has struck out of the judgment of the trial court in an action to foreclose a mechanic's lien, a provision to which the plaintiff was entitled, adjudging a lien in his favor and substituted a provision for a personal judgment to which he was not entitled, the court of appeals has power on appeal under the provisions of § 1337 to correct the judgment by striking out the improper provision and restoring the original one: Gilmore v. Colcord, 183 N. Y. 342, mod'y 96 App. Div. 358; 89 N. Y. Supp. 689.

§ 1338. When reversal presumed not to be on a question of fact.

h. **Presumption.**—Where the order of the appellate division does not state that the reversal was upon a question of fact, the court of appeals must presume that it was on the law: Dunlap & Co. v. Young, 174 N. Y. 327; Gates v. Dudgeon, 173 N. Y. 426; Bates v. Holbrook, 171 N. Y. 460, at 468; Van Siclen v. City of New York, 172 N. Y. 504; Matter of Bandreth, 169 N. Y. 437, at 440; National Prot. Assn. v. Cumming, 170 N. Y. 315.

i. Where the reversal by the appellate division of a judgment is presumed to have been based on questions of law, the facts as found by the trial court

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must stand for the purposes of review: Lehigh Valley Ry. Co. v. Adam, 176 N. Y. 420.

a. **Grounds not specified.**—Where the order of the appellate division, reversing the judgment of the trial court, is silent as to the grounds upon which it was made, the court of appeals must treat it as resting wholly upon questions of law: Bennett v. Long Island Railroad Co., 181 N. Y. 431; 34 Civ. Pro. R. 292, aff'g 89 App. Div. 379; 85 N. Y. Supp. 938.

b. On an appeal from a judgment in an action for specific performance, although the appellate division in the exercise of its discretion may reverse upon the facts, yet where its order of reversal is silent as to the grounds thereof, it must be assumed to have been based upon questions of law only; and if no error of law appears and there is evidence to sustain the findings of fact by the referee, the judgment must be affirmed: Butler v. Wright, 186 N. Y. 259, rev'g 103 App. Div. 463; 93 N. Y. Supp. 113.

c. When an order of reversal is silent as to the grounds, the court of appeals is required to presume that the judgment was not reversed upon a question of fact and that the facts as found were approved by the appellate division: McClure v. Leaycraft, 183 N. Y. 36, rev'g 97 App. Div. 518; 90 N. Y. Supp. 233.

d. Where the order of reversal does not state that the reversal was upon the facts, the court of appeals must assume that the facts as found by the trial court remain undisturbed and that the reversal was upon the law: Gates v. Dudgeon, 173 N. Y. Supp. 426; 33 Civ. Pro. R. 317.

e. Where the order of the appellate division reversing a judgment of the special term in part, does not state that the reversal was upon the facts, under § 1338 the court of appeals must assume that the judgment was reversed for errors of law and not upon the facts: Ganz v. Lancaster, 169 N. Y. 357; 32 Civ. Pro. R. 300.

f. Where the order of reversal is silent as to the facts, the court of appeals must assume that it is based solely upon questions of law: Toop v. Smith, 181 N. Y. 283; 34 Civ. Pro. R. 211, aff'g 87 App. Div. 241; 84 N. Y. Supp. 326.

g. The order of the reversal of the appellate division, being silent as to the facts, must be presumed to have been based solely on questions of law: Heinken v. Schwitcker, 174 N. Y. 298.

h. **Decree.**—The court of appeals has jurisdiction of an appeal from an order of the appellate division reversing a surrogate's decree upon the law and facts, where the inferences from the uncontradicted evidence all point in one direction so that but one conclusion could be drawn by any reasonable mind: Matter of Totten, 179 N. Y. 112, rev'g 89 App. Div. 368; 85 N. Y. Supp. 928.

i. **Mistrial.**—Where it appears from the opinion of the appellate division, which forms no part of the record, that the appellate division reversed upon a question of fact, yet as they did not say so in their order, the statute compels the court of appeals to presume that the reversal was upon questions of law only; where the return to the court of appeals shows such irregularity of practice as to amount to a mistrial, the only way to avoid injustice is to reverse the order of both courts below and direct a trial which the law can recognize: People ex rel. Berlinger v. Wells, 178 N. Y. 411.

j. **Waiver.**—Where the question whether or not an artisan's lien has been waived is one of fact, and when the trial court in a short decision found upon sufficient evidence that the lien existed, it must be assumed to have found that there was no waiver thereof, and the appellate division, in the absence of errors arising upon the trial, cannot properly reverse upon the law, upon the ground that there was a waiver: Blumenberg Press v. Mut. Mer. Agency, 177 N. Y. 362, rev'g 77 App. Div. 87; 78 N. Y. Supp. 1085.

k. **Question of fact.**—An appeal from an order of the appellate division reversing a judgment upon questions of fact and law and ordering a new trial is reviewable in the court of appeals, when there is no controverted fact upon which the decision of the question of law depends and there are no questions of fact to be resettled upon a new trial of the case to affect the question of law involved: Erie Railroad Co. v. Steward, 170 N. Y. 172, aff'g 61 App. Div. 480; 70 N. Y. Supp. 698.

l. **Indefinite opinion.**—An order of the appellate division reversing a judgment and granting a new trial upon the grounds stated in the opinion, "delivered herein and which is hereby made part of the order," is not a compliance with this section, and particularly where the opinion is capable of different constructions and it is not clear whether the reversal was upon the law or the facts or both: Townsend v. Bell, 167 N. Y. 462; 32 Civ. Pro. R. 111, rev'g 42 App. Div. 409; 59 N. Y. Supp. 203.

m. **Decision in short form.**—Where the order of the appellate division reversing a judgment of the special term is silent as to its grounds, the reversal must be presumed to have been upon questions of law. Where the decision of the special term is in the short form, the court of appeals is confined to the question whether, in any view of the facts proved, the judgment can be sustained: Dannhauser v. Wallenstein, 169 N. Y. 199; 32 Civ. Pro. R. 276, rev'g 52 App. Div. 312; 65 N. Y. Supp. 219.

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§ 1339. Preparation of a case for an appeal from a judgment rendered upon a verdict subject to the opinion of the court.

See § 1315, ante, Papers to be transmitted to appellate court.

§ 1340. Appeals from inferior courts.

See § 3188 et seq., post, Appeals from judgments of the city court of New York.

a. **Justice's court.**—Where, upon an appeal to the county court from a judgment rendered against the appellant upon his default before a justice of the peace, the county court refuses to exercise the discretionary power granted by § 3064 to open the default and grant a new trial. the appellate division has jurisdiction, under §§ 1340 and 1342 to review the exercise of such discretionary power, whether the determination of the county court be considered as a judgment or as an order: Kilts v. Neahr, 101 App. Div. 317.

b. When summary proceedings originate in a justice's court and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

c. **Partition.**—An interlocutory judgment of partition and sale rendered by a county court is not appealable to the appellate division, as the Code of Civil Procedure only provides for appeals from final judgments of the county court; the parties may stipulate that such an appeal may be heard as a motion for a new trial on exceptions: Russ v. Maxwell, 94 App. Div. 107; 87 N. Y. Supp. 1077.

d. **City court.**—Where the defendants appeal from a judgment of the city court of the city of New York and the appellate term reverses the judgment and orders a new trial, with costs to the appellant to abide the event, and the defendants, thereupon by permission of the appellate term, appeal to the appellate division, stipulating that, if the appellate division affirms the judgment, judgment absolute shall be rendered for the defendants, and the judgment of reversal is affirmed and judgment absolute is thereupon rendered in favor of the defendants, the defendants are entitled to tax the cost before and after notice of trial and a trial and term fee: Foltenstein v. Ernst, 54 Misc. 223.

§ 1341. Limitation of time, security.

e. **Stay.**—Where a judgment directing defendant to remove forthwith certain obstructions from plaintiff's premises is affirmed by the appellate division, the usual undertaking to perfect an appeal to the court of appeals, pursuant to § 1326, does not stay the judgment: Sagehomme v. Pugh & Co., 53 Misc. 41.

§ 1342. Appeal from order.

An appeal may also be taken as provided by section thirteen hundred and forty, from an order affecting a substantial right, made by the court or a judge, in an action brought in, or taken by appeal to, a court specified in said section.

Amended by chap. 135 of 1881, chap. 946 of 1895 and chap. 579 of 1907.

f. **Discretion.**—Where, upon an appeal to the county court from a judgment rendered against the appellant upon his default before a justice of the peace, the county court refuses to exercise the discretionary power granted by § 3064 to open the default and grant a new trial, the appellate division has jurisdiction, under §§ 1340 and 1342, to review the exercise of such discretionary power, whether the determination of the county court be considered as a judgment or as an order: Kilts v. Neahr, 101 App. Div. 317.

g. **Not appealable.**—Order denying a motion to re-settle another order is not appealable: Waltham Mfg. Co. v. Bradley, 67 App. Div. 102; 73 N. Y. Supp. 540.

h. When summary proceedings originate in a justice's court and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

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§ 1344. Appeal, where and how heard.

An appeal taken as prescribed in this title, must be heard by the appellate division of the supreme court, except that appeals from the judgment of any municipal court in either of the boroughs of Manhattan or the Bronx in the city of New York, or from a judgment or order of the city court in the city of New York, may be heard by the appellate division of the supreme court, or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division sitting in the first judicial department. In case an appeal is heard by a justice or justices of the supreme court as hereinbefore provided, the justice or justices by whom such appeal was determined, or a justice of the appellate division in the first judicial department, may allow an appeal to be taken to such appellate division from such determination; and appeals from inferior courts heretofore heard by the superior court of Buffalo shall be heard by the appellate division of the supreme court in the fourth judicial department, or by such justice or justices of the supreme court as may be designated for that purpose by the justices of the appellate division of the fourth judicial department. The provisions of title fourth of this chapter, relating to the hearing of appeals, taken in the supreme court, and to the subsequent proceedings thereupon, apply to an appeal taken as prescribed in this title, except as specified in the next section.

Co. Proc., § 346; L. 1870, c. 408, §§ 5, 6, 10.

Amended by chap. 946 of 1895, chap. 515 of 1902 and chap. 502 of 1904.

a. **Appellate term.**—An appeal to the appellate division of the supreme court from the appellate term is regulated by this section: Hart v. North Ger. St. Co., 108 App. Div. 279.

b. Under § 1344, providing for the allowance of an appeal taken to the appellate division from the appellate term, it is necessary that the justices should act as justices and not as a court, and that the order allowing the appeal should be signed by a majority of the justices and not by the court; a majority of the justices may allow the appeal: Harrison v. Weir, 68 App. Div. 25.

c. The appellate term cannot review the alleged error of the court below in excluding a paper offered in evidence upon the trial where the paper was not marked for identification and is not annexed to the record: Devine v. Kerwin, 52 Misc. 535.

d. The appellate term will refer to the opinion of the court below to ascertain the grounds or reasons for its disposition of the case; and, where, on appeal from an order granting a new trial, it thus appears that the motion was granted on the ground that the verdict was contrary to the evidence and the answer should, therefore, have imposed the payment of costs of the first trial upon the defendants, it will be modified accordingly: Israel v. Ury, 52 Misc. 525.

e. A judgment entered in the municipal court may be appealed to the appellate term and, when affirmed, may, by leave of that court, be appealed to the appellate division: Harrison v. Weir, 71 App. Div. 248; 75 N. Y. Supp. 909.

f. **New trial.**—Where the record on an appeal from a judgment of the city court of the city of New York to the appellate term contains no order denying the plaintiff's motion for a new trial, the court cannot inquire into the weight of evidence and can review only the objections and exceptions taken to rulings upon the trial: Strauss & Co. v. Welsbach Gas Lamp Co., 42 Misc. 184; 85 N. Y. Supp. 367.

g. **Permission.**—Under this section appeals can only be taken from determinations of the appellate term to the appellate division by permission of the "justices by whom such appeal was determined," and the permission must be obtained by those justices and not from others: Jaeger v. Koenig, 67 App. Div. 552.

h. **Newly discovered evidence.**—No appeal lies to the appellate term from an order of the city court of the city of New York granting or denying a new trial on ground of newly discovered evidence: Streep v. McLoughlin, 36 Misc. 165; 72 N. Y. Supp. 1061.

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a. **City Court.**—Notice of entry of judgment in the city court of the city of New York, which states the judgment to have been "entered herein in the office of the clerk of the court within named," is sufficient and service thereof limits the time to appeal: Leer v. Wormser, 52 Misc. 455.

b. A motion to resettle the case, on appeal from a judgment of the city court of the city of New York so as to permit an excluded exhibit to be inserted therein, must be made before the justice who tried the case, though in the meantime he has been sworn in as a justice of the supreme court: Knobloch v. Taube, 53 Misc. 546.

c. **Municipal court.**—The action of a justice of a municipal court transferring an action into another district may be reviewed upon appeal from the final judgment and mandamus will not be granted to compel the justice to retain jurisdiction and try the action: People ex rel. McGowan v. Murray, 53 Misc. 364.

d. The order of the municipal court denying the motion to compel the plaintiff, a non-resident, to give security for costs, is not appealable: Enderlein v. Coghlan, 52 Misc. 658.

§ 1345. Judgment or order, where entered.

See § 1231, ante, Entry of judgment.
See §§ 1237, 1239, ante, Judgment roll.

§ 1346. Appeal from judgment.

See §§ 3375-3376, post, Appeal from final order in condemnation proceedings.

e. **Weight of evidence.**—A verdict will not be sustained when against the weight of evidence, although two former verdicts in favor of the plaintiff were reversed as against the weight of evidence: Meinrenken v. N. Y. Central & H. R. R. Co., 103 App. Div. 319.

f. The court of appeals has no power to reverse a judgment affirming a judgment entered on the verdict of a jury which has some evidence to support it. The appellate division only has power to consider the weight of evidence: Merchants' Nat. Bank v. Barnes, 172 N. Y. 618, aff'g 57 App. Div. 630; 68 N. Y. Supp. 1143.

g. **Appeal from judgment.**—Where the plaintiff does not make a motion for a new trial, his appeal from the judgment dismissing the complaint brings up all questions of law presented by the case including the rulings of the court during the trial, and the exceptions noted to such rulings: Rollins v. Bowman Cycle Co., 96 App. Div. 365; 89 N. Y. Supp. 289.

h. **Direction of verdict.**—Upon an appeal from a judgment entered on the verdict of the jury, the appellant can only complain of errors which are pointed out by objections and exceptions to the rulings, and where the appellant made no motion for the direction of a verdict he cannot be heard to claim that the case should not have been submitted to the jury: Perry v. Village of Potsdam, 106 App. Div. 297.

i. **Question of fact.**—Where a new trial is granted by the appellate division upon a question of fact, the court of appeals has no power to review even rulings duly excepted to, provided there was a question of fact; but if it is granted solely upon questions of law, that is, in the language of the Constitution "on exceptions," that court may review the questions of law raised by exceptions, and if it is found that no exception was well taken, the order must be reversed and the judgment reinstated: Vollkommer v. Cody, 177 N. Y. 124.

j. **Partition.**—An interlocutory judgment of partition and sale rendered by a county court is not appealable to the appellate division, as the Code of Civil Procedure only provides for appeals from final judgments of the county court; the parties may stipulate that such an appeal may be heard as a motion for a new trial on exceptions: Russ v. Maxwell, 94 App. Div. 107; 87 N. Y. Supp. 1077.

k. **No exception.**—In an action for personal services, where the plaintiff was allowed to testify to a conversation with plaintiff's testator as to her employment, but no exception was taken to the ruling, the judgment on that ground will not be reversed on appeal: Ralley v. O'Connor, 71 App. Div. 328; 75 N. Y. Supp. 925.

l. Where a case is submitted upon an erroneous theory, a verdict for the amount of the tender with costs will be reversed, although the defendant took no exception to the charge; the error is available under an exception to the denial of a motion for a new trial on the ground that the verdict was contrary to law: Goldman v. Swartout, 117 App. Div. 185.

m. The appellate division will reverse a judgment because of an erroneous charge of the trial judge even though no exception was taken thereto: Van Alstine v. S. L. H. & P. Co., 116 App. Div. 100.

n. Where, on the trial of an action before a jury, after the granting of a motion dismissing the complaint at the close of plaintiff's case, to which no ex-

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ception was taken, a motion for a new trial, made without specifying any grounds, was denied, but no order was entered and no foundation laid for an appeal therefrom, the appellate division, upon an appeal from the judgment dismissing the complaint, has no power to review or reverse upon the facts: Collier v. Collins, 172 N. Y. 99.

a. Upon an appeal to the appellate division from a judgment dismissing the complaint in a negligence action at the close of the plaintiff's evidence, the fact that the plaintiff was entitled to have the case submitted to the jury is not a ground for a reversal of the judgment, where it appears that the plaintiff took no exception to the dismissal of the complaint and made no motion for a new trial; only such questions are brought up for review as are raised by exceptions taken at the trial: Muratore v. Pirkl, 104 App. Div. 133.

b. Upon an appeal to the appellate division from a judgment entered on a verdict, that court has no power to review the ruling of the trial judge excluding evidence to which no exception was taken: Alden v. Knights of Maccabees, 178 N. Y. 535, rev'g 78 App. Div. 18; 79 N. Y. Supp. 89.

c. **Modification of judgment.**—The appellate division should not modify an order of the special term which awarded a separate item of damages to one of the plaintiffs, without granting a new trial, and on appeal, the court of appeals will modify a judgment in that respect: Van Siclen v. City of New York, 172 N. Y. 505, mod'y 64 App. Div. 437; 72 N. Y. Supp. 209.

d. **The modification of a judgment and not the granting of a new trial is required when the appellate division reduces the amount, and it is not possible upon such trial that the facts can be altered: Heerwagen v. Crosstown St. Ry. Co., 179 N. Y. 99, mod'y 90 App. Div. 275; 86 N. Y. Supp. 218.**

e. **Default.**—Where heirs-at-law bring an action under § 2653a to have the probate of a will set aside and the defendant interposes a general denial, an affirmative defense and a prayer for judgment, such defendant is entitled, upon failure of plaintiffs to appear, to give proof and obtain a judgment thereon and the plaintiffs having made default have no standing to appeal from the judgment: Delmar v. Delmar, 65 App. Div. 582; 72 N. Y. Supp. 959.

f. **Exception not argued.**—The appellate division may reverse a judgment upon an exception taken at a trial but not discussed orally or in the appellant's brief: Purcell v. Colonial Trust Co., 97 App. Div. 307.

g. **Improper questions.**—The appellate division should reverse a judgment where they believe that the jury was influenced on the trial by counsel for plaintiff asking questions which he must be assumed to know could not be answered and which were prejudicial to defendant: Cosselmon v. Dunfee, 172 N. Y. 507, aff'g 59 App. Div. 467; 69 N. Y. Supp. 271.

h. **Annulment.**—The appellate division has no authority to affirm an invalid judgment, upon a new issue, and cannot dismiss the complaint in an action for the annulment of a marriage upon the ground of collusion, where no such issue was raised at the trial or determined by the trial judge: Svenson v. Svenson, 178 N. Y. 54, rev'g 78 App. Div. 536; 79 N. Y. Supp. 657.

i. **City court.**—After a trial of the whole issue by the court without a jury, a motion for a new trial on the minutes will not lie, and an order denying such a motion is unauthorized and presents no question for review by the appellate court; the remedy of the defeated party is by appeal from the judgment under § 1346 made applicable to appeals from final judgments of the city court of the city of New York by § 3188: Simpson v. Hefter, 43 Misc. 608; 88 N. Y. Supp. 282.

j. Where the defendants appeal from a judgment of the city court of the city of New York and the appellate term reverses the judgment and orders a new trial, with costs to the appellant to abide the event, and the defendants, thereupon by permission of the appellate term, appeal to the appellate division, stipulating that, if the appellate division affirms the judgment, judgment absolute shall be rendered for the defendants, and the judgment of reversal is affirmed and judgment absolute is thereupon rendered in favor of the defendants, the defendants are entitled to tax the costs before and after notice of trial and a trial and term fee: Feltenstein v. Ernst, 54 Misc. 223.

k. **Case.**—On an appeal from an order denying a motion for a new trial under § 999, unless the case shows that it contains all the evidence, the appellate division is limited to a consideration of the exceptions taken at the trial: Laquinto v. Bauer, 104 App. Div. 56; 93 N. Y. Supp. 388.

l. **Findings.**—When findings, whether made by the court as its own conclusions or at the request of an unsuccessful party, are inconsistent, and the determination of the facts involved in the findings is material and necessary to uphold the judgment, the defeated party on appeal is entitled to the benefit of the findings most favorable to his contention, and if the judgment stands without sufficient facts as a basis, it should be reversed: Hamilton v. Fleckenstein, 118 App. Div. 579.

m. When an appeal in a judgment creditor's action is based only upon the pleadings, the decision and the judgment, and there is no case containing

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the evidence, and there is printed in the appeal book certain requests to find, some marked "found" and some "not found" are not incorporated in the decision, the request cannot be considered, and exceptions to refusals to find raise no question in the absence of the testimony: Jacquelin v. Jacquelin, 119 App. Div. 428.

a. **Res adjudicata.**—The old general term had power to reverse the decision of the special term upon the law and direct it to make interlocutory judgment in accordance with its decision based upon facts found by the trial judge. Such former decision affirms the facts, but reverses upon the law and is *res adjudicata* and not to be reviewed by the appellate division upon a subsequent appeal: Jones v. Jones, 118 App. Div. 148.

b. When the court of appeals, on granting a new trial, has determined that plaintiff has established a cause of action for negligence and he proves the same facts on the new trial, the decision is binding upon the appellate division unless the evidence introduced by the defendant establishes a defense as a matter of law or is of such character as to make the verdict of the jury contrary to the weight of evidence: McCoy v. N. Y. C. & H. R. R. Co., 119 App. Div. 531.

c. **Unnecessary adjudications** in judgment dismissing complaint struck out on appeal: Manufactures' Commercial Co. v. Anderson, 116 App. Div. 912.

d. **Decision of an arbitrator.**—On appeal from the decision of an arbitrator the appellate division cannot review the merits of the decision where there is nothing on the face of the award showing that the arbitrator decided wrongly; the court is limited in its review by §§ 2373, 2374 and 2375, and is confined to the grounds specified in those sections: Matter of Burke, 117 App. Div. 477.

e. **Injustice.**—The appellate division will reverse an order setting aside a verdict because of insufficient damages where it appears that by affirmance of the order palpable injustice will result: Ryckman v. Inter. Ry. Co., 114 App. Div. 914.

f. **Replevin.**—In an action of replevin, where the proof showed a joint ownership of the property in question in the plaintiff and defendants and judgment was rendered in conformity with such facts, upon appeal by plaintiff, the answer, which alleged individual ownership in the defendants, will be amended to conform to the proof, and the judgment will be affirmed: Alexander v. Harkin, 53 Misc. 317.

g. **Reversible error.**—Evidence of transactions with one deceased, incompetent under § 829, must be objected to as inadmissible under the statute in order that the error may be available on appeal; § 829 forbids not only direct testimony of personal transactions with a decedent, but also every attempt by indirection to prove the same thing; thus, when plaintiffs suing on a *quantum meruit* to recover for services in preparing plans for a house for the decedent are allowed over objection to testify to frequent interviews with the decedent respecting the plans while they were being prepared, and to a number of consultations and interviews when the plans were discussed, it is reversible error: Little v. Johnson, 117 App. Div. 500.

h. **Attorney's statement.**—An attorney's statement of his understanding of the law at trial does not estop him from changing his view upon appeal: People ex rel. Sturtevant v. Armstrong, 115 App. Div. 103.

§ 1347. Appeal from order.

See § 1294, ante, When party may appeal.

See § 2087, post, Appeal from order granting peremptory writ of mandamus.

See § 2570, post, Appeal from order of surrogate.

i. **Re-settlement.**—An order denying plaintiff's motion for a re-settlement of the case in order to show a qualification of the objection is appealable to the appellate division: Csatlos v. Met. St. Ry. Co., 63 App. Div. 271; 71 N. Y. Supp. 254.

j. An order denying a motion to resettle another order is not appealable: Waltham Manufacturing Co. v. Brady, 67 App. Div. 102; 73 N. Y. Supp. 540.

k. Preliminary or other formal objections, taken on the arguments of a motion and ruled on by the court, should be stated in the order for the purposes of review; if, however, the order does not contain such a recital, the appellate division will not reverse an order denying a motion to resettle the order by inserting the recital, unless it appears that the appellant has been prejudiced by the omission: Matter of National Gramaphone Corp., 82 App. Div. 593; 81 N. Y. Supp. 853.

l. **Discretion.**—The disposition to be made of a motion to change the venue of a transitory action rests largely in the discretion of the special term, and the appellate division will not disturb the determination of the special term, unless such discretion has been abused or unless it is clear that the determination resulted in a palpable error: Pattison v. Hines, 105 App. Div. 282.

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a. **Demurrer.**—An appeal cannot be taken to the appellate division from a decision in the form of an order overruling a demurrer: Rowe v. Rowe, 103 App. Div. 100; 92 N. Y. Supp. 491.

b. An order overruling a demurrer is not an intermediate order and may be reviewed on the appeal from the judgment entered thereon, although the appeal does not specify an intention to review the order; an order sustaining or overruling a demurrer is not appealable as it is not one of the orders enumerated in § 1347, and the appeal is from the judgment only: Smith v. Johnson, 118 App. Div. 6.

c. **Reargument.**—An order denying a motion for a reargument of a prior motion is not appealable: Tucker v. Dudley, 104 App. Div. 191; 93 N. Y. Supp. 355.

d. **Costs.**—Upon reversing an order denying an application, the appellate division will not award costs of the appeal against a party who did not oppose the granting of the application and against whom it was made: Matter of Collins, 104 App. Div. 184.

e. **Certiorari.**—A return to a writ of certiorari to review a determination of a town board made by a majority of such board is conclusive upon the appellate division, and a separate return made by a single member of such board cannot be considered: People ex rel. Lester v. Eno, 176 N. Y. 513, rev'g 84 App. Div. 55; 82 N. Y. Supp. 520.

f. **Additional allowance.**—While an additional allowance may have been improperly made, yet where it was made without objections, equitable reasons may exist why it should not be denied on appeal: Schiff v. Tamor, 104 App. Div. 42; 93 N. Y. Supp. 853.

g. **Taxation of fees.**—The appellate division will not review an order made under § 3287 at a special term and stated in the record to have been entered in the clerk's office as that section requires the fees to be taxed by a justice of the supreme court and, *quaere*, whether an order made pursuant to the provisions of § 3287 taxing the fees of a register of the county for making a search is appealable to the appellate division: Matter of Howe, 66 App. Div. 7.

h. **Pro forma order.**—The appellate division has no jurisdiction to review a *pro forma* order made at special term, on the consent of the parties, especially where the order recites that it was granted for the purpose of permitting an appeal to the appellate division and that it was made without an examination of the merits by the court below: Brown v. Brown, 64 App. Div. 544; 72 N. Y. Supp. 309.

i. **Juror.**—An appeal does not lie from an order allowing a plaintiff to withdraw a juror on the payment of costs; an order allowing a plaintiff to withdraw a juror may properly be granted and as a condition thereof he may be required to pay the term fee, trial fee and the witnesses' fees: Rawson v. Silo, 105 App. Div. 278.

j. **Foreclosure.**—Where the purchaser at a mortgage foreclosure sale procured an order to show cause why a writ of assistance should not be issued commanding the sheriff to place him in possession and the mortgagor failed to show cause, an appeal by the mortgagor will be dismissed: Title Guarantee & T. Co. v. Am. P. & C. Co., 95 App. Div. 192; 88 N. Y. Supp. 502.

k. **Habeas corpus.**—An appeal from an order dismissing a writ of *habeas corpus* will not be dismissed by the appellate division upon the ground that the relator had no interest in the proceeding and was practically a stranger, where it appears that the special term, with full knowledge of all the facts on which the motion to dismiss the appeal was based, entertained the *habeas corpus* proceeding and proceeded to a determination thereof on the merits: People ex rel. Bebro v. Bond, 104 App. Div. 47.

l. When the appellate division has no power to reverse as a matter of law an order of a county judge discharging a relator upon the hearing of a writ of *habeas corpus:* Matter of Depue, 185 N. Y. 60.

m. **Injunction.**—The appellate division has power under § 1348, where the special term refuses so to do, to eliminate the improvident provisions of an injunction order restraining creditors from prosecuting their claims where the action is one brought to restrain defendants from interfering with the plaintiff in the conduct of a hotel: Marty v. Marty, 66 App. Div. 527; 73 N. Y. Supp. 369.

n. When, in an action for a permanent injunction, a preliminary injunction has been denied in the court below, the appellate division will usually leave the question of the right to an injunction to be determined on the trial. But where it is apparent that no facts substantially different will be developed on the trial, and there is little or no dispute as to any material fact, but merely as to the conclusions to be drawn therefrom, the appellate division will determine the right to a preliminary injunction on appeal from the order denying it: Dutton & Co. v. Cupples, 117 App. Div. 172.

o. **Compromise verdict.**—Where it is clear that the verdict of a jury was a compromise, it would seem that the court should set aside on its own motion under § 999, and the appellate division on appeal will, within its inherent power, set aside the verdict and judgment; a delay to make the motion under § 999 will not affect the party's rights and the error is one which cannot be waived by a party to the suit: Wiegand v. Fee Brothers Co., 73 App. Div. 139; 76 N. Y. Supp. 872.

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a. **Disqualification of judge.**—Upon an appeal from a judgment of the county court because the county judge was related to one of the defendants within the sixth degree, it is better practice for the appellate division to dismiss the appeal and remit the parties to their remedy by a motion in the county court to set aside the judgment: Elmira Realty Co. v. Gibson, 103 App. Div. 140.

b. **Dismissal.**—The appellate division cannot, after dismissing an appeal upon the facts and the law, vacate and set aside the judgment, since a dismissal of the appeal deprives it of any further jurisdiction over the judgment or proceedings: Westerfield v. Rogers, 174 N. Y. 230, rev'g 63 App. Div. 18; 71 N. Y. Supp. 401.

c. **Surrogate.**—A surrogate, in assessing a transfer tax, acts judicially, not ministerially, and the appellate division has jurisdiction to entertain an appeal by the comptroller from the order of such surrogate reversing an order assessing the tax: Matter of Hull, 109 App. Div. 248.

d. The review of a surrogate's order exempting an estate from taxation without the appointment of an appraiser should be taken first by an appeal to the surrogate and then by appeal to the appellate division from the affirmance or reversal by the surrogate of his order. The original order of the surrogate being in the nature of an *ex parte* order, no direct appeal therefrom lies to the appellate division: Matter of Costello, Nos. 1, 2, 117 App. Div. 807.

e. **Commissioner's report.**—An order of the special term denying a motion to confirm the report of commissioners of estimate is not appealable to the appellate division of the supreme court; the authority of that court to entertain appeals from orders made upon the coming in of reports of commissioners exists only where there has been an order of confirmation in whole or in part: Matter of Comr. of Public Works, 185 N. Y. 391, aff'g 111 App. Div. 285; 97 N. Y. Supp. 503.

f. Where the first report of the commissioners of appraisal of lands for water purposes was set aside because improper evidence had been admitted, an appeal may be taken from the confirmation of the second report to the appellate division, the determination of which is reviewable by the court of appeals: Matter of Daly, 189 N. Y. 34, rev'g 116 App. Div. 798.

g. **Supplemental answer.**—Where, after a denial of a motion to serve a supplemental answer, the cause is tried before the time to appeal from the order expires, and before such time the defendant appeals from both the judgment and the order, the order is before the court on a direct appeal: Gleason v. Northwestern Mut. L. Ins. Co., 113 App. Div. 186.

h. **Default.**—When a case is admittedly abandoned, a default should not be opened, and the order opening such default will be reversed: Rosenfield v. Central Vermont Railway Co., 116 App. Div. 851.

i. **Two orders.**—It is perfectly proper for a judge, when, after inadvertently signing two orders, to adopt the proper one: Hill v. Muller, 53 Misc. 255.

j. **Interrogatories.**—An order allowing interrogatories is appealable. When they are clearly irrelevant or have some ulterior or improper purpose the appellate court may disallow them; while the court should be liberal in allowing interrogatories, and they should stand unless it be clear that they cannot be material, yet the appellate court will leave the question of the admissibility of cross-interrogatories to be determined at the trial: Shafer v. McIntyre, 115 App. Div. 87.

k. **Right of appeal.**—A litigant cannot be deprived of his right of appeal by the arbitrary refusal of the court to resettle its order so as to show the fact that the order was not made upon default or by consent: Wollowitz v. New York City Railway Co., 116 App. Div. 361.

l. **Resettled order.**—When after an appeal from an order the same is resettled so that an entirely different record is presented and no notice of appeal from the resettled order is served, the appeal from the first order should be dismissed. This because an appeal from any order must be heard upon the papers recited in that order and a resettled order stands in place of the original order: Dewsnap v. Matthews, 119 App. Div. 167.

m. **Newly discovered evidence.**—A motion for a new trial upon the ground of newly discovered evidence may be made, in the absence of objection, upon the pleadings and affidavits; and an objection that a settled case is necessary under § 997 cannot be raised for the first time upon appeal from the order entered on such motion: Rosenthal v. Bell Realty Co., 53 Misc. 265.

§ 1348. Id.; when made out of court; powers of appellate division to grant orders.

n. **Stay.**—An undertaking in the sum of $500, given pursuant to § 1326 upon an appeal by the defendant corporation from a judgment requiring it to remove certain obstructions from defendant's premises, does not stay the execution of the judgment, and a stay can only be granted upon notice to the adverse party

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upon such terms as may seem to the court just: Sagehomme v. Pugh Co., 53 Misc. 41.

a. **Special verdict.**—Where the court has taken a special verdict which is rendered in favor of the plaintiff and then dismissed the complaint, and there are no exceptions taken by the defendant which would justify the appellate division in ordering a new trial, the appellate division on reversing the order dismissing the complaint should direct judgment for the plaintiff on the special verdict: Nicholls v. American S. & W. Co., 117 App. Div. 21.

§ 1349. Appeal from interlocutory judgment.

See §§ 1301, 1316, When interlocutory judgment may be reviewed upon appeal from final judgment.

See § 1021, ante, Decision of court or report of referee, upon trial of demurrer.

b. **Partition.**—An interlocutory judgment of partition and sale rendered by a county court is not appealable to the appellate division, as the Code of Civil Procedure only provides for appeals from final judgments of the county court; the parties may stipulate that such an appeal may be heard as a motion for a new trial on exceptions: Russ v. Maxwell, 94 App. Div. 107; 87 N. Y. Supp. 1077.

c. **Costs.**—Upon the reversal of an interlocutory judgment of the city court, overruling a demurrer to a complaint with costs of the appeal, the successful party is entitled to tax twenty dollars costs before notice of argument and forty dollars for argument and, from an order allowing said items, an appeal lies to the appellate term under § 3188 and not under § 3189; the failure to omit "interlocutory judgment" from § 3189 by the amendment of chap. 515 of 1902 was an inadvertence, and the intention of the legislature as evinced by the affirmative act of introducing a reference to § 1349 "interlocutory judgment" into § 3188 was to omit the reference to § 1349 and those words from § 3189: Campbell v. Hallihan, 46 Misc. 409.

d. **Order.**—An appeal cannot be taken to the appellate division from a decision in the form of an order overruling a demurrer: Rowe v. Rowe, 103 App. Div. 100; 92 N. Y. Supp. 491.

e. An order overruling a demurrer is not an intermediate order and may be reviewed on the appeal from the judgment entered thereon, although the appeal does not specify an intention to review the order; an order sustaining or overruling a demurrer is not appealable as it is not one of the orders enumerated in § 1347 and the appeal is from the judgment only: Smith v. Thompson, 118 App. Div. 6.

§ 1350. Appeal from final judgment, after affirmance of interlocutory judgment, or denial of new trial. Review in the court of appeals.

See § 1316, ante, Interlocutory judgment in intermediate order may be reviewed.

See § 1336, ante, Appeal from final judgment after affirmance of interlocutory judgment.

§ 1351. Limitation of time; order to stay proceedings.

An appeal, authorized by this title, must be taken, within thirty days after service, upon the attorney for the appellant, of a copy of the judgment or order appealed from, and a written notice of the entry thereof. Security is not required to perfect the appeal; but, except where it is otherwise specially prescribed by law, the appeal does not stay the execution of the judgment or order appealed from; unless the court, in or from which the appeal is taken, or a judge thereof, makes an order, directing such a stay. Such an order may be made, and may, from time to time, be modified, upon such terms, as to security or otherwise, as justice requires. If security is given, either as a condition of granting the order, or as prescribed in the next section, the provisions of title second of this chapter apply thereto, as if the appellate division of the supreme court was specified in those provisions, in place of the appellate court, and a judge of the same court, in place of a judge of the court below. Execution of a judgment for

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the recovery of money only shall not be stayed without security for more than thirty days after the service upon the attorney for the appellant of a copy of the judgment and written notice of the entry thereof.

Co. Proc., §§ 332, 348, 350.

Amended by chap. 946 of 1895 and chap. 238 of 1903.

See § 784, ante, Time for taking an appeal cannot be extended.

See § 1306, ante, Deposit in lieu of undertaking.

See § 1310, ante, When appeal operates as a stay of proceedings.

See § 1312, ante, Court may limit the amount of security.

a. **Strictly construed.**—The provisions of § 1351, in relation to the time in which an appeal to the appellate division must be taken, must be strictly construed, and any irregularities in regard to the copy of the judgment served or the notice of entry will not start the time to appeal running: Gabay v. Doane, 38 Misc. 661; 78 N. Y. Supp. 224.

b. The requirements of § 1351 must be observed with great particularity: People ex rel. Dinsmore v. Vandewater, 83 App. Div. 60, at 62; 82 N. Y. Supp. 627.

c. **Undertaking.**—An undertaking given on a trial from an order directing the restitution of money, paid in proceedings supplementary to execution, does not, in the absence of an order to that effect, operate as a stay: Mossein v. Empire State Surety Co., 97 App. Div. 230; 89 N. Y. Supp. 843.

d. **Attachment.**—The entry of an order vacating an attachment of the property of a foreign corporation does not annul the warrant of attachment, and, upon an appeal from the order, a stay of proceedings is properly granted: Norden v. Duke, 47 Misc. 473; 95 N. Y. Supp. 940.

e. **Supplemental answer.**—Where, after a denial of a motion to serve a supplemental answer, the cause is tried before the time to appeal from the order expires, and before such time the defendant appeals both from the judgment and from the order, the order is before the court on a direct appeal: Gleason v. Northwestern Mut. L. Ins. Co., 113 App. Div. 186.

f. **Foreclosure.**—When in an action to foreclose a mortgage upon a leasehold, the mortgagor does not appear and has no claim except an alleged right to a redemption from summary proceedings, and the value of the leasehold is rapidly decreasing while the arrears in rents and taxes are rapidly increasing, a stay of execution upon an appeal which is apparently dilatory in character, by one not a party to the mortgage, but merely claiming that it was given for his benefit, should not be granted: Bouden v. Sire, 119 App. Div. 194.

§ 1353. Upon what papers appeal to be heard.

See rule 41 (Sup. Ct.), Papers to be furnished by appellant.

See rule 43 (Sup. Ct.), Manner of printing and distribution of cases and points.

See § 997, ante, How case made and settled.

See § 998, ante, When case is unnecessary.

See § 1315, ante, Papers to be transmitted to appellate court.

See § 3301, post, Attorneys may stipulate that a paper be used as a certified copy.

g. **Municipal court.**—The appellate division will decline to consider an appeal unless on an appeal from a judgment the papers in the record shall be either certified or stipulated copies of a notice of appeal and judgment roll in the court below; that judgment roll must contain, when printed, a return by the municipal court of the proceedings had in that court, together with its judgment: Sherlock v. Sherlock, 64 App. Div. 624; 72 N. Y. Supp. 128.

h. **Filing.**—§ 1353, which provides that, before an appeal based upon a case can be heard in the appellate division, the judge trying the case shall order the printed papers to be filed with the clerk of the appellate division, applies to all appeals founded upon a case prepared and settled, notwithstanding that the language of the last clause of the section refers strictly to appeals from judgments only: Odendall v. Haebler, 91 App. Div. 372.

i. **Exceptions.**—When a certificate that a case contains all the evidence is refused by the justice who tried the case, the appellate court cannot consider the merits, but can only determine whether the conclusions of law were justified by the findings of fact and pass upon the exceptions taken: Voss v. Smith, 110 App. Div. 104; 97 N. Y. Supp. 3; appeal dis. 183 N. Y. 536.

j. When no motion has been made for a nonsuit on the ground that the evidence does not establish a cause of action, and there is no certificate that the case con-

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tains all the evidence, the appellate court is limited to a review of the exceptions and cannot review the questions of fact: Ceballos v. Munson Steamship Line, 112 App. Div. 352.

a. When an exception is taken to the court's refusal to charge specifically and in the language requested, certain written requests submitted and the court states that the requests will be given to the stenographer to copy in the record, a specific exception to each of such requests should not be stricken from the printed case upon the theory that the "exceptions" did not appear in the stenographer's minutes; a case should be made up so as to state the truth as to what took place at the trial, and substance should not be sacrificed to form: People v. Browne, 118 App. Div. 38.

b. **Judgment.**—Although in an action upon a judgment of a foreign court, the record of the judgment was not authenticated in the manner required by the Code of Civil Procedure to be read in evidence, the defect may be remedied by the presentation of a duly authenticated record in the appellate record: Milliken v. Dotson, 117 App. Div. 527.

c. **Error.**—The rule that the action of the trial justice in settling a case on appeal cannot be reviewed applies only when it appears that he decided the disputed matter upon his recollection or understanding of the proceedings had before him. When a trial justice, since deceased, signed a case on his sick bed as stipulated by the parties, an error which was overlooked may be subsequently corrected: McMahon v. Delaware, Lackawanna & Western R. R. Co., 116 App. Div. 532.

d. **Default.**—The preparation, settlement and filing of a case or bill of exceptions is part of the record of the court below and the opening of a default in these respects is with the special term. But after the case is settled, and filed, the filing and service of the printed papers upon which an appeal is heard are part of the appeal and the opening of any default therein lies with the appellate division: Hansen v. Walsh, 117 App. Div. 39.

e. **Decision of referee.**—In trials by a court or before a referee, the formal decision directing a judgment must contain every finding of fact made by the justice or referee, and no fact not thus incorporated in the decision forms any part of the judgment-roll or the case on appeal, or can be considered for any purpose by the appellate court. A party has no right to incorporate in a judgment-roll, or case on appeal, his requests to find, submitted to the court or referee under § 1023, unless the court refuses to find, in which case the requests refused may be inserted in the appeal book, unless incorporated in the decision: Elterman v. Hyman, 117 App. Div. 519; 102 N. Y. Supp. 613.

f. **Judgment creditor's action.**—When an appeal in a judgment creditor's action is based only upon the pleadings, the decision and the judgment, and there is no case containing the evidence, and there is printed in the appeal book certain requests to find, some marked "found" and some "not found," are not incorporated in the decision, the requests cannot be considered, and exceptions to refusals to find raise no question in the absence of the testimony: Jacquelin v. Jacquelin, 119 App. Div. 428.

g. **Board of railroad commissioners.**—An appeal from the board of railroad commissioners refusing a certificate of public convenience and necessity for a proposed street surface railroad comes before the appellate division as an original application to be determined upon the record made before the board of railroad commissioners, or upon such further evidence and facts as the court may deem essential to enable it to make a proper determination. It is not merely a review of the decision of a subordinate tribunal which casts upon the petitioners the burden of showing affirmatively that the commissioners erred in their determination: Matter of Rochester, Corning, Elmira Traction Co., 118 App. Div. 521; 102 N. Y. Supp. 1112.

h. **What may be considered.**—When the plaintiff's proof of ownership of the premises is not clear, the appellate court may consider a warranty deed, produced on argument, showing his title when no objection is made to its reception and there is no suggestion made that it can be controverted: Karfiol v. City of New York, 119 App. Div. 70.

i. When, in an action to recover for services rendered, the defendant introduces a receipt signed by the plaintiff, and the plaintiff's explanation as to why he signed the paper is excluded on the objection of the defendant, the plaintiff is entitled to have the excluded question contained in the printed case in order that the defendant cannot reverse judgment on the ground that there was a failure of evidence when the same was excluded on his own objection. This is so, although the plaintiff's exceptions to the exclusion of the evidence were not well taken: Selah v. New York Times Co., 118 App. Div. 384.

j. When at trial the plaintiff moves for the direction of a verdict, and the defendant moves for the dismissal of the complaint, and in the alternative for a direction of verdict for plaintiff for nominal damages, and the court directs judgment for the plaintiff, the case on appeal should state the grounds upon which the defendant moved to dismiss the complaint and for the direction of a

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verdict, so that there can be no question that he waived any position which he was entitled to take: Blewett v. Hoyt, 117 App. Div. 32.

a. The failure of the plaintiff to tender consideration for release is not available on appeal: Ambellan v. Barcalo Mfg. Co., 118 App. Div. 547.

§ 1354. Entry of judgment or order; judgment-roll.

See § 1237, ante, Judgment-roll to be filed; of what it consists.

b. **Amendment.**—When the appellate division has modified an interlocutory judgment, the entry thereof in the court below for the purpose of taxing costs is a mere formality and there is no authority in the attorneys for either party or in the county clerk to change or modify the order of the appellate division; when an interlocutory judgment requiring the severance of actions has been modified by the appellate division by granting leave to amend, the right to amend is effective without further action on the part of the clerk of the court below: Myers v. Lederer, 119 App. Div. 332.

§ 1355. Hearing, etc., in the supreme court.

See rule 39 (Sup. Ct.), Appellate division calendar and calendar practice.

See § 231, ante, Reargument, etc., when cause to be heard in another department.

a. When the appellate division has modified an interlocutory judgment, the entry thereof in the court below for the purpose of taxing costs is a mere formality and there is no authority in the attorneys for either party or in the county clerk to change or modify the order of the appellate division; when an interlocutory judgment requiring the severance of actions has been modified by the appellate division by granting leave to amend, the right to amend is effective without further action on the part of the clerk of the court below: Myers v. Lederer, 119 App. Div. 332.

§ 1356. Appeal from order made in the same court.

See § 1347, ante, When an appeal from an order may be taken.

See § 2058, post, Appeal from order refusing writs of habeas corpus and certiorari.

See § 3334, post, Special proceeding defined.

d. **Retaxation.**—An order denying a motion for retaxation is appealable to the appellate division: Matter of Collis (Rundall Claim), 78 App. Div. 495; 79 N. Y. Supp. 801.

e. **Summary proceedings.**—An order of the county court of Ulster county, reversing an order of the city court of the city of Kingston, in summary proceedings instituted by a landlord to recover possession of demised real estate, is not appealable to the appellate division, as the right to take such appeal is not conferred by §§ 1356 and 1357 relating to appeals to the appellate division from orders made in special proceedings generally, nor by § 2260, relating to appeals from orders made in summary proceedings to recover possession of real estate; the final order mentioned in § 2260, as defined in § 2249, is the final order made upon the trial: Matter of Soop v. Burhans, 106 App. Div. 341; 94 N. Y. Supp. 463, rev'g 183 N. Y. 227.

f. When summary proceedings originate in a justice's court, and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

g. **Report of commissioners.**—There is no appeal authorized from an order of the special term refusing to confirm the report of commissioners in condemnation proceedings and sending the report back with directions requiring a further report in accordance therewith: Matter of Commissioners of Public Works, 111 App. Div. 285; 97 N. Y. Supp. 503, aff'd 185 N. Y. 391.

h. An order of the special term denying a motion to confirm the report of commissioners of estimate is not appealable to the appellate division of the supreme court; the authority of that court to entertain appeals from orders made upon the coming in or reports of commissioners exists only where there has been an order of confirmation in whole or in part: Matter of Comr. of Public Works, 185 N. Y. 391, aff'g 111 App. Div. 285; 97 N. Y. Supp. 503.

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§ 1357. Id.; when made by another court or judge.

See § 1342, ante, Appeal from order affecting a substantial right.

a. **Summary proceedings.**—An order of the county court of Ulster county, reversing an order of the city court of the city of Kingston, in summary proceedings instituted by a landlord to recover possession of demised real estate, is not appealable to the appellate division, as the right to take such appeal is not conferred by §§ 1356 and 1357 relating to appeals to the appellate division from orders made in special proceedings generally, nor by § 2260, relating to appeals from orders made in summary proceedings to recover possession of real estate; the final order mentioned in § 2260, as defined in § 2249, is the final order made upon the trial: Matter of Soop v. Burhans, 106 App. Div. 341; 94 N. Y. Supp. 463, rev'd 183 N. Y. 227.

b. This section contains nothing which forbids an appeal from an inferior court to the appellate division from a final order in a summary proceeding: Matter of Soop v. Burhans, 183 N. Y. 227, rev'g 106 App. Div. 227.

c. When summary proceedings originate in a justice's court, and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

§ 1358. Preceding order may be reviewed.

See § 1301, ante, Notice of appeal to specify intermediate order.

See § 1316, ante, An interlocutory judgment may be reviewed on an appeal from a final judgment.

d. The order authorizing the constructing of a temporary crossing is not a final order in a special proceeding, and the specification in the notice of appeal of an intention to bring up the intermediate orders for review is not effective for that purpose: Oneonta, C. & R. S. R. Co. v. C. & C. V. R. R. Co., 85 App. Div. 284.

§ 1361. This title qualified; application of provisions relating to actions.

e. **Special proceeding.**—Questions of fact are to be tried and determined in a court of original jurisdiction which is not the appropriate function of an appellate court; this principle applies to an appeal from a final order in a special proceeding, as well as from a judgment: Matter of Fitzsimmons, 174 N. Y. 15, at 25.

f. There is no appeal authorized from an order of the special term refusing to confirm the report of commissioners in condemnation proceedings and sending the report back with directions requiring a further report in accordance therewith: Matter of Commissioner of Public Works, 111 App. Div. 285; 97 N. Y. Supp. 503, aff'd 185 N. Y. 391.

§ 1362. To whom execution directed; provision where sheriff is a party.

g. A sheriff can execute process, for an arrest in a civil action, only within his own county; an execution against the person of a resident of the state of New York is defective where it fails to state that the execution against his property was issued to the county where he resides: Fisher v. Young, 41 Misc. 552, aff'd 95 App. Div. 619; 85 N. Y. Supp. 115.

§ 1364. The different kinds of execution.

See § 1240, ante, When judgment may be enforced by execution.

§ 1365. To what counties execution may issue.

See § 597, ante, Certain executions necessary before action against bail.

See § 1369, post, Requisites of execution against property.

§ 1366. General requisites of executions.

See §§ 23, 24, ante, Writs; teste and return; subscribed by attorney.

§ 1367. Id.; when issued on filing transcript from justice's court, etc.

See § 3017, post, Docketing of judgment of justice's court.

See § 3043, post, Execution upon judgment docketed with county clerk.

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§ 1369. Id.; against property.

a. Where a judgment was recovered and docketed more than four months prior to the filing of a petition in bankruptcy, a lien is impressed upon the real estate of the judgment debtor, and the judgment creditors may enforce their judgment by a sale of the land under execution or may bring an action in equity to set aside fraudulent transfers of such real estate by such judgment debtors: Hillyer v. LeRoy, 179 N. Y. 369, mod'y 84 App. Div. 129; 82 N. Y. Supp. 80.

§ 1370. Id.; where a warrant of attachment has been levied by sheriff.

See §§ 706-708, ante, Execution, when warrant of attachment has been issued.

b. An execution issued under the provisions of § 1370 in an action in which the judgment creditor had obtained an attachment supersedes the lien of the attachment, and thereafter the judgment creditor cannot maintain an action in aid of the attachment: Barton v. Palmer Co., 87 App. Div. 35; 83 N. Y. Supp. 1041.

§ 1371. Id.; against executor, etc.

c. Where a surrogate's decree directs the payment of a sum of money by an executor as such, execution thereunder must run against his property, as he is the party directed to make the payment: Matter of Quackenbos, 38 Misc. 66; 76 N. Y. Supp. 964.

§ 1372. Id.; against the person.

See § 1487 et seq., post, Execution against the person.

See § 1489, post, When execution must first be issued against the property of judgment debtor.

d. An execution against the person of a resident of the state of New York is defective where it fails to state that the execution against his property was issued to the county where he resides: Fisher v. Young, 41 Misc. 552, aff'd 95 App. Div. 619; 85 N. Y. Supp. 115.

§ 1373. Id.; for delivery of property. How money, recovered by same judgment, may be collected.

e. When a writ of assistance serves all the functions that an execution would under § 1373: Title Guarantee & T. Co. v. Am. P. & C. Co., 95 App. Div. 192; 88 N. Y. Supp. 502.

§ 1375. Execution of course, within five years.

See § 1382, post, Time to stay, etc., not included.

See § 1858, post, When execution against infant heir may be issue.

§ 1376. Execution after death of judgment creditor.

f. Upon an application for leave to issue execution after the lapse of five years from the entry of final judgment in an action, the court will not inquire into the validity of the judgment nor permit the judgment debtor to show that no summons was ever served upon him in the action: Matter of Armstrong, 35 Misc. 327.

§ 1377. When execution may be issued after five years.

g. Relation of §§ 376 and 1377 considered: Seaman v. Clarke, 60 App. Div. 416, aff'd 170 N. Y. 594; 69 N. Y. Supp. 1002.

h. **Second execution.**—A judgment creditor, upon whose judgment an execution was issued within five years after its entry, may issue a second execution after the expiration of such five years without application to the court, notwithstanding the fact that his attorneys, being unaware that any previous execution was issued, have made an application to the court for leave to issue a second execution, which has been denied with leave to renew it upon additional papers: Cooper v. Bailey, 69 App. Div. 358; 74 N. Y. Supp. 667.

i. **Service of notice.**—§§ 1377 and 1378, which provides that notice of an application to the court for leave to issue execution on a final judgment, after the lapse of five years from its entry, must be served personally upon the adverse party,

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if he is a resident of the state, are applicable to a decree of the surrogate's court judicially settling the accounts of an administrator: People ex rel. Sackett v. Woodbury, 70 App. Div. 416.

§ 1378. Id.; leave, how obtained.

See § 1825, post, When leave is necessary to issue execution against executor or administrator.

a. **Notice.**—§§ 1377 and 1378, which provides that notice of an application to the court for leave to issue execution on a final judgment, after the lapse of five years from its entry, must be served personally upon the adverse party, if he is a resident of the state, are applicable to a decree of the surrogate's court judicially settling the accounts of an administrator: People ex rel. Sackett v. Woodbury, 70 App. Div. 416.

§ 1380. Execution against decedent's property.

See § 1825, post, Leave to issue execution against executor.

See § 2749, post, What property subject to this title.

b. Lien of judgment continued by virtue of § 1380: Le Boeuf v. Gray, 42 Misc. 632; 87 N. Y. Supp. 597.

c. **Termination.**—A judgment recovered August 16, 1893, was a lien upon an undivided one-sixth interest in certain real estate conveyed by the judgment debtor, who died, and upon whose estate letters of administration were issued March 16, 1900, by virtue of § 1380. The statutory lien of the judgment terminated September 15, 1903: Le Boeuf v. Gary, 101 App. Div. 358.

d. **Lien.**—Where a judgment creditor after the lapse of ten years has served notice of motion on the heirs of the deceased judgment debtor for leave to issue execution on the lands owned by the judgment debtor, the lien of the execution when levied is superior to the rights of a mortgagee and grantee under mortgages and deeds made by the heirs subsequent to the notice of motion, but prior to the execution, when the mortgagee and grantee had knowledge of the motion: Lyons Nat. Bank v. Shuler, 115 App. Div. 859.

§ 1381. Leave, how obtained.

See § 2725, subd. 2, post, Executor may file intermediate account when creditor files petition to that execution issue.

§ 1384. Sale on execution, etc.; when and how conducted.

e. The act of a sheriff in levying upon and selling personal property under an execution against a person who had no interest in such personal property, is such an exercise of dominion over the property as will enable the actual owner thereof to maintain an action against the sheriff for its conversion: Hill v. Page, 108 App. Div. 71.

§ 1389. Certain special exemptions not affected by this article.

f. Articles and property to be set aside for the benefit of a widow and minor children are enumerated in § 2713, and those exempt from execution are chiefly enumerated in §§ 1390-1391: Matter of Keough, 42 Misc. 387; 86 N. Y. Supp. 807.

§ 1390. What personal property is exempt, when owned by a householder.

g. Articles and property to be set aside for the benefit of a widow and minor children are enumerated in § 2713 and those exempt from execution are chiefly enumerated in §§ 1390-1391: Matter of Keough, 42 Misc. 387; 86 N. Y. Supp. 807.

h. **Waiver.**—In an action against a marshal to recover property which the marshal seized under an execution against the plaintiff, and which the plaintiff claimed was exempt, under § 1391, it is incumbent upon the plaintiff to show that the property was exempt and that he claimed such exemption at some time before the property was sold, or it will be deemed to have been waived: Gilewicz v. Goldberg, 69 App. Div. 438; 74 N. Y. Supp. 984.

i. **Widow.**—A desk, counter, two chairs, three wagons, two sets of harness and a Dutch collar, not shown to be worth over $250, owned by a judgment debtor who is a widow and supports herself and five children from an income ranging from nothing to fourteen dollars a week derived from an express business conducted by her together with less than ten dollars in the bank are exempt from execution, and, where

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that is all the property discovered, a motion for a receiver of the judgment debtor in supplementary proceedings will be denied and the proceedings dismissed with ten dollars costs: Matter of Galowitz v. Bumford, 54 Misc. 41.

§ 1391. Additional personal property exempt in certain cases.

In addition to the exemptions, allowed by the last section, necessary household furniture, working tools and team, professional instruments, furniture and library, not exceeding in value two hundred and fifty dollars, together with the necessary food for the team, for ninety days, are exempt from levy and sale by virtue of an execution, when owned by a person, being a householder, or having a family for which he provides, except where the execution is issued upon a judgment, recovered wholly upon one or more demands, either for work performed in the family as a domestic or for the purchase money, of one or more articles, exempt as prescribed in this or the last section. Where a judgment has been recovered wholly for necessaries sold, or work performed in a family as a domestic, or for services rendered for salary owing to an employee of the judgment debtor, and where an execution issued upon said judgment has been returned wholly or partly unsatisfied, and where any wages, debts, earnings, salary, income from trust funds or profits are due and owing to the judgment debtor or shall thereafter become due and owing to him, to an amount exceeding twelve dollars per week, and where no execution issued as hereafter provided for in this section is unsatisfied and outstanding against said judgment debtor, the judgment creditor may apply to the court in which said judgment was recovered or the court having jurisdiction of the same without notice to the judgment debtor and upon satisfactory proof of such facts by affidavits or otherwise, the court, if a court not of record, a judge or justice thereof, must issue, or if a court of record, a judge or justice, must grant an order directing that an execution issue against the wages, debt, earnings, salary, income from trust funds or profits of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages, debts, earnings, salary, income from trust funds or profits are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages, earnings, debts, salary, income from trust funds or profits due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid or until modified as hereinafter provided. It shall be the duty of any person or corporation, municipal or otherwise, to whom said execution shall be presented, and who shall at such time be indebted to the judgment debtor named in such execution, or who shall become indebted to such judgment debtor in the future, and while said execution shall remain a lien upon said indebtedness to pay over to the officer present-

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ing the same, such amount of such indebtedness as such execution shall prescribe until said execution shall be wholly satisfied and such payment shall be a bar to any action therefor by any such judgment debtor. If such person or corporation, municipal or otherwise, to whom said execution shall be presented shall fail, or refuse to pay over to said officer presenting said execution, the percentage of said indebtedness, he shall be liable to an action therefor by the judgment creditor named in such execution, and the amount so recovered by such judgment creditor shall be applied towards the payment of said execution. Either party may apply at any time to the court from which such execution shall issue, or to any judge or justice issuing the same, or to the county judge of the county, and in any county where there is no county judge, to any justice of the city court upon such notice to the other party as such court, judge or justice shall direct for a modification of said execution, and upon such hearing the said court, judge or justice may make such modification of the said execution as shall be deemed just, and such execution as so modified shall continue in full force and effect until fully paid and satisfied, or until further modified as herein provided.

L. 1842, c. 157, § 1; L. 1858, c. 107, § 1; L. 1866, c. 782.

Amended by chap. 542 of 1879, chap. 116 of 1901, chap. 461 of 1903 and chap. 175 of 1905.

a. **Seat in stock exchange.**—A seat in the stock exchange is property which will pass to a receiver in supplementary proceedings and is not exempt, under § 1391, as "working tools" of a member: Leggett v. Waller, 39 Misc. 408.

b. **Burden of proof.**—In an action against a marshal to recover property which the marshal seized under an execution against the plaintiff, and which the plaintiff claimed was exempt under § 1391 of the Code of Civil Procedure, it is incumbent upon the plaintiff to show that the property was exempt and that he claimed such exemption at some time before the property was sold, or it will be deemed to have been waived: Gilewicz v. Goldberg, 69 App. Div. 438; 74 N. Y. Supp. 984.

c. **Jury.**—In an action against a sheriff to recover property in value less than $250, claimed by plaintiff to be exempt under § 1391, of which claim the sheriff was notified before the sale, the jury should be allowed to determine, under instructions from the court and from the evidence, whether or not the articles were exempt: O'Reilly v. Erlanger, 46 Misc. 278.

d. **Complaint.**—A complaint in an action brought under the provisions of the last sentence (now next to the last sentence) of § 1391, as amended by chap. 491 of 1903, against a person or corporation refusing to honor an execution issued against the wages of a judgment debtor, is demurrable if it fails to allege that no prior similar execution against a judgment debtor is outstanding; when a statute gives a new remedy and prescribes the requisite conditions, or if an action of a certain character against certain persons be authorized only after the performance of certain conditions, it is necessary to allege performances of these conditions; a person seeking to maintain an action under a statute must state every fact requisite to enable the court to judge whether he has a cause of action under the statute: Rosenstock v. City of New York, 97 App. Div. 337; 89 N. Y. Supp. 948.

e. **Notice.**—An application for an execution, under § 1391, against the income of a trust fund created for the benefit of the judgment debtor cannot be made *ex parte*, but only upon notice not only to the judgment debtor, but also to the trustee of the trust fund; the said § 1391 would be unconstitutional if intended by the legislature to affect rights acquired under trusts created and in operation before the passage of the act; the legislature has no power to destroy existing property rights by legislation: Sloane v. Tiffany, 103 App. Div. 540; 34 Civ. Pro. R. 208.

f. **Municipal corporations.**—Public policy exempts a municipal corporation from being subject to the operation of § 1391, added in 1903, entitling a judgment creditor, with an execution returned upon a debt of a nature described in the section, to reach by an execution issued by an order of the court not more than ten per cent of a salary exceeding twenty dollars a week, due or to become due to the judgment debtor from a corporation em-

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ploying him: Emes v. Fowler, 43 Misc. 603; 89 N. Y. Supp. 685.

a. **Retroactive effect.**—§ 1391, as amended by chap. 461 of 1903, is not retroactive and there is nothing in the statute indicating a legislative intent that it should apply to a trust created by will prior to its passage, and full effect can be given the statute without giving it a retroactive effect: King v. Irving, 103 App. Div. 420.

b. A statute exempting property from execution may be changed by subsequent legislation, and hence, under § 1391, an execution may be allowed although the judgment was entered before the amendment to said section was permitted execution against wages as such amendment is retroactive: Myers v. Moran, 113 App. Div. 427.

c. The clause added to § 1391 by chap. 461 of 1903, authorizing certain classes of judgment creditors to reach a certain percentage of their judgment debtor's wages where they exceed twenty dollars a week, applies to a judgment recovered before September 1, 1903: Meyer v. Halberstadt, 44 Misc. 408; 89 N. Y. Supp. 1019.

d. **Policeman.**—An execution against the salary of a policeman in New York city is not authorized by § 1391: Rosenstock v. City of New York, 101 App. Div. 9; 34 Civ. Pro. R. 16; 91 N. Y. Supp. 737.

e. **Necessaries.**—In order to warrant an order against a judgment debtor under § 1391, it must appear that the judgment was recovered wholly for necessaries and that no similar execution is outstanding, and a judgment in an action brought on another judgment is not a judgment recovered wholly for necessaries, although the first judgment was itself wholly for necessaries sold: Neuman v. Mortimer, 98 App. Div. 64; 34 Civ. Pro. R. 164; 90 N. Y. Supp. 524.

f. The rule that § 1391 allowing the enforcement of a judgment for necessaries out of the income of a trust fund is not retroactive, has not been changed by the amendment to aid section made by chap. 175 of 1905: Ringe v. Mortimer, 116 App. Div. 722.

g. **Municipal court.**—An action brought under § 1391, as amended by chap. 461 of 1903, against a person indebted to a judgment debtor, because of the failure of such person to satisfy an execution issued under the said section to the extent of his obligation to the judgment debtor, is to be regarded as an action upon the judgment and, hence, if the judgment was recovered in the supreme court, the municipal court of the city of New York has not jurisdiction thereof: Weisel v. Old Dominion Steamship Co., 99 App. Div. 568.

h. **Surgeon.**—A person recovering a judgment for professional services rendered by a surgeon to the defendant's wife is not entitled to an execution against the wages or income of the defendant under this section: Taylor v. Barker, 108 App. Div. 21.

i. **Desk, safe.**—Neither a desk nor a safe owned by an undertaker and embalmer is exempt as part of his necessary professional instruments and furniture; but a candelabrum, necessarily used at the funerals of persons of certain religious beliefs, is exempt as part of his "working tools:" O'Reilly v. Erlander, 108 App. Div. 318.

j. A desk, counter, two chairs, three wagons, two sets of harness and a Dutch collar, not shown to be worth over $250, owned by a judgment debtor who is a widow and supports herself and five children from an income ranging from nothing to fourteen dollars a week derived from an express business conducted by her together with less than ten dollars in the bank are exempt from execution, and, where that is all the property discovered, a motion for a receiver of the judgment debtor in supplementary proceedings will be denied and the proceedings dismissed with ten dollars costs: Matter of Galowitz v. Bumford, 54 Misc. 41.

§ 1392. Woman entitled to same exemption as a householder.

k. A desk, counter, two chairs, three wagons, two sets of harness and a Dutch collar, not shown to be worth over $250, owned by a judgment debtor who is a widow and supports herself and five children from an income ranging from nothing to fourteen dollars a week derived from an express business conducted by her together with less than ten dollars in the bank are exempt from execution, and, where that is all the property discovered, a motion for a receiver of the judgment debtor in supplementary proceedings will be denied and the proceedings dismissed with ten dollars costs: Matter of Galowitz v, Bumford. 54 Misc. 41.

§ 1393. Military pay, rewards, etc., exempt from execution and other legal proceedings.

l. **Pension moneys.**—Property purchased by pension moneys by one who dies intestate, leaving a widow and several minor children, is subject to be sold for the payment of his debts pursuant to title 5 of chap. 18 of the Code of Civil Procedure, as the exemption of such property under an execution conferred by § 1393 is

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personal to the pensioner and does not extend beyond his lifetime or to his family: Smith v. Blood, 106 App. Div. 317.

a. The exemption afforded real property, purchased with pension money, from levy and sale for payment of debts, does not extend beyond the life of the pensioner and, when he dies, leaving such real property as the only fund for the payment of his debts and his will directs their payment, the real property may be sold to pay them: Matter of Liddle, 35 Misc. 173; 71 N. Y. Supp. 474.

§ 1397. Homstead; when exempted.

See § 1391, ante, Additional personal property exempt in certain cases.

§ 1399. Married woman's homestead; when exempted.

See § 1392, ante, Woman entitled to same exemption as householder.

§ 1404. Exemption of real property; how cancelled.

b. **Estoppel.**—A statement in the justification clause of an undertaking for bail, given by a surety to the effect that his property is not exempt from execution, does not estop him, where the sheriff seeks to sell it for default of the principal, from asserting it to be exempt as purchased with pension money: King v. Warren, 42 Misc. 317; 86 N. Y. Supp. 609.

c. **Pension money.**—The exemption afforded real property purchased with pension money does not extend beyond the life of the pensioner, and where he dies, leaving such property as the only source for the payment of his debts, and his will directs their payment, the real property may be sold to pay them: Matter of Liddle, 35 Misc. 173; 71 N. Y. Supp. 474.

d. **Mortgage.**—§ 1404 provides that a conveyance of mortgage by a husband and wife jointly is valid: McMahon v. Cook, 107 App. Div. 150.

§ 1405. Personal property bound by execution.

See § 1411, post, Levy upon certain evidences of debt.

e. Where the owner of a hotel leases the hotel property, leaving whiskey, which is part of his stock in trade, in the possession of the lessees under an agreement that the latter should retail it over their bar and pay him for what they so used, the lessees have an interest in the whiskey, which is subject to seizure and sale under execution: Cook v. Gross, 60 App. Div. 446; 69 N. Y. Supp. 924.

§ 1407. Id.; when attachments also are issued.

See § 697, ante, Preferences of two or more warrants.

§ 1408. Id.; when issued from court not of record.

f. Quaere, whether §§ 2468 and 2469 controls § 1408, which provides: "But an execution issued out of a court not of record * * * if actually levied, has preference over another execution issued out of any court of record or not of record which has not been previously levied:" Droege v. Baxter, 69 App. Div. 58, aff'd 171 N. Y. 654; 74 N. Y. Supp. 596.

§ 1413. When partners may apply for release of property levied upon.

See § 693, ante, When partners may apply for release of property levied on by virtue of an attachment.

§ 1418. Claim of property by a third person, how tried.

If personal property, levied upon as the property of the judgment debtor, is claimed by or in behalf of another person, as his property, an affidavit may be made and delivered to the sheriff, in behalf of such person, at any time while such property or the proceeds thereof are in the sheriff's possession, stating that he makes such a claim; specifying in whole or in part the property to which it relates, and in all cases stating the value of the property claimed and the damages, if any, over and above such

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value, which the claimant will suffer in case such levy is not released. In that case, the officer may, in his discretion, empanel a jury to try the validity of the claim.

New.

Amended by chap. 541 of 1904.

See §§ 108, 109, ante, Sheriff may try claim of title by third person.

See § 657, ante, Claim of property; how tried.

See § 657, ante, Trial of claim of third person when property is levied under a writ of attachment.

§ 1419. Proceedings, if claimant succeeds.

If by their inquisition the jurors find that the property belongs to the claimant, they must also determine its value and the damages above such value as specified in the last section. Thereupon the officer may relinquish the levy, unless the judgment creditor gives him an undertaking with at least two sufficient sureties, to the effect that the sureties will indemnify him to an amount therein specified, not less than twice the value of the property and damages as determined by the jury, and two hundred and fifty dollars in addition thereto, against all damages, costs and expenses, in an action to be brought against him by any person, by the claimant, his assignee, or other representative, by reason of the levy upon, detention or sale of any of the property, by virtue of the execution. If the undertaking is given, the officer must detain the property as belonging to the judgment debtor. Where an undertaking is given to indemnify an officer, he must, within two days after the giving of the said undertaking, cause the same to be filed in the office of the clerk of the court out of which the execution was issued, and serve upon the claimant, his assignee or other representative, and the judgment creditor, or the attorney whose name is subscribed to the execution, a copy of the said undertaking, with a notice of the justification of the sureties thereon. The justification must take place before a judge of the court out of which the execution was issued, at a time to be specified in the notice, which must not be less than two nor more than five days after service of said notice. For the purpose of justification, each of the sureties upon the undertaking must attend before the judge, at the time and place mentioned in the notice, and be examined on oath, on the part of the claimant, his assignee or other representative, touching his sufficiency in such manner as the judge in his discretion thinks proper. The examination may be adjourned from day to day, until it is completed, but such adjournment must always be to the next judicial day. If required by the claimant, his assignee or other representative, the examination must be reduced to writing and subscribed by the sureties. If the judge finds the sureties sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause the said undertaking, together with the examination of the sureties, to be filed with the clerk of the court. Thereupon the sheriff is released and discharged from all liability by reason of the levy upon, detention, and sale

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of the property seized. When any such undertaking shall have been approved and filed, as hereinbefore provided, the clerk of the court shall immediately upon the same being filed, index the same in the index book in his office, under which executions are indexed, under the title of the suit in which the execution is issued.

New.

Amended by chap. 416 of 1877, chap. 98 of 1888, chap. 663 of 1895 and chap. 541 of 1904.

See §§ 108, 109, ante, Trial of claim of title by third person; expenses.

See §§ 657-659, ante, Claim of property attached; how tried.

See § 658, ante, Proceedings if claimant succeeds.

§ 1420. Inquisition not to prejudice claimant's right.

a. The finding of a sheriff's jury is not decisive on the question of title, as under § 1420 it is provided that a finding shall not prejudice the right of a claimant to sue the sheriff for a recovery of his property: Minor v. Gurley, 39 Misc. 662, aff'd 81 App. Div. 586; 80 N. Y. Supp. 596.

§ 1421. In an action against officer, indemnitors may be substituted as defendants.

See § 1711, post, Substitution in an action on a bond given in replevin.

b. **Bond.**—The provisions of §§ 1421-1425 relating to actions against public officers to recover a chattel levied upon or damages resulting from levies or sales, do not apply to a bond given by a third party claiming title to attached property: Krauss v. Merklee, 53 Misc. 277.

§ 1425. Application when officer is joined with indemnitors.

c. **Bond.**—The provisions of §§ 1421-1425 relating to actions against public officers to recover a chattel levied upon or damages resulting from levies or sales, do not apply to a bond given by a third party claiming title to attached property: Krauss v. Merklee, 53 Misc. 277.

§ 1428. Sale of personal property; how made.

d. **Title.**—The title of a purchaser of goods under an execution sale at public auction, he being the highest bidder and paying an adequate price, cannot be affected because the judgment was collusive between the parties to the action and given to hinder, cheat and defraud the creditors of the judgment debtor: Lipschitz v. Halperin, 53 Misc. 280.

e. A sheriff must sell for cash and to consummate a sale there must be a bidder, the property must be struck off, and the bidder must complete his purchase by complying with the terms of sale; in an action at law defendants who separately appear and answer may tax separate bills of costs unless it be shown that they are united in interest or collusively appear by separate attorneys in bad faith for the purpose of enchancing the costs: Rowe v. Granger, 118 App. Div. 459.

f. **Conversion.**—After judgment is entered in an action, the sheriff levies execution on certain property, advertises it for sale and at the sale the husband for the first time claims ownership and thereafter sues the sheriff for conversion, the question as to whether the sheriff relied upon the statement of the husband and whether the latter was estopped from asserting title, should be left to a jury: Feinberg v. Allen, 118 App. Div. 497.

§ 1429. Notices of sale to be posted.

At least six days' previous notice of the time and place of a sale of personal property, by virtue of an execution, must be given, by posting conspicuously written or printed notices thereof, in at least three public places of the town or city, where the sale is made. Where perishable property has been levied upon by virtue of an execution the court may,

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upon the application of the officer making the levy, by order, direct the sale thereof at such a time and upon such a notice as it deems proper; and, thereupon, the property must be sold accordingly.

Amended by chap. 244 of 1907.

§ 1430. To what leasehold property this article applies.

a. The interest acquired by a receiver in supplementary proceedings in a judgment debtor's real property is derived under § 2468, subd. 1, and this interest is simply a right of possession for the purpose of specifying the judgment and is subject to be terminated by the sale of the real property under execution: Chadeayne v. Gwyer, 83 App. Div. 403; 83 N. Y. Supp. 198.

§ 1434. Notice of sale of real property; how given.

See chap. 133 of 1884, repealing acts providing for a state paper.

See § 787, ante, How time of publication is computed.

b. Covenants.—When the terms of sale of real property on a mortgage foreclosure do not give notice of certain restrictive covenants running with the land sold, and it is shown that the purchaser had no knowledge thereof, and that such covenants lessened the value of the property, he should be relieved from his purchase: Conlen v. Rizer, 109 App. Div. 537.

§ 1435. Property, how described therein. Part may be sold.

See § 1253, ante, Land held under a contract cannot be sold by virtue of an execution.

§ 1437. Manner of conducting sale.

See rule 62 (Sup. Ct.), Sale of lands in certain cities.

See § 3343, subd. 16, post, Miscellaneous general definitions and rules of construction.

§ 1438. Sheriff to make duplicate certificates of sale.

c. §§ 1438 and 1439 require a sheriff to execute and acknowledge a duplicate certificate of sale and file the same as required by law, with the clerk of the county: People ex rel. Ehrlich v. Grant, 61 App. Div. 238; 70 N. Y. Supp. 504.

§ 1439. Certificate to be recorded, etc.

See § 3304, post, Fees of county clerks generally.

§ 1440. Title to real property not divested before deed.

d. The interest acquired by a receiver in supplementary proceedings in a judgment debtor's real property is derived under § 2468, subd. 1, and this interest is simply a right of possession for the purpose of specifying the judgment and is subject to be terminated by the sale of the real property under execution: Chadeayne v. Gwyer, 83 App. Div. 403; 82 N. Y. Supp. 198.

§ 1441. Rights of holder of the property during intermediate period.

e. The interest acquired by a receiver in supplementary proceedings in a judgment debtor's real property is derived under § 2468, subd. 1, and this interest is simply a right of possession for the purpose of specifying the judgment, and is subject to be terminated by the sale of the real property under execution: Chadeayne v. Gwyer, 83 App. Div. 403; 82 N. Y. Supp. 198.

§ 1446. When and how real property sold may be redeemed.

f. A wife may maintain an action for the redemption of real property sold under foreclosure of a mortgage upon premises owned by her husband, during his lifetime, when she was not made a party to the foreclosure action: Mackenna v. Fidelity T. Co., 184 N. Y. 411.

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§ 1447. By whom such redemption may be made.

a. A wife, by reason of her inchoate right of dower, may maintain an action for the redemption of real property sold under foreclosure of a mortgage upon premises owned by her husband, during his lifetime, when she was not a party to the foreclosure action: Mackenna v. Fidelity Trust Co., 184 N. Y. 411.

§ 1450. What sum to be paid, etc., when creditor redeems.

See § 1458, post, Redemption by person entitled to redeem part.

§ 1454. When creditor may redeem after fifteen months.

See § 1471, post, When and by whom conveyance to be executed.

§ 1467. Officers to keep papers open to inspection; when to file them.

See § 1464, ante, What evidence a redeeming judgment creditor must furnish.

§ 1471. When and by whom conveyance to be executed.

b. If the sheriff dies, the duty of executing a deed, it never having been executed and delivered, devolves upon the under-sheriff, if he be living, and, if both be dead, then upon the successor of the sheriff in office at the time when the deed is executed: People ex rel. Ehrlich v. Grant, 61 App. Div. 238; 32 Civ. Pro. R. 73.

The language of the statute is mandatory and seems to impose an absolute duty whenever a demand is made, unless he be excused by other matters. Id.

§ 1472. To whom conveyance to be executed.

c. Where property is sold under an execution, the sheriff's deed, in case of the death of the purchaser, can only be given to his executor or administrator; a recital in a deed that it was given in pursuance of an order of the supreme court is not evidence of that fact, nor is any such order binding upon a party who had not notice of the application therefor until twenty years after the recording of the deed: Dixon v. Dixon, 89 App. Div. 603, rev'g 38 Misc. 652; 78 N. Y. Supp. 255.

§ 1473. When conveyance made to executor or administrator; effect thereof.

d. Where property is sold under an execution, the sheriff's deed, in case of the death of the purchaser, can only be given to his executor or administrator; a recital in a deed that it was given in pursuance of an order of the supreme court is not evidence of that fact, nor is any such order binding upon a party who had not notice of the application therefor until twenty years after the recording of the deed: Dixon v. Dixon, 89 App. Div. 603, rev'g 38 Misc. 652; 78 N. Y. Supp. 255.

§ 1475. Under-sheriff or successor to act, if sheriff dies.

e. If the sheriff dies, the duty of executing a deed, it never having been executed and delivered, devolves upon the under-sheriff, if he be living, and, if both be dead, then upon the successor of the sheriff in office at the time when the deed is executed: People ex rel. Ehrlich v. Grant, 61 App. Div. 238; 32 Civ. Pro. R. 73.

§ 1476. Money may be paid, etc., to under-sheriff, or deputy-sheriff, who sold property.

See § 1440, ante, Title to real property not divested before deed.

See § 1446, ante, When and how real property sold may be redeemed.

§ 1487. In what cases execution may be issued against the person.

See § 549, ante, When the right to arrest depends upon the nature of the action.

See § 550, ante, When the right to arrest depends partly upon extrinsic facts.

See § 563, ante, How order of arrest is executed.

See § 1489, post, When execution against property must be first issued.

f. Whether an action is in tort or on contract is not determined by the prayer of the complaint, but by the allegations: Frick v. Freudenthal, 45 Misc. 348; 90 N. Y. Supp. 344.

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a. **Judgment for costs.**—Where a verdict is rendered in favor of the defendant in an action brought for alleged assault by a conductor, employed by defendant, upon the plaintiff, a passenger, and a judgment is entered for costs only, an execution against the person may be issued; the right to issue the execution depends solely upon the nature of the action: Davids v. Brooklyn Heights R. R. Co., 104 App. Div. 23; 93 N. Y. Supp. 285, aff'd 182 N. Y. 526.

b. When a judgment in favor of a defendant in an action for trespass, which was tried in justice's court, was reversed on appeal to the county court, an execution against the defendant's person for costs was properly issued: Losaw v. Smith, 109 App. Div. 754.

c. **Death of decedent.**—An action to recover damages for the death of a decedent is an action for a wrong done the property rights or interests of the decedent's next of kin, and a judgment in such an action may be enforced by an execution against the person, under §§ 549 and 1487: People ex rel. Harris v. Gill, 85 App. Div. 192; 83 N. Y. Supp. 135.

d. **Replevin.**—When the complaint in an action brought to recover possession of chattels alleges that the defendant concealed, removed or disposed of such chattels so that they could not be found, and such allegations are proved upon an inquest and are incorporated in the decision, an execution against the person of the defendant may be issued, in the event of the return unsatisfied of an execution against his property, although no order of arrest was granted in the action: Lehman v. Mayer, 68 App. Div. 12; 74 N. Y. Supp. 194.

e. **Municipal court.**— In an action brought in the municipal court of the city of New York to foreclose a lien on personal property, which the defendant had maliciously and wilfully disposed of, the court, under § 140 of the Municipal Court Act and § 1487, construed in connection with § 20 of the Municipal Court Act, has no power to enforce a judgment against the defendant by an execution against the person, unless an order of arrest has been issued in the action: Liederman v. Rovner, 82 App. Div. 541.

§ 1488. Id.; against a woman.

See § 553, ante, Woman cannot be arrested, except, etc.

See § 1206, ante, Judgment for or against a married woman.

§ 1489. When execution against property must be first issued.

f. A judgment debtor whose last place of sojourn within the state of New York, before being sent to the Elmira reformatory in Chemung county, was the city of New York, cannot, while incarcerated, be deemed a resident of Chemung county, and therefore an execution issued to that county during such period against his property and returned unsatisfied does not, within § 1489, entitle the judgment creditor subsequently to issue an execution against his person to the county of New York: American Surety Co. v. Cosgrove, 40 Misc. 262.

g. An execution directed to the sheriff of Sullivan county, issued after return unsatisfied of an execution against property issued to the same county, affords the sheriff no authority to arrest the judgment creditor in the county of New York, the place of his residence: Fisher v. Young, 41 Misc. 552; 85 N. Y. Supp. 115.

§ 1492. New execution may issue after escape.

See § 155, ante, What deemed and what not deemed an escape.

§ 1493. Id.; when debtor dies charged in execution.

See § 1380, ante, Leave required to issue execution against decedent's property.

See § 1381, ante, Leave, how obtained.

§ 1496. Plaintiff may recover damages with the land.

h. **Justice of the peace.**—A justice of the peace has no jurisdiction of an action of ejectment: McMahon v. Howe, 40 Misc. 546; 82 N. Y. Supp. 984.

i. **Complaint.**—A single complaint, which embraces causes of action for injuries to real property, for ejectment, and for injuries to personal property, is defective under § 484, for misjoinder of causes of action, as no two of these causes of action can be joined in the same action: Wait v. Hudson Valley Railway Co., 43 Misc. 304; 88 N. Y. Supp. 825.

j. **Alleyway.**—Where deeds of partition made by tenants in common reserve an alleyway by metes and bounds and reserve to the grantee and his heirs the sole and exclusive enjoyment thereof, a subsequent grantee thereof may maintain an action against owners of the adjoining lot, out of which the alleyway was reserved and taken, to recover pos-

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session of it: Remson v. Hyams, 35 Misc. 345; 71 N. Y. Supp. 1002.

a. **Bill of particulars.**—Where a landlord brings an action in ejectment against a tenant, claiming that the tenant has violated various conditions of the lease and is not entitled to any renewal thereof or to continue in the occupation of the demised premises, and that the lease in fact has not been renewed, the tenant is entitled to a bill of particulars specifying the conditions and covenants of the lease claimed to have been violated, and how and when they were violated, and what action the landlord took, which deprived the tenant of his right to renew the lease and when such action was taken: Slingerland v. Corwin, 105 App. Div. 310; 93 N. Y. Supp. 953.

b. **Encroachment.**—An action to recover a strip of land, upon which the adjoining owner has unlawfully encroached with a brick wall, is founded upon a single wrong, and creates but one cause of action. In such an action, brought under chap. 14, title 1, art. 1, of the Code of Civil Procedure, the plaintiff may have all the relief, both legal and equitable, to which he is entitled, but he cannot maintain an action at law to prove his title and right to possession, and then bring a separate suit in equity to remove the encroachment. Under §§ 481 and 3339, a plaintiff must join and plead in one action all the elements of his cause of action, upon which he seeks either legal or equitable relief, or both: Hahl v. Sugo, 169 N. Y. 109; 32 Civ. Pro. R. 265, rev'g 46 App. Div. 632; 61 N. Y. Supp. 770.

c. **Fraud.**—The negligence of the plaintiff in an action of ejectment against a telephone company to recover lands occupied by its poles, in failing to read an instrument executed by him under seal, granting to the defendant the right to construct and maintain its lines over and along his property, does not preclude him from attacking the validity of the paper where it appears that his signature thereto was obtained by fraud, in that he relied in signing it upon the statement of defendant's agent, that the paper was a receipt for a dollar, which he wished to pay him for trimming one of his trees, and the direction of a nonsuit upon that ground is reversible error: Wilcox v. Am. Tel. & Tel. Co., 176 N. Y. 115, rev'g 73 App. Div. 614; 73 N. Y. Supp. 1037.

Under such circumstances the action is properly brought; the plaintiff is not obliged to appeal to a court of equity for relief against the grant, but when it is set up to defeat his claim he may avoid its effect by proof of the fraud by which it was obtained; nor is he obliged to return the dollar paid to him on its execution; the rescission of a contract induced by fraud is not attempted as the fraud charged relates, not to the contract, but to the instrument purporting to represent it. Id.

d. **Damages.**—In an action to recover the possession of real property, the plaintiff is entitled to recover damages for wrongfully withholding such property for the six years prior to the commencement of the action, and, also, for the time elapsed after the commencement of the action and before the trial, and the recovery is not limited by § 1531 to a term, not exceeding the six years immediately proceeding the commencement of the action: Willis v. McKinnon, 178 N. Y. 451, aff'g 79 App. Div. 249; 79 N. Y. Supp. 936.

e. § 1496 permits the plaintiff in ejectment to demand and recover damages for the withholding of the property and by § 1497 these "include rents and profits or the value of the use and occupation:" Barson v. Mulligan, 40 Misc. 470; 82 N. Y. Supp. 677.

f. **Mortgage.**—An action of ejectment may be maintained by a landlord, although he had made a lease of the premises to one not a party to the action; after a person entered into possession as lessee of a life tenant and subsequently acquired an outstanding mortgage made prior to the creation of the life tenancy by the owner of the fee, he is entitled, after the death of the life tenant, to continue in possession as against a remainderman until the mortgage is paid, as the mortgagee in possession: Barson v. Mulligan, 66 App. Div. 486; 32 Civ. Pro. R. 251.

g. A mortgagee has no title to mortgaged premises either before or after default; and if in possession, the mortgagor may maintain ejectment, in which case the statute of limitations is found in § 365 and not in § 379: Becker v. McCrea, 119 App. Div. 56.

h. **Condition subsequent.**—Where land is deeded to a city for the purpose of building a city hall, and the conveyance is made with the proviso that the land shall revert to parties of the first part in case the land should cease to be used for a city hall, a condition subsequent is created requiring the grantee to comply therewith within a reasonable time; an action of ejectment will lie to recover the land: Trustees of Union College v. City of New York, 173 N. Y. 38, aff'g 65 App. Div. 553; 73 N. Y. Supp. 512.

i. **Ejectment.**—A complaint which demands the recovery of possession of lands with an incidental request that the defendant railway in possession thereof be compelled to remove its tracks, and be enjoined from using the same, states a mere action for ejectment and should be tried before a jury; the fact that incidental equitable relief is asked does not deprive the defendant

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of its right to a jury trial, as such relief would be given in the common-law action: Remsen v. N. Y., Brooklyn & M. Beach R. Co., 111 App. Div. 413.

a. An action of ejectment lies to compel the removal of a telephone wire strung above the plaintiff's land without authority, even though the actual soil has not been interfered with: Butler v. Frontier Tel. Co., 109 App. Div. 217; 95 N. Y. Supp. 684, aff'd 186 N. Y. 486.

b. When ownership and right of possession of lands insufficient to sustain ejectment: Country Club Land. Assn. v. Lohbauer, 110 App. Div. 875; 97 N. Y. Supp. 11, aff'd 187 N. Y. 106.

c. An action of ejectment will lie where the soil is not touched, but part of the space a few feet above the soil is occupied by a telephone wire unlawfully strung by the defendant above the plaintiff's premises; the disseizin of the owner is measured by the extent of the space occupied and the sheriff can physically remove the wire and thereby restore the plaintiff to possession: Butler v. Frontier Tel. Co., 186 N. Y. 486, aff'g 109 App. Div. 217.

§ 1497. Rents and profits to be included in damages.

See § 1531, post, Damages recoverable; set-off by defendant.

d. § 1496 permits the plaintiff in ejectment to demand and recover damages for the withholding of the property, and by § 1497 these "include rents and profits or the value of the use and occupation:" Barson v. Mulligan, 40 Misc. 470; 82 N. Y. Supp. 677.

e. In an action to recover the possession of real property, the plaintiff is entitled to recover damages for wrongfully withholding such property for the six years prior to the commencement of the action and, also, for the time elapsed after the commencement of the action and before the trial, and the recovery is not limited by § 1531 to a term not exceeding the six years immediately preceding the commencement of the action: Willis v. McKinnon, 178 N. Y. 451, aff'g 79 App. Div. 249; 79 N. Y. Supp. 936.

f. **Complaint.**—A single complaint which embraces causes of action for injuries to real property, for ejectment, and for injuries to personal property, is defective under § 484, for misjoinder of causes of action as no two of these causes of action can be joined in the same action: Wait v. Hudson Valley Ry. Co., 43 Misc. 304; 88 N. Y. Supp. 825.

§ 1498. Mortgagee cannot maintain action.

g. A vendee, rightfully in possession of premises under a contract of purchase and sale, has an equitable title which may be mortgaged or sold; where the premises are already mortgaged when the vendee acquired the equitable title, he, or one claiming under him, is, as a subsequent incumbrancer, a necessary party to the foreclosure of that mortgage, and, if not made a party thereto, the foreclosure operates only as an assignment of the mortgage to the purchaser at the foreclosure sale; the latter cannot, thereafter, maintain ejectment against the vendee by virtue of the mortgage: Titcomb v. Fonda, J. & G. R. R. Co., 38 Misc. 630; 78 N. Y. Supp. 226.

§ 1499. Action cannot be maintained for dower.

See § 1596, post, Limitation of action for dower.

See § 1625, post, Certain provisions of article 2 made applicable.

h. § 1499 is constitutional: Volz v. Steiner, 67 App. Div. 504; 73 N. Y. Supp. 1006.

i. Effect of statute of limitations contained in this section: Snow v. Monk, 81 App. Div. 206; 80 N. Y. Supp. 719.

j. § 1499 applies only to a case where the owners of both pieces of land have erected buildings, whose walls abut one on the other, and who have thereby apparently made a practical location of the boundary line: Bergman v. Klein, 97 App. Div. 15.

k. § 1499 does not apply, although part of the property consists of a strip of land not exceeding six inches in width where no building is erected upon the land of the plaintiff abutting the defendants: Goldbacher v. Eggers, 38 Misc. 36.

§ 1500. Separate action by joint tenant or tenant in common.

l. This section does not require the owner of an undivided interest in lands to allege in his complaint in an action of ejectment that he and all his co-tenants might join together in maintaining the action, since the section does not prescribe the form of pleading in such an action, but only provides what showing of title will entitle him to a judgment of possession, the section is intended to allow the person suing to show that he has a legal title and that

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those having title to the other undivided interests are entitled to maintain a similiar action: Deering v. Reilly, 167 N. Y. 184; 32 Civ. Pro. R. 49, aff'g 38 App. Div. 164; 56 N. Y. Supp. 704.

§ 1501. Grantee of lands held adversely may maintain action.

a. Under this section the grantee under a void deed may use his grantor's title in order to obtain possession of the land: Deever v. Hagerty, 169 N. Y. 481.

§ 1502. Against whom action to be brought.

b. The redemption of land from a sale for unpaid taxes by a person who occupies the land without legal right, does not give to such occupant any interest in the land or right of occupancy, as against the grantee of the owner: Willey v. Greenfield, 64 App. Div. 220; 71 N. Y. Supp. 1046.

c. **Ejectment.**—If, in an action of ejectment, the defendant's title rests upon an unprobated will, the plaintiff is entitled to show that at the time of execution the testator lacked testamentary capacity; an unprobated will is valid to pass real estate when its execution has been proved. Probate is not necessary to pass real estate: Smith v. Ryan, 116 App. Div. 397.

§ 1503. Who may be joined as defendants.

d. In an action of ejectment, if the plaintiff fails to make a tenant in occupation of the premises a party, and the landlord does not plead the nonjoinder of the tenant, he waives the defect, and, as the tenant is a proper party, the action must be tried upon the plaintiff's title and right to possession, although a recovery of the land cannot be enforced as against the occupancy of the tenant: Ward v. Terry, 36 Misc. 330; 73 N. Y. Supp. 569.

§ 1504. When action may be brought for non-payment of rent.

See § 2231, post, Summary proceedings to recover possession of real property.

e. Meaning of "re-entry" and "re-enter:" Michaels v. Fishel, 169 N. Y. 381.

f. **Covenant.**—While a mere breach of a covenant on the part of a lessee does not authorize ejectment, a reservation to authorize ejectment, a reservation to the lessor, of a right of re-entry for such breach, does: Palmieri v. Antinozzi, 47 Misc. 237.

While a mere breach of covenant on the part of the lessee does not authorize ejectment, a reservation to the lessor, of a right of re-entry for such breach, does. Id.

§ 1505. Id.; when right of re-entry is reserved for want of distress.

g. Where the re-entry clause did not provide for the monthly ascertainment or payment of any deficiency arising upon the reletting of the premises, the landlord would not be entitled to recover any portion of such deficiency until the entire amount of such deficiency was ascertained, *i. e.*, until the expiration of the term of the lease: Harding v. Austin, 93 App. Div. 564; 87 N. Y. Supp. 887.

§ 1516. Rule when there are distinct occupants.

See § 456, ante, Proceedings in action against defendants severally liable.
See § 758, ante, Where one of the defendants severally liable dies.

§ 1521. Abatement of action.

See § 755 et seq., Proceedings upon the death or disability of a party or a transfer of his interest.

§ 1522. Action to be divided, when different persons succeed to different parcels.

h. Where the defendant in an action interposes in his answer the plea of a former action pending, but does not urge such defense upon the trial, he will be deemed to have waived it and will not be heard in support thereof for the first time on appeal: Hirsh v. Manhattan Railway Co., 84 App. Div. 374; 82 N. Y. Supp. 754.

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§ 1524. Effect of judgment rendered after trial of issue of fact.

See § 1526, post, Effect of judgment by default, etc.

a. Though a judgment in an action of ejectment is not a judgment *in rem*, yet it is analogous thereto, and a judgment in an action of ejectment, brought by the plaintiff's predecessor in title of the land in dispute, is admissible in evidence for the purpose of establishing a link in the chain of title: Skelly v. Jones, 61 App. Div. 173.

§ 1525. New trial may be granted.

b. **Effect.**—The fact that under § 1525, the plaintiff is entitled, as matter of right, to have the judgment vacated and a new trial of the action granted upon compliance with certain conditions, does not affect the final character of the judgment: Jarvis v. American Forcite Powder Mfg. Co., 93 App. Div. 234.

c. **Second new trial.**—A second new trial in an action of ejectment is a matter of favor but will be granted where the defendant's defeat on the first new trial may have turned upon questions of pleading and of the order of proof, which may be obviated on the next trial by an amendment of the answer and a strict compliance with the rules as to the introduction of evidence: Barson v. Mulligan, 40 Misc. 470; 82 N. Y. Supp. 677.

d. **Encroachment.**—In an action to recover possession of real property when a judgment therein is a bar to a subsequent action to compel the removal of an encroachment: Hahl v. Sugo, 169 N. Y. 109.

e. **Costs.**—In an action of ejectment, a judgment for plaintiff was reversed by the appellate division, with costs to the defendant to abide "the event," the plaintiff on the second trial obtained judgment, which was affirmed by the appellate division, and on the third trial, obtained by defendants under § 1525, judgment was obtained by them. *Held*, "the event" was in favor of defendants and the costs of the first appeal shall be taxed in their favor: Barson v. Mulligan, 44 Misc. 26; 89 N. Y. Supp. 704, rev'g 107 App. Div. 614, aff'g 111 App. Div. 913.

f. **Ejectment.**—Under § 1525 whereby the defendant in an action of ejectment is entitled to a new trial as a matter of right upon costs within three years after entry of judgment against him, it is immaterial whether the costs be paid by the defendant voluntarily or collected from him by execution on the judgment. This section does not refer to a voluntary payment of costs only. Actual payment within the time specified is all that is necessary; the situation is not affected by reason of the fact that the execution was satisfied by a sale of the interest of the defendant in the premises: Townshend v. Keenan, No. 1, 117 App. Div. 484.

§ 1531. Damages recoverable; set-off by defendant.

See §§ 1496, 1497, ante, What damages may be recovered.

g. In an action to recover the possession of real property, the plaintiff is entitled to recover damages for wrongfully withholding such property for the six years prior to the commencement of the action, and also for the time elapsed after the commencement of the action and before the trial, and the recovery is not limited by § 1531 to a term not exceeding the six years immediately preceding the commencement of the action: Willis v. McKinnon, 178 N. Y. 451, aff'g 79 App. Div. 249; 79 N. Y. Supp. 936.

h. **Double damages.**—The only damages specified in §§ 1496 to 1531 are the double damages for holding over and the value of the use and occupation recovered by the plaintiff: Barson v. Mulligan, 40 Misc. 470; 82 N. Y. Supp. 677.

i. **Pleading.**—An action to recover a strip of land, upon which the adjoining owner has unlawfully encroached with a brick wall, is founded upon a single wrong, and creates but one cause of action. In such an action, brought under chap. 14, title 1, art. 1, of the Code of Civil Procedure, the plaintiff may have all the relief, both legal and equitable, to which he is entitled, and he cannot maintain an action at law to prove his title and right to possession, and then bring a separate suit in equity to remove the encroachment. Under §§ 481 and 3339, a plaintiff must join and plead in one action all the elements of his cause of action, upon which he seeks either legal or equitable relief or both: Hahl v. Sugo, 169 N. Y. 109; 32 Civ. Pro. R. 265, rev'g 46 App. Div. 632; 61 N. Y. Supp. 770.

§ 1532. When action for partition may be brought.

See rule 65 (Sup. Ct.), Partition action to embrace all lands held in common.

j. **Possession.**—A person cannot maintain an action for partition when he was not, at the commencement of the action, in actual or constructive possession of the premises: Mersereau v. Camp, 42 Misc. 253; 86 N. Y. Supp. 568.

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a. A person who is entitled to the possession of real property, as a joint tenant or tenant in common, save for an alleged adverse title of his co-tenant which is challenged, may maintain an action for the partition of such property, although his co-tenant may be in the actual and exclusive possession thereof under such alleged title; and in such action he is entitled to have the validity of such alleged title determined, and if found to be invalid, is entitled to a judgment of partition. "The possession necessary to the maintenance of an action of partition, under § 1532, is that constructive possession which follows the title, and not the actual physical possession:" Drake v. Drake, 61 App. Div. 1; 70 N. Y. Supp. 163.

b. **Joint tenants.**—A deed executed by a woman to her daughter and the latter's affianced husband, in order to provide a home for them, which states that the grantees shall take "as joint tenants, and not as tenants in common, the survivor to take of the second part," creates, when the arrangement is consummated by marriage of the grantees, a tenancy by the entirety and not a joint tenancy, and neither of the grantees can maintain an action for partition: Messing v. Messing, 64 App. Div. 125; 71 N. Y. Supp. 717.

c. **Heirs-at-law.**—An action brought by one of the heirs-at-law to partition the real property inherited by them may proceed, although proceedings are pending for the disposition of the real property of the ancestor for the payment of his debts: Reubel v. Reubel, 47 Misc. 474.

d. **Infants.**—Infants, who are necessary parties to an action for partition should be made parties defendant by their guardians *ad litem*, who should not in any way be connected in business with the attorney for the parties who had rights, which were or might be adverse to those infants: Parish v. Parish, 77 App. Div. 267; 78 N. Y. Supp. 1089.

e. Partition will be decreed as against infant co-tenants, although their immediate ancestor derived her estate under the will of her ancestor, which contains a power of sale, when her own will, under which the infant claims, requires judicial construction: Hayden v. Sugden, 48 Misc. 109.

f. **Parties.**—Parties who hold adversely may be made parties defendant: Satterley v. Kobbe, 173 N. Y. 91.

§ 1534. Id.; by an infant.

See rule 65 (Sup. Ct.), Petition must state whether or not the parties own any other lands in common.

g. **Omission.**—Jurisdiction to entertain an action for partition is not conferred by the Code of Civil Procedure, and § 1534, for the appointment of a guardian *ad litem*, and requiring the consent of the surrogate for the maintenance of the action by an infant plaintiff, is intended to regulate the exercise of that jurisdiction, and the omission to obtain the consent of the surrogate before the commencement of the action may be subsequently supplied: Pearsall v. Rosebrook, 42 Misc. 10.

§ 1535. Guardian ad litem; how appointed.

See rules 49-51 (Sup. Ct.), Qualifications, duties and security of guardian *ad litem*.

See § 472, ante, Guardian, how appointed.

§ 1536. Security.

See rule 4 (Sup. Ct.), Duty of attorney to file undertakings with clerk.

See rule 51 (Sup. Ct.), Guardian to give security before receiving property.

See §§ 474, 475, Security of guardian *ad litem*.

See §§ 810, 816, ante, General provisions relating to bonds and undertakings.

§ 1538. Who must be parties.

Every person having an undivided share, in possession or otherwise, in the property, as tenant in fee, for life, by the curtesy, or for years; every person entitled to the reversion, remainder or inheritance of an undivided share, after the determination of a particular estate therein; every person who, by any contingency contained in a devise or grant, or otherwise, is or may become entitled to a beneficial interest in an undivided share thereof, provided that where a future estate or interest is limited in any contingency to the persons who shall compose a certain class upon the happening of a

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future event, it shall be sufficient to make parties to the action the persons who would have been entitled to such estate or interest if such event had happened immediately before the commencement of the action; every person having an inchoate right of dower in an undivided share in the property; and every person having a right of dower in the property, or any part thereof, which has not been admeasured, must be made a party to an action for a partition. But no person, other than a joint tenant, or a tenant in common of the property, shall be a plaintiff in the action. Whenever an action for the partition of real property shall be brought before the expiration of three years from the time when letters of administration or letters testamentary, as the case may be, shall have been issued upon the estate of the decedent from whom the plaintiff's title is derived, the executors or administrators, as the case may be, if any, of the estate of said decedent, shall be made parties defendant. In case no executor or administrator of such decedent shall have been appointed at the time said action is begun, that fact shall be alleged in the complaint. The executors or administrators, if any, as the case may be, of a deceased person, who, if living, should be a party to such action, shall be made parties defendant therein, and in case no executor or administrator of such deceased person shall have been appointed, that fact shall be alleged in the complaint. Where the interlocutory judgment directs a sale of the premises sought to be partitioned, or of some part thereof, the judgment may, in the discretion of the court, direct that the premises so sold pursuant to such interlocutory judgment shall be free from the lien of every debt of such decedent or decedents, except debts which were a lien upon the premises before the death of such decedent or decedents. When the action is brought before three years have elapsed from the granting of such letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived his title, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the proceeds of the sale remaining after payment of the costs, referee's fees, expenses of sale, taxes, assessments, water rates, and liens established before the death of the decedent, including any sum allowed to a widow in satisfaction of her right of dower, therein directed to be paid, be forthwith paid into court by the referee making such sale by depositing the same with the county treasurer of the county, in which the trial of the action is placed, to the credit of the parties entitled thereto, to await the further order in the premises. Where the action is brought before three years have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of a deceased person, who, if living, should be a party to the action, and the interlocutory judgment directs, as above provided, that the premises shall be sold, free from the lien of debts, the final judgment shall direct that the share of the proceeds of such sale, which would have

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been his, if living, be paid into court by such referee, by depositing the same with such county treasurer, to await the further order in the premises. Upon the certificate of the surrogate of the county of which the decedent was, at the time of his death, a resident, showing that three years have elapsed since the issuing of letters testamentary or letters of administration, as the case may be, upon the estate of said decedent, and that no proceedings for the mortgage, lease or sale of the real property of said decedent for the payment of his debts or funeral expenses, or both, is pending, and upon the certificate of the county clerk of the county where the real property sold under the interlocutory judgment is located, showing that no notice provided for in section 2751 of the code of civil procedure has been filed in his office, the court, wherein the final judgment was made shall, upon the application of any party to said action, make an order directing the county treasurer to pay to said party from said deposit, the amount to which he is entitled under the said final judgment, with the accumulation thereon, if any, less the fees of said county treasurer. Any party to such action may, at any time after final judgment, upon notice to the executors or administrators of the decedent from whom the party applying derived his share or interest, apply to the court in which said action is pending for leave to withdraw the deposit or share of the deposit, adjudged in the final judgment to belong to him; and, upon said application, the court may, in its discretion, make an order directing the county treasurer to pay over to said party the deposit, or the share of the deposit, adjudged in the final judgment to belong to him, but said order shall not be made until said party so applying shall have furnished a bond to the people of the state of New York in the penalty of twice the amount of the deposit sought to be withdrawn, with two or more good and sufficient sureties, approved by the judge or justice of the court making such order, and filed with such approval, in the office of the clerk of the county in which such action is pending, to the effect that the said party so withdrawing said deposit will pay any and all claims, not exceeding the amount of said deposit, when thereunto required by order of the court or by order of the surrogate or of the surrogate's court in a proceeding to mortgage, lease or sell the real property of such decedent. But where final judgment shall be rendered in any action for partition after three years have elapsed from the granting of letters of administration or letters testamentary, as the case may be, upon the estate of the decedent from whom the plaintiff derived title, and the premises shall have been sold, free from the lien of debts, as above provided, then, upon producing to the court the certificate of the surrogate of the county of which the decedent was at the time of his death a resident, showing that three years have elapsed since the issuing of letters of administration or letters testamentary as the case may be upon the estate of said decedent and that no proceeding for the mortgage, lease or sale of the real property of the decedent for the payment of his

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debts or funeral expenses or both is pending and upon the certificate of the clerk of the county where the real property sold under the interlocutory judgment is located showing that no notice provided for in section 2751 of the code of civil procedure has been filed in his office the court rendering the final judgment shall direct the payment of the different shares to the several parties entitled thereto; except that the share of a deceased person, who if living, should be a party to the action shall be paid into court as above provided, unless three years have also elapsed since the granting of letters of administration or letters testamentary, as the case may be, upon the estate of said last mentioned deceased person, and like certificates of the surrogate and county clerk are produced to the court.

2 R. S. 317 (Part 3, c. 5, tit. 3) § 6.

Amended by chap. 509 of 1890, chap. 277 of 1896, chap. 726 of 1897, chap. 78 of 1898, and chap. 662 of 1905.

See § 570, ante, Question of fact arising on a motion.

a. One claiming title adverse and in hostility to plaintiff and his co-tenants may be made a party in an action of partition: Satterlee v. Kobbe, 173 N. Y. 91, rev'g 66 App. Div. 306; 72 N. Y. Supp. 675.

b. **Amendment.**—An interlocutory judgment of sale, made in an action to partition real estate of which a decedent died seized, brought within three years after the issue of the letters of administration on the decedent's estate, should, pursuant to § 1538, direct that the sale be made free from the lien of the decedent's debts and that the proceeds be paid into court to satisfy such debts as may be established; where, although no such provision was contained in the judgment, the property was sold free from the decedent's debts, the court has power to amend the interlocutory judgment *nunc pro tunc* by inserting such direction: Palmer v. Terwilliger, 95 App. Div. 35.

c. **Creditors.**—The surrogate must make the certificate provided for by § 1538 as amended by chap. 726 of 1897, as that certificate is a condition precedent to final distribution, but distribution itself must be made by the supreme court and particularly where that court has declined to allow the surrogate's court to make it: Matter of Dusenbury, 34 Misc. 666; 70 N. Y. Supp. 725.

d. **Heirs at law.**—An action brought by one of the heirs at law to partition the real property inherited by them may proceed, though proceedings are pending for the disposition of the real property of the ancestor for the payment of his debts: Reubel v. Reubel, 47 Misc. 474.

e. **Interested persons.**—In an action of partition the plaintiff may make parties defendant persons having or claiming an interest in the lands sought to be partitioned in order to settle all questions of title in one action, thus persons disputing the boundary line of the premises to be partitioned who have erected houses thereon and torn down boundary fences may be made parties defendant: Lawrence v. Norton, 116 App. Div. 896.

§ 1539. Who may be made parties.

f. **Party.**—A person claiming title in hostility to the plaintiff in an action of partition may properly be made a party defendant: Wallace v. McEchron, 176 N. Y. 424, rev'g 84 App. Div. 88; 82 N. Y. Supp. 556.

§ 1540. Id.; as to persons having liens.

g. In partition it is optional with the plaintiff, under § 1540, whether he will make a party having a lien upon an undivided share or interest in the property, a defendant, or not: Le Boeuf v. Gray, 42 Misc. 632; 87 N. Y. Supp. 597.

§ 1541. Provision where a party is unknown.

See § 438 et seq., Service by publication.

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§ 1542. Complaint to state interest of parties.

See rule 65 (Sup. Ct.), Partition to embrace all lands held in common.

a. The last provision in this section seems to contain a clear implication that the plaintiff may join, as defendants in the action, persons in possession or who claim some interest, the nature and character of which is unknown: Satterlee v. Kobbe, 173 N. Y. 91.

§ 1543. Title of parties may be tried.

b. § 1543 provides that the title or interest of the plaintiff or of any of the defendants as stated in the complaint may be controverted by the answer of any defendant and the issues thus joined must be tried and determined in the action: Place v. Kennedy, 89 App. Div. 167; 85 N. Y. Supp. 766, appeal dis. 183 N. Y. 509.

c. **Adverse claims.**—Under § 1543, the adverse claims of persons who are necessary parties to an action of partition may be litigated in the action: Kurtz v. Weichmann, 75 App. Div. 26; 77 N. Y. Supp. 964.

d. Although, it seems, that under § 1543 the adverse claims of persons who are properly made parties to an action of partition may be determined therein, yet persons claiming the entire title to real property, adversely to persons claiming the property as tenants in common are not necessary or proper parties to such an action and cannot be compelled to litigate their claims of title in such action: Satterlee v. Kobbe, 66 App. Div. 306; 72 N. Y. Supp. 675.

e. **Execution of deed.**—An issue as to whether a deed, under which a person claimed to be a tenant in common of certain premises, had ever been executed and delivered, is triable in an action of partition brought by such person: Booth v. Fordham, 73 App. Div. 109; 76 N. Y. Supp. 664.

f. **Jury.**—The title or interest of any party may be put in issue by a pleading and the issue tried by a jury: Satterlee v. Kobbe, 173 N. Y. 91.

g. **Title.**—A person who is entitled to the possession of real property, as a joint tenant or a tenant in common, save for an alleged adverse title of his co-tenant, which is challenged, may maintain an action for the partition of such property, although his co-tenant may be in the actual and exclusive possession thereof under such alleged title, and in such an action he is entitled to have the validity of such alleged title determined, and if found to be invalid, is entitled to a judgment of partition: Drake v. Drake, 61 App. Div. 1; 70 N. Y. Supp. 163.

h. **Jurisdiction.**—Although the plaintiff's title and right of possession is disputed, yet a court of equity having acquired jurisdiction, may retain it: Dixon v. Dixon, 89 App. Div. 603.

i. **Partition.**—In an action for the partition of real estate, in which all the parties except plaintiff's wife are children of the deceased owner, who died intestate, the validity of a transfer by the deceased owner individually and as administrator of a deceased son of his interest in a mortgage upon the property, executed by said deceased owner and assigned to such deceased son and his brother, one of the defendants in the partition action, may be determined therein under appropriate and sufficient allegations that such alleged assignment of interest in the mortgage by the deceased owner was obtained by fraud and undue influence; and the complaint is not demurrable upon the ground of improper joinder of causes of action. The wife of a plaintiff in partition is properly made a party defendant to the action: Dunn v. Dunn, 51 Misc. 302.

§ 1544. Issues of fact triable by jury.

j. The title or interest of any party may be put in issue by a pleading and the issue tried by a jury: Satterlee v. Kobbe, 173 N. Y. 91.

k. **Reference.**—Under § 1544 issues of fact in an action of partition are triable by a jury as a matter of right, whether an infant is a party or not; § 1545 refers only to defaults including the case of an infant defendant who has served a formal answer which raises no issue and which is a practical default and gives him no right to insist upon a reference when one of the parties objects: Fairweather v. Burling, 181 N. Y. 117.

l. **Partnership.**—Where it is found that a partnership existed between the co-tenants as to the management of the property, but not as to the purchase and ownership thereof, an accounting as to rents and profits alleged to have been collected by the defendant co-tenant, and a division of certain personal property used in connection with the premises sought to be partitioned, should be left to be adjusted in an appropriate action for the dissolution of the copartnership: Levine v. Goldsmith, 71 App. Div. 204; 75 N. Y. Supp. 706.

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§ 1545. When title to be ascertained by the court.

See rule 66 (Sup. Ct.), Order of reference to take proof of title of plaintiff may be made.

a. **Partnership.**—Where it is found that a partnership existed between the co-tenants as to the management of the property, but not as to the purchase and ownership thereof, an accounting for the rents and profits alleged to have been collected by the defendant co-tenant, and a division of certain personal property used in connection with the premises sought to be partitioned, should be left to be adjusted in an appropriate action for the dissolution of the copartnership: Levine v. Goldsmith, 71 App. Div. 204; 75 N. Y. Supp. 706.

b. **Reference.**—Under § 1544 issues of fact in an action of partition are triable by a jury as a matter of right, whether an infant is a party or not; § 1545 refers only to defaults including the case of an infant defendant who has served a formal answer which raises no issue and which is a practical default and gives him no right to insist upon a reference when one of the parties objects: Fairweather v. Burling, 181 N. Y. 117.

§ 1546. Interlocutory judgment.

c. Where the issues have been tried under § 823 and the verdict certified to the special term, an application may be made upon such verdict for an interlocutory judgment as provided by § 1546: Southack v. Central Trust Co., 62 App. Div. 260; 70 N. Y. Supp. 1122.

d. **Partnership.**—Where it is found that a partnership existed between the co-tenants as to the management of the property, but not as to the purchase and ownership thereof, an accounting for the rents and profits alleged to have been collected by the defendant co-tenant, and a division of certain personal property used in connection with the premises sought to be partitioned, should be left to be adjusted in an appropriate action for the dissolution of the copartnership: Levine v. Goldsmith, 71 App. Div. 204; 75 N. Y. Supp. 706.

§ 1555. Fees and expenses.

See § 3299, post, Surveyors' and commissioners' fees.

§ 1557. Final judgment on report; effect thereof.

See § 1577, post, Effect of final judgment.

e. **Partition.**—Although there are contingent interests in real estate devised by will, dependent upon whether children entitled to share may come into being, an order for sale in an action for partition is proper, when all the persons who have a present interest in the subject matter of the sale are before the court, including the executor of the will, who will receive the portions of such afterborn children in trust to be disposed of under the terms of the will: Dwight v. Lawrence, 111 App. Div. 616.

§ 1558. Judgment must direct delivery of possession.

See § 1675, post, How court may compel delivery of possession of real property to purchaser.

§ 1559. Costs; how awarded. Id.; against unknown parties.

See § 1579, post, Costs and expenses, how paid.

See § 3251, post, Amount of costs.

See § 3252, post, Additional allowance in partition.

f. § 1559 does not purport to confer power or to limit power conferred by § 3253 or any other section; the court may grant an extra allowance under § 3253 and costs under § 1559: Crossman v. Wyckoff, 64 App. Div. 554; 72 N. Y. Supp. 337.

§ 1560. Sale of property; when directed.

See rule 67 (Sup. Ct.), Stay of sale in partition; notice.

g. Although there are contingent interests in real estate devised by will, dependent upon whether children entitled to share may come into being, an order for sale in an action for partition is proper, when all the persons who have a present interest in the subject matter of the sale are before the court, including the executor of the will, who will receive the portions of such afterborn children in

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trust, to be disposed of under the terms of the will: Dwight v. Lawrence, 111 App. Div. 616.

a. **Expenses.**—In an action of partition, the final judgment should provide that the necessary expenses of the partition sale and the taxes should first be paid and that the balance be paid to the defendant mortgagee on account of his mortgage: Goebbles v. Morrisey, 53 Misc. 424.

§ 1561. Reference to inquire as to creditors.

See rule 66 (Sup. Ct.), Reference to take proof of plaintiff's title.

§ 1562. Duty of referee.

See § 1578, post, Judgment is bar upon incumbrancers.

§ 1564. Application for money.

See rules 68, 69 (Sup. Ct.), Payment of money into court.

See § 743 et seq., ante, Care and disposition of money paid into court.

See § 1015, ante, Compulsory reference upon question, incidentally arising.

§ 1565. Payment of incumbrances.

See § 1578, post, Judgment is bar upon incumbrancers.

§ 1568. Purchaser to hold property free therefrom.

b. The provisions of the Code of Civil Procedure, permitting the sale of lands in partition free of all liens, are not applicable to the dissolution of corporations on the ground of insolvency: Matter of Coleman, 174 N. Y. 373, rev'g 77 App. Div. 496; 78 N. Y. Supp. 1052.

§ 1569. Gross sum to be paid to or invested for tenant in dower, etc.

See rule 70 (Sup. Ct.), How gross sum is ascertained.

c. The husband, having an estate by courtesy, may consent to take a gross sum in accordance with § 1569: Valentine v. Hutchinson, 43 Misc. 314; 88 N. Y. Supp. 862.

§ 1572. Unknown owners.

See § 1541, ante, Provision, where a party is unknown.

See § 1557, ante, Final judgment on report; effect thereof.

§ 1573. Sale; terms of credit thereupon.

d. **Title.**—A person, who in good faith, bids upon real property at a judicial sale where the particular interest offered is not expressly stated, has a right to assume that he is to receive a conveyance of the fee, and that the title to such real property is marketable. In case the title to such real property is not marketable such fact is a defense to a motion to compel the purchaser to complete his purchase or to any other proceeding or action based upon such bid: Wanser v. De Nyse, 188 N. Y. 378, rev'g 116 App. Div. 796.

§ 1575. Separate securities.

See § 745, ante, Securities to be taken in name of county treasurer.

§ 1577. Final judgment; effect thereof.

See § 1557, ante, Effect of final judgment.

e. Although there are contingent interests in real estate devised by will, dependent upon whether children entitled to share may come into being, an order for sale in an action for partition is proper, when all the persons who have a present interest in the subject matter of the sale are before the court, including the executor of the will, who will receive the portions of such afterborn children in trust, to be disposed of under the terms of the will: Dwight v. Lawrence, 111 App. Div. 616.

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§ 1578. Id.; effect thereof upon incumbrances.

See §§ 1561, 1562, ante, References to inquire as to creditors.

a. The provisions of the Code of Civil Procedure, permitting the sale of lands in partition free of all liens, are not applicable to the dissolution of corporations on the ground of insolvency: Matter of Coleman, 174 N. Y. 373, rev'g 77 App. Div. 496; 78 N. Y. Supp. 1052.

§ 1579. Costs and expenses; how paid.

See § 3251 et seq., post, Costs and additional allowances in partition actions.

§ 1580. Distribution of proceeds.

b. Where an executor, empowered by a will to use the rents and income of certain of the testator's real estate to support an infant legatee, devisee and tenant in common, makes payments in that behalf in excess of such rents and income, he cannot procure reimbursement in an action to partition the real estate, even though his accounts for her support have been finally settled by the surrogate and show a balance in his favor: Johnson v. Weir, 34 Misc. 683; 70 N. Y. Supp. 1020.

§ 1582. Id.; of unknown and absent owners.

See § 841, ante, Presumption of death when unknown heir's share has been deposited with county treasurer and is unclaimed for twenty-five years.

§ 1583. Id.; of tenants of particular estates.

See § 745, ante, Money to be paid to county treasurer.

See § 1563, ante, Money to be paid into court.

See § 1569, ante, Gross sum to be invested for tenant.

§ 1585. Security to be taken in name of county treasurer.

See § 745, ante, Securities to be taken in name of county treasurer.

§ 1589. Rents, etc., may be adjusted.

c. **Reference.**—Where it appears that neither party has individually collected or received any rents or profits from the premises sought to be partitioned and that such rents and profits are in the hands of third parties, a reference to take and state the account of such rents and profits should not be ordered: Levine v. Goldsmith, 71 App. Div. 204; 75 N. Y. Supp. 706.

§ 1590. Partition by guardian of infant, committee of lunatic, etc.

Where an infant, idiot, lunatic, or habitual drunkard, holds real property, in joint tenancy or in common, the general guardian of the infant, or the committee of the idiot, lunatic, or habitual drunkard, may apply to the supreme court or to the county court of the county, wherein the real property is situated, for authority to agree to a partition of the real property. Where such application affects the interests of an incompetent person who has been committed to a state institution, and is an inmate thereof, notice of such application must be given to the superintendent, acting superintendent, or state officer having special jurisdiction over the institution where the incompetent person is confined.

2 R. S. 330, 331, §§ 86, 89.

Amended by chap. 946 of 1895 and chap. 434 of 1905.

d. Where the uncle and aunt, by means of false representations and fraudulent concealment in respect to the condition of the real estate, induce the committee of the lunatic to accept as the lunatic's share of the real estate, property, the title to which is in dispute, and the value of which is much less than the value of the property set apart for the uncle and aunt, the lunatic's heirs may, after his death, maintain an action to set aside the partition: McNally v. Fitzsimons, 70 App. Div. 179; 73 N. Y. Supp. 331.

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§ 1596. Limitation of action for dower.

a. Under § 1596, an action for dower must be commenced by a widow within twenty years after the death of her husband, unless there exist such disabilities as are set forth in said § 1596, and where the action is not commenced within said twenty years, the statute is not prevented from running by force of § 401, on the ground that at no time since the husband's death have the defendants resided in the state of New York since by subd. 1 of § 414, the general provisions of the Code relating to the limitation of actions (§§ 362-415) do not apply where a different limitation, such as is provided by § 1596, is prescribed by law: Wetyen v. Fick, 178 N. Y. 223, aff'g 90 App. Div. 43; 85 N. Y. Supp. 592.

Where, in an action for dower, the twenty years provided by § 1596 in which an action may be brought, have passed, and the real estate has been unoccupied and the defendants have been non-residents of the state of New York, still the action might have been commenced by the service of the summons by publication under § 438. Id.

In an action by a widow for dower, where real estate has been leased by tenants from whom the rents have been collected by a life tenant and owner in fee of the real estate for a period of twenty years before the commencement of the action for dower, the statute of limitations provided for by § 1596 is not prevented from running by reason of the fact that such life tenant and owner were non-residents of the state, since, under § 1597, the action could have been commenced by making the tenant a party. Id.

b. **Foreign divorce.**—When plaintiff obtains a foreign divorce, even though it would not be a valid divorce in this state, she is bound by the decree, and cannot recover dower in lands thereafter acquired by her husband: Voke v. Platt, 48 Misc. 273.

§ 1597. Against whom action to be brought.

c. In an action by a widow for dower, where real estate has been leased by tenants, from whom the rents have been collected by a life tenant and owner in fee of the real estate for a period of twenty years before the commencement of the action for dower, the statute of limitations provided for by § 1596 is not prevented from running by reason of the fact that such life tenant and owner were non-residents of the state, since, under § 1597, the action could have been commenced by making the tenant a party: Wetyen v. Fick, 178 N. Y. 223, aff'g 90 App. Div. 43; 85 N. Y. Supp. 592.

§ 1598. Who may be joined as defendants.

See § 452, ante, Court may order other parties brought in.

§ 1600. Damages may be recovered; how estimated.

d. Under § 1600, where a widow brings an action to recover dower in lands which were devised by her husband to his executors in trust, the damages for withholding such dower shall be computed from the time when the widow demanded her dower, although some of the defendants in the action are children of the testator: Gorden v. Gorden, 80 App. Div. 258; 80 N. Y. Supp. 241.

§ 1606. Complaint.

See § 1499, ante, Action cannot be maintained for dower.

§ 1613. Final judgment.

e. After a final judgment provided for in § 1613, the widow has her remedy by writ of assistance or by action of ejectment to secure possession, if still denied her: Jimeson v. Pierce, 78 App. Div. 9, at 13; 79 N. Y. Supp. 3.

§ 1616. Appeal not to stay execution, if undertaking is given.

See § 1331, ante, Security to stay execution on judgment for the possession of real property.

See § 1352, ante, Stay of proceedings without order.

§ 1617. Plaintiff may consent to receive a gross sum.

See rule 70 (Sup. Ct.), How gross sum ascertained.

f. **Consent.**—In an action to procure an admeasurement of dower, the failure of the widow to file her consent to accept a gross sum in lieu of dower before the interlocutory judgment is rendered, is cured by the filing of such consent prior to the entry of judgment confirming the referee's report of sale, where it does not

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appear that the defendants have been prejudiced by the irregularity: Freeman v. Ahearn, 64 App. Div. 509; 72 N. Y. Supp. 226.

a. **Sale.**—In an action to enforce a widow's right of dower, where the widow has filed an agreement to accept a certain sum in lieu of dower, and a judgment was entered directing the sale of the property, the sale under such judgment did not operate as an absolute eviction of the grantee from the premises, but it was simply a method of procedure by which there was a substitution of the proceeds in place of the land itself: Olmstead v. Rawson, 188 N. Y. 517, mod'y 110 App. Div. 809.

§ 1624. Final judgment thereon.

b. In an action to enforce a widow's right of dower, where the widow has filed an agreement to accept a certain sum in lieu of the dower, and a judgment was entered directing the sale of the property, the sale under such judgment did not operate as an absolute eviction of the grantee from the premises; it was simply a method of procedure by which there was a substitution of the proceeds in place of the land itself: Olmstead v. Rawson, 188 N. Y. 517, mod'y 110 App. Div. 809.

§ 1625. Certain provisions of article second made applicable.

See §§ 1580-1586, ante, Care of proceeds of sale, etc.

§ 1626. Final judgment; what to contain.

See rule 61 (Sup. Ct.), Judgment of sale, etc.

c. The holder of a mortgage in a case where the mortgagor is liable personally for the payment of the mortgage debt, has two remedies; he may foreclose the mortgage and sell the mortgaged premises or obtain a money judgment against the one liable, but he cannot prosecute the two actions concurrently, without leave of the court: French v. French, 107 App. Div. 107; 94 N. Y. Supp. 1026, appeal dis. 185 N. Y. 532.

§ 1627. Person liable for mortgage debt may be made defendant, etc.

d. The heirs-at-law of a mortgagee are respectively liable under § 1843 for the debts of decedent to the extent of any interest in the real property that descends from him, and should be made parties in the foreclosure of a mortgage on the real property descending to them by virtue of § 1627: Rowley v. Nellis, 41 Misc. 315; 84 N. Y. Supp. 841.

e. **Owner.**—If a defendant in an action to foreclose a mortgage has not interposed a plea that the owner of the premises is living, it is the duty of the court, if the defendant claims that the owner of the equity of redemption is still living, to direct that he be made a party to the action: Donovan v. Twist, 105 App. Div. 171.

f. **Assignor.**—The assignor of a mortgage, who guarantees that the assignee shall collect the debt, is a party liable to the plaintiff for the payment of the debt secured by the mortgage, and may be made a party to an action to foreclose the same under this section: Robert v. Kidansky, 111 App. Div. 475.

§ 1628. Other actions for mortgage debt, when prohibited.

g. **Facts held sufficient to authorize court to grant application, under § 1628, to commence and maintain an action to recover part of a mortgage debt:** Matter of McLaughlin v. Durr, 76 App. Div. 75.

h. **Sufficient reason.**—Where a suit is brought upon a mortgage, an action upon the bond should not be permitted, unless a sufficient reason is shown therefor; such leave should not be granted during the pendency of a foreclosure action or before the sale of the premises except under most extraordinary circumstances: Matter of Byrne, 81 App. Div. 74; 80 N. Y. Supp. 977.

i. **Demurrer.**—In an action to foreclose a mortgage, the answer alleged the pendency of another action between the parties to recover the mortgage debt and is demurrable unless it alleges that the action which it pleads in bar was brought without leave of the court: Schieck v. Donohue, 77 App. Div. 321; 79 N. Y. Supp. 233.

j. **Interest.**—A complaint to foreclose a mortgage, following a prior foreclosure of the same mortgage for interest only, is not one to recover the mortgage "debt" within §§ 1628 and 1629, and therefore leave to sue need not be obtained: Pretzfeld v. Lawrence, 34 Misc. 329.

k. **Two mortgages.**—An action to foreclose two mortgages upon the same property, made by the same mortgagor and held by the same assignee, is not

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prohibited by §§ 1628 and 1630, notwithstanding that another mortgage given by the same mortgagor upon another property to the same mortgagee to secure the payment of another debt and also as a further and additional security for the debts represented by the first two mortgages had been foreclosed: Reichert v. Stilwell, 172 N. Y. 83, aff'g 57 App. Div. 480; 67 N. Y. Supp. 1062.

a. **Mortgagor.**—An assignee of a mortgage, who has failed to make the assignor a party defendant in an action for foreclosure, when the assignor guaranteed the collection of the debt, cannot maintain a subsequent action against such assignor for a deficiency without leave of the court as required by this section: Robert v. Kidansky, 111 App. Div. 475.

b. An action to foreclose a mortgage will not be stayed on the ground that a prior action has been begun by the mortgagor in a federal court to set aside the mortgage on the ground of usury, when it appears that the mortgagor is an attorney of the courts of this state and brings said action in the federal court on a technical non-residence, and there are circumstances which make it probable that said action was so brought to hinder and delay the mortgagee: Curlette v. Olds, 110 App. Div. 596.

c. The fact that the mortgagor claims to have a valid defense for the balance unpaid on a bond secured by a mortgage is no reason for denying an application by the assignee of such bond for leave to bring an action thereon under § 1628: La-Grave v. Hellinger, 109 App. Div. 515.

§ 1629. Complaint to state whether such action brought.

d. An assignee of a mortgage, who has failed to make the assignor a party defendant in an action for foreclosure, when the assignor guaranteed the collection of the debt, cannot maintain a subsequent action against such assignor for a deficiency without leave of the court, as required by § 1628; a complaint in such subsequent action against the assignor, which does not allege leave of court, fails to state a cause of action: Robert v. Kidansky, 111 App. Div. 475.

e. Although § 1629 provides that the complaint in an action to foreclose a mortgage upon real property must state whether any other action has been brought to recover any part of the mortgage debt, the plaintiff is not required to prove that fact as an affirmative fact on an inquest taken by default. Especially is this so when the answer merely denies any knowledge or information sufficient to form a belief as to the allegation: Riesgo v. Glengariffe Realty Co., 116 App. Div. 414.

f. In a foreclosure suit it is sufficient under § 1629 that the complaint allege "that no other action has been had for the recovery of the said sum secured by the said bond and mortgage:" Schieck v. Donohue, 77 App. Div. 321; 79 N. Y. Supp. 233.

g. **Interest.**—A complaint to foreclose a mortgage, following a prior foreclosure of the same mortgage for interest only, is not one to recover the mortgage "debt" within §§ 1628 and 1629, and therefore leave to sue need not be obtained: Pretzfeld v. Lawrence, 34 Misc. 329.

§ 1630. If judgment rendered therein, execution must be returned.

See § 1430 et seq., ante, Execution sale of realty.

h. An action to foreclose two mortgages upon the same property, made by the same mortgagor and held by the same assignee, is not prohibited by §§ 1628 and 1630, notwithstanding that another mortgage given by the same mortgagor upon another property to the same mortgagee to secure the payment of another debt and also as a further and additional security for the debts represented by the first two mortgages had been foreclosed: Reichert v. Stilwell, 172 N. Y. 83, aff'g 57 App. Div. 480; 67 N. Y. Supp. 1062.

§ 1631. Notice of pendency of action to be filed.

See rule 60 (Sup. Ct.), When plaintiff applies for judgment he must show that the *lis pendens* has been filed.

See § 1670 et seq., post, General provisions relating to *lis pendens*.

§ 1632. Effect of conveyance upon sale.

See rule 63 (Sup. Ct.), Mortgage and assignments to be filed before conveyance.

i. The purchase of mortgaged premises upon foreclosure by the executors of the mortgagor confers a good title as against judgment creditors of a son, who had a life estate in the property under the will of the mortgagor, which also authorized the executors to pay the mortgage: Marshall v. U. S. Trust Co., 93 App. Div. 252; 87 N. Y. Supp. 747.

j. A purchaser at a mortgage foreclosure sale is a "holder of any mortgage:" People ex rel. B. U. El. R. R. Co. v. Morgan, 85 App. Div. 292; 83 N. Y. Supp. 86.

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a. A purchaser of real property under a judgment foreclosing a mortgage thereon, entered in an action in which the owner of the equity of redemption was not served with the summons, acquires all of the rights of the mortgagee in the premises and may bring a new action to foreclose the mortgage: Green v. Mussey, 76 App. Div. 174; 78 N. Y. Supp. 434.

b. A wife, by reason of her inchoate right of dower, may maintain an action for the redemption of real property sold under foreclosure of a mortgage upon premises owned by her husband, during his lifetime, when she was not a party to the foreclosure action: Mackenna v. Fidelity Trust Co., 184 N. Y. 411.

c. **Jurisdiction.**—As a sovereign state cannot be sued without its consent, the courts obtain no jurisdiction in an action to foreclose a mortgage against the state, even though the attorney-general be made a party defendant: Seitz v. Messerschmitt, 117 App. Div. 401; 102 N. Y. Supp. 732, aff'g 188 N. Y. 587.

§ 1633. Disposition of surplus.

See rule 64 (Sup. Ct.), Referee to be appointed to determine disposition of surplus.

See § 1676, post, Officer making sale shall pay certain liens on the premises.

See § 2728, post, Executors, etc., may petition for judicial settlement; citation thereupon.

§ 1636. When part only of the property to be sold.

See § 1350, ante, Appeal from final judgment, after affirmance or interlocutory judgment, or denial of new trial; review in the court of appeals.

§ 1638. Who may maintain action.

Where a person has been, or he and those whose estates he has, have been for one year in possession of real property, or of any undivided interest therein, claiming it in fee, or for life, or for a term of years not less than ten, he may maintain an action against any other person to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records the defendant might make to any estate in that property in fee, or for life, or for a term of years not less than ten, in possession, reversion or remainder, or to any interest in that property, including any claim in the nature of an easement therein, whether appurtenant to any other estate or lands or not, and also including any lien or incumbrance upon said property, of the amount or value of not less than two hundred and fifty dollars. But this section does not apply to a claim for dower.

2 R. S. 312 (Part 3, c. 5, tit. 2), §§ 1, 3; Co. Proc., § 449; L. 1848, c. 50; L. 1854, c. 116; L. 1855, c. 511; L. 1860, c. 173; L. 1864, c. 219.

Amended by chap. 210 of 1891 and chap. 526 of 1904.

See § 982, ante, Action to be tried where property is situated.

See § 1639, post, Complaint.

See § 1686, post, Infant may maintain action in his own name.

See § 1688a et seq., post, Evidence in actions or proceedings involving title to real property.

d. When action may be maintained for relief under this article: Brown v. Doherty, 185 N. Y. 383, aff'g 93 App. Div. 190; 87 N. Y. Supp. 563.

e. **Unoccupied property.**—A person having the legal title to real property, which is unoccupied, may maintain an action, under § 1638, to compel the determination of a claim to such property, although he is not in the actual possession thereof: Whitman v. City of New York, 85 App. Div. 468; 83 N. Y. Supp. 465.

f. **Possession.**—The plaintiff in an action to remove a cloud from the title of land must be in possession thereof, and the complaint is demurrable when it contains no allegations that the plaintiff was in possession of the real estate: Howarth v. Howarth, 67 App. Div. 354; 73 N. Y. Supp. 785.

g. **Under §§ 1638 and 1639,** there is granted the right to a party in possession of land to maintain an action against a party out of possession for the purpose of

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testing title; such right did not exist at common law; the plaintiff or his grantor, under the provisions of this section, is obliged to have been in possession for one year before the action is commenced and, where this fact is not shown, the action cannot be maintained: Lewis v. Howe, 174 N. Y. 340, aff'd 64 App. Div. 572; 72 N. Y. Supp. 851.

a. The owner of lands cannot maintain an action under § 1638 et seq. against an alleged assignee of her tenant to determine the plaintiff's right to possession when the remainder of the defendant's term is less than ten years, and a temporary injunction in such action restraining the defendant from maintaining summary proceedings against sub-tenants is authorized: Hollister v. Wohlfeil, 115 App. Div. 400.

b. In an action to quiet title, brought in 1898, in which the complaint in which there is no allegation that the plaintiff was ever in possession of the property, and where it appears that neither the defendants nor any other person ever asserted an adverse claim thereto, the judgment was without effect and a title depending thereon is unmarketable: Lese v. Metzinger, 54 Misc. 151.

c. **Tax title.**—An owner may maintain an action under § 1638 to compel a determination of a claim to her real property, where the defendant has purchased it for unpaid taxes amounting to thirty-five dollars, and will, in the absence of redemption, acquire an absolute title in two years from the sale: Loomis v. Semper, 38 Misc. 567.

d. **Jury.**—The question of title acquired by adverse possession is one for the jury: Lewis v. Upton, 90 App. Div. 453; 86 N. Y. Supp. 397.

e. A person may maintain an action to determine claims to real property under § 1638, if he proves legal title, as possession is deemed to follow it, and he may maintain an equitable action to remove a cloud on title if he has actual possession at the time of the commencement of the action: Mitchell v. Einstein, 42 Misc. 358.

f. In an action under § 1638 et seq. of the Code of Civil Procedure brought to determine a claim to real property, there is a right to a jury trial unless the defendant merely demands a dismissal of the complaint or a jury trial is waived. The proceedings in such action are similar to proceedings in ejectment, except as otherwise expressly prescribed: Ryan v. Murphy, 116 App. Div. 242.

§ 1639. Complaint.

The complaint in such an action must set forth facts showing:

1. The plaintiff's right to the real property; whether his estate therein is in fee, or for life, or for a term of years not less than ten; and whether he holds it as heir, devisee or purchaser, with the source from or means by which his title immediately accrued to him.

2. That the property, at the commencement of the action was, and, for the one year next preceding, has been in his possession, or in the possession of himself and those from whom he derives his title, either as sole tenant, or as joint tenant, or as tenant in common with others.

3. That the defendant unjustly claims, or that it appears from the public records that the defendant might unjustly claim an estate or interest or easement therein, or a lien or incumbrance thereupon of the character specified in the last section.

The complaint must describe the property as prescribed in section 1511 of this act. The demand for judgment may be to the effect that the defendant and every person claiming under him to be barred from all claim to an estate in the property described in the complaint, or from all claim to an interest or easement therein, or a lien or incumbrance thereupon, of the character specified in the last section, or it may combine two or more of said demands with other demand for appropriate relief.

2 R. S. 312, § 2.

Amended by chap. 210 of 1891 and chap. 526 of 1904.

See § 1638, ante, Who may maintain action.

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a. Under §§ 1638 and 1639, there is granted the right to a party in possession of land to maintain an action against a party out of possession for the purpose of testing title; such right did not exist at common law; the plaintiff or his grantor, under the provisions of this section is obliged to have been in possession for one year before the action is commenced, and where this fact is not shown the action cannot be maintained: Lewis v. Howe, 174 N. Y. 340, aff'g 64 App. Div. 572; 72 N. Y. Supp. 851.

b. Power of court.—When, in an action to determine the title to real property, both the plaintiffs and defendants admit that a deed absolute upon its face was given as security only and ask that the property be sold to pay the debt, due the grantee, the court is without power to render judgment that the deed was void as champertous and because given while the property was in the adverse possession of another: Bradt v. McClenahan, 118 App. Div. 768.

§ 1645. Judgment for plaintiff.

a. The judgment, in an action to compel the determination to real property, should conform with § 1645, and provide that the defendant be forever barred from all claim to any estate in the property: Whitman v. City of New York, 85 App. Div. 468; 83 N. Y. Supp. 465.

§ 1647. Action to determine widow's dower.

See § 1596 et seq., ante, General provisions relating to action for dower.

§ 1651. Who liable to action for waste.

See § 1441, ante, Rights of purchaser under an execution.

See § 1681, post, Order restraining defendant from committing waste during the pendency of the action.

See § 1925, post, Action by a taxpayer against a public officer.

See § 2321, post, Court must prevent waste of property of incompetent.

See § 2348, post, Sale of incompetent's property when it is exposed to waste.

d. Where a life tenant conveyed her interest in certain land to another and gave him the express right to enter into possession and to receive rents, etc., until a sum of money due him from her should be paid, the grantee is the assignee of the life tenant within the meaning of § 1651 and an action for waste will lie against such assignee: Cole v. Bickelhaupt, 64 App. Div. 6.

§ 1652. Action by heir, devisee, or grantor of reversion.

e. A life tenant of real property may, in the event of waste being committed upon the premises by a sub-tenant, recover the full damage done both to the life estate and to the estate in remainder, and for the latter even where no damage has been done to the former: Dix v. Jaquay, 94 App. Div. 554; 88 N. Y. Supp. 228.

§ 1654. Id.; by grantee of real property sold under execution.

See § 1441, ante, Rights of holder of the property during intermediate period.

See § 1445, ante, How warrant, etc., superseded.

§ 1659. View, when not necessary; when and how made.

f. As the legislature, by § 1659, expressly confers the power upon the judge, presiding at the trial of an action for waste, to direct an inspection of the premises by a jury, it is clearly indicated that it was not intended that such power should exist in other civil actions: Buffalo Structural Co. v. Dickinson, 98 App. Div. 355; 90 N. Y. Supp. 268.

§ 1660. When action may be brought.

See § 968, ante, Action is triable by jury.

See § 982, ante, Triable where the subject thereof is situated.

g. Under §§ 1660 and 1662, the court has power in an action for a nuisance to award the plaintiff judgment for damages, or for the removal of the nuisance, or for both; the court may award damage caused by the nuisance and may refuse to direct the removal of the nuisance: Hadcock v. City of Gloversville, 96 App. Div. 130; 89 N. Y. Supp. 74.

h. Injunction.—§ 968 applies only to the "action for a nuisance" which is authorized by § 1660, and that is purely a common law action; an action for a perpetual injunction to restrain the defendant

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from using its property in such a way as to continue a nuisance should be tried as an action in equity, and only specific issues may be sent to a jury: Miller v. Edison Electric Illuminating Co., 78 App. Div. 390; 80 N. Y. Supp. 319.

a. When an injunction to restrain a nuisance will work great damage to the defendant, and afford comparatively little relief to the plaintiff, it should be denied: Bently v. Empire Portland Cement Co., 48 Misc. 457.

b. **Defense.**—The fact that a plant could not be operated in the locality without creating a nuisance constitutes no defense: Pritchard v. Edison El. Illuminating Co., 92 App. Div. 178, aff'g 179 N. Y. 364; 87 N. Y. Supp. 225.

c. **Dynamite.**—A dynamite magazine located within one thousand feet of an inhabited house is a nuisance: Reilly v. Erie R. R. Co., 72 App. Div. 476; 76 N. Y. Supp. 620.

d. The keeping of upwards of one hundred pounds of dynamite upon the line of the work is a nuisance at common law: Ricker v. McDonald, 89 App. Div. 300; 85 N. Y. Supp. 825.

e. **Drainage.**—A city which collects the surface drainage of a watershed and discharges it into a natural stream, thereby overtaxing the capacity of the stream and causing it to overflow its banks and flood the land through which it passes, is liable to the owner of such land for the damages sustained by him: Hentz v. City of Mount Vernon, 78 App. Div. 515; 79 N. Y. Supp. 774.

f. **Sand pile.**—Where a dealer in molding sand stores large piles thereof upon land owned by her, the blowing of such sand upon adjoining property becomes a nuisance and can be abated, as such, where the resultant injury to the adjoining property is so great that it visibly diminishes its value and materially interferes with physical comfort and the enjoyment of the property: Wilmot v. Bell, 76 App. Div. 252; 78 N. Y. Supp. 591.

g. **Dumping-board.**—Right of a city while a street remains unopen to maintain a dumping-board thereon: Coleman v. City of New York, 70 App. Div. 218; 75 N. Y. Supp. 342.

h. **Chemicals.**—Action for a death from an explosion of chemicals resulting from a fire: Schuck v. Main, 39 Misc. 251; 79 N. Y. Supp. 399.

i. **Underground road.**—Slot of unusual width in an underground cable road causing injury to bicycle riders: Brown v. Metropolitan Street R. Co., 60 App. Div. 184; 70 N. Y. Supp. 40.

j. **Hotel.**—An erection by a sub-contractor of a structure which cause serious damage to a hotel proprietor, and which could be well located in sparsely settled districts, constitutes a nuisance: Bates v. Holbrook, 171 N. Y. 460.

k. **Equity.**—Even though a plaintiff may allege sufficient facts to entitle him to maintain an action, as one for a nuisance, still the allegations may be sufficient to entitle plaintiff to maintain the action, as a suit in equity brought specifically for the purpose of compelling the defendant to remove obstructions and encroachments on the public streets of the city: City of New York v. Knickerbocker T. Co., 104 App. Div. 223.

l. **Nuisance.**—A signboard fastened to the top of a building and overhanging the street is a public and private nuisance and may be enjoined by any one who suffers damage thereby: Buskirk v. Gude Co., 115 App. Div. 330.

m. A court of equity, which has obtained jurisdiction of an action brought by a landowner to restrain the continuance of a nuisance, and for damages alleged to be caused by the maintenance and operation of a plant for the production of electric light and power, may retain the case, although it is found that the nuisance was abated at the time of the trial, and that it was improbable that any would be created in the future, and may determine whether the plaintiff is entitled to any damages: Miller v. Edison El. Illuminating Co., 184 N. Y. 17, rev'g 97 App. Div. 638; 89 N. Y. Supp. 1059.

§ 1662. Final judgment.

n. § 1662, providing for the granting of a judgment directing the removal of a nuisance, does not apply to an action at law, for it is expressly provided in § 1663 that it shall not apply where the complaint demands judgment for a sum of money only: Van Veghten v. Hudson River Power T. Co., 103 App. Div. 130.

o. **Judgment.**—Under §§ 1660 and 1662 the court has power in an action for a nuisance to award the plaintiff judgment for damages, or for the removal of the nuisance, or for both; the court may award damages caused by the nuisance and may refuse to direct the removal of the nuisance: Hadcock v. City of Gloversville, 96 App. Div. 130; 89 N. Y. Supp. 74.

§ 1663. Application of this article.

p. § 1662, providing for the granting of a judgment directing the removal of a nuisance, does not apply to an action at law, for it is expressly provided in § 1663 that it shall not apply where the complaint demands judgment for a sum of money only: Van Veghten v. Hudson River Power T. Co., 103 App. Div. 130.

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§ 1665. Reversioner, etc., may maintain action.

a. In an action to restrain the maintenance and operation of a railroad in front of premises and for fee and rental damages, the remainderman, under § 1665, may maintain such an action and the statute of limitations in such a case is governed by § 375: Muller v. Manhattan Railway Co., 53 Misc. 133.

§ 1666. Joint tenant, etc., may maintain action against his cotenant.

b. Action by wife to compel accounting by her husband of the proceeds of a mortgage and the rents and profits of land held by them as tenants by the entirety: Messing v. Messing, 64 App. Div. 125; 71 N. Y. Supp. 717.

§ 1667. Action for cutting, etc., trees.

c. **Complaint.**—A complaint which alleges that the defendants have wrongfully trespassed on the plaintiff's premises by cutting timber thereon, and are continuing, and threaten to continue to do so to the plaintiff's irreparable damage, followed by a prayer for an injunction with damages for the cutting already done, sets out only an action in equity, and defendants have no right to a jury trial, although the defendants are alleged to be liable for treble damages under §§ 1667 and 1668: Page v. Herkimer Lumber Co., 109 App. Div. 391.

d. **Theory of the action.**—The right of action given by §§ 1667 and 1668 to recover treble damages against any person who cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave, is based upon the theory of an injury to the land owned by the person injured, and an action can be maintained only by the owner of the fee: Kellar v. Central Tel. & Tel. Co., 53 Misc. 526.

§ 1668. Id.; when treble damages may be recovered.

e. A complaint which alleges that the defendants have wrongfully trespassed on the plaintiff's premises by cutting timber thereon, and are continuing and threaten to continue to do so to the plaintiff's irreparable damage, followed by a prayer for an injunction with damages for the cutting already done, sets out only an action in equity, and defendants have no right to a jury trial, although the defendants are alleged to be liable for treble damages under §§ 1667 and 1668: Page v. Herkimer Lumber Co., 109 App. Div. 391.

f. The right of action given by §§ 1667 and 1668 to recover treble damages against any person who cuts down or carries off any wood, underwood, tree, or timber, or girdles or otherwise despoils a tree on the land of another, without the owner's leave, is based upon the theory of an injury to the land owned by the person injured, and an action can be maintained only by the owner of the fee: Kellar v. Central Tel. & Tel. Co., 53 Misc. 526.

§ 1669. Treble damages for forcible entry or detainer.

See § 1184, ante, How treble damages found and awarded.

g. **Complaint.**—Where the plaintiff seeks treble damages for forcible entry under § 1669, it should appear from the complaint that the action is brought to recover such damages; and, in such a case, where there is no allegation of such a claim in the complaint, the motion for treble damages will be denied, although the facts as found by the jury might authorize their recovery: Salmon v. Blasier Manufacturing Co., 53 Misc. 36.

§ 1670. Notice of pendency of action by plaintiff.

In an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property, if the complaint is verified the plaintiff may, when he files his complaint, or at any time afterwards before final judgment, file, in the clerk's office of each county where the property is situated, a notice of the pendency of the action, stating the names of the parties, and the object of the action, and containing a brief description of the property in that county, affected thereby. Such a notice

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may be filed with the complaint, before the service of the summons; but, in that case, personal service of the summons must be made upon a defendant, within sixty days after the filing, or else, before the expiration of the same time, publication of the summons must be commenced, or service thereof must be made without the state, pursuant to an order obtained therefor, as prescribed in chapter fifth of this act.

Co. Proc., § 132.

Amended by chap. 518 of 1904.

See § 3343, subd. 11, post, Miscellaneous general definitions and rules of construction.

See § 649, ante, Attachment of real property.

a. **Party-wall.**—An action brought to procure an injunction to prevent an increase in the height of a party-wall and encroachments upon plaintiff's land is one "to recover a judgment affecting the title to or the possession, etc., of real property" within § 1670, and the plaintiff has the right to file a *lis pendens*, and such right is absolute, and the court has no power to cancel the same after it has been filed: Moeller v. Wolkenberg, 67 App. Div. 487; 73 N. Y. Supp. 890.

b. **Specific lien.**—In an action by a judgment creditor to set aside conveyances it would not seem that it was necessary to file a *lis pendens* in order to obtain a specific lien upon the property: Arnold v. Treviranus, 78 App. Div. 589; 79 N. Y. Supp. 732.

c. **Motion to cancel.**—If there is any doubt as to the right of the plaintiff in an action to file a *lis pendens*, the question should not be decided on a motion to cancel such *lis pendens;* a notice of *lis pendens* filed by the plaintiff should not be vacated on motion when it cannot be said that the action was not brought to recover a judgment affecting the title to or possession, use or enjoyment of the premises, or that it was clear that the plaintiffs would not be able on the trial to establish a lien as vendees: Smadbeck v. Law, 106 App. Div. 552; 94 N. Y. Supp. 797.

d. Where the complaint, in an action to recover a deposit made by a vendee on a contract to purchase real estate, together with expenses of searching title, alleges no facts showing plaintiff's right to resort to equity or that he has not a full and adequate remedy at law, a *lis pendens* filed in the action will be canceled on motion: Krainin v. Coffey, 53 Misc. 6.

e. On a motion to cancel a *lis pendens* the complaint must be examined to see whether the action is one in which a *lis pendens* is proper; a *lis pendens* is not proper in an action by the vendee of lands who has paid earnest money but has not been let into the possession under the contract: Krainin v. Coffey, 119 App. Div. 516.

f. A motion to cancel a *lis pendens* on the ground that the action is not one "brought to recover a judgment affecting the title to or the possession, use or enjoyment of real property," as is contemplated by § 1670, will only be granted where it appears by the complaint that such is not the cause of action alleged: St. Regis Paper Co. v. Santa Clara Co., 62 App. Div. 538; 71 N. Y. Supp. 82; 173 N. Y. 156.

g. **Discretion.**—The right to file a *lis pendens* is an absolute right, not resting in the discretion of the court, but conferred by statute, and when once properly filed, cannot be canceled except pursuant to § 1674; if the complaint sets out a cause of action entitling the plaintiff to file a *lis pendens*, the merits thereof cannot be determined on motion to cancel a *lis pendens:* Lindheim v. Central Nat. Realty Co., 111 App. Div. 275; 97 N. Y. Supp. 619.

h. **Encroachment.**—In an action brought by the owner of city lot against the owner of an adjoining lot to compel the latter to remove such portion of the wall of a building erected on the adjoining lot as overhanging plaintiff's lot, the plaintiff is not entitled to file a *lis pendens:* McManus v. Weinstein, 108 App. Div. 301.

i. **Summons.**—A *lis pendens* filed before the service of the summons will be canceled when it is not followed within sixty days by the personal service or publication of the summons as required by § 1670: Lipschitz v. Watson, 113 App. Div. 408.

j. **Specific performance.**—When the complaint sets out an action for the specific performance of a contract to convey lands, the court cannot determine the merits of the action and the right of the plaintiff to the relief sought on a motion to cancel a *lis pendens*, except where it is manifest from the complaint that specific performance is impossible: McCrum v. Lex. Realty Co., 113 App. Div. 58; 98 N. Y. Supp. 1021.

k. In an action to compel the specific performance of an agreement for the sale of real estate the law does not pro-

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vide for the filing of successive notices of pendency thereof; and, where a notice is filed with the complaint before the service of the summons and personal service of the summons is not made within sixty days thereafter, or publication thereof commenced or service thereof made without the State, the plaintiff's right to file such notice is exhausted and a second notice should be canceled: Lipschutz v. Horton, 55 Misc. 44.

a. **Discretion.**—A defendant who is aggrieved by the failure of the plaintiff to serve the summons after the filing of a *lis pendens* within the time set by § 1670, should move for the cancellation thereof under § 1674, in which case the cancellation is in the discretion of the court: Levy v. Kon, 114 App. Div. 795.

b. **Covenants.**—When a grantee covenants to pay to the grantor any amount recovered in consequence of the destruction of easements by a railroad company, it is a personal covenant, does not run with the land, and does not affect the easements appurtenant thereto, and the grantor in an action for the specific performance of such covenant is not entitled to file a *lis pendens:* Schomacker v. Michaels, 117 App. Div. 125; 102 N. Y. Supp. 334.

c. A notice of pending action to enforce covenant of grantee to permit grantor to recover and collect the fee and rental damages caused by elevated railroad to property cannot be cancelled: Schomacker v. Michaels, 189 N. Y. 61, rev'g 117 App. Div. 125.

§ 1671. Effect of notice; cancellation of notice upon making deposit or giving undertaking.

Where a notice of the pendency of an action may be filed, as prescribed in the last section, the pendency of the action is constructive notice, from the time of so filing the notice only, to a purchaser or incumbrancer of the property affected thereby, from or against a defendant, with respect to whom the notice is directed to be indexed, as prescribed in the next section. A person, whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action. In any action, other than an action to foreclose a mortgage or for the partition of real property or for dower, in which a notice of the pendency thereof has been filed, and in which it shall appear to the court upon a motion made as hereinafter provided, that adequate relief can be secured to the plaintiff by a deposit of money, or in the discretion of the court by the giving of an undertaking, as hereinafter provided, where the cancellation of such notice is not otherwise expressly provided for or regulated, any defendant or any other person having an interest in the property affected by the action, may apply for the cancellation of such notice. Such application shall be by motion made in the action upon notice, to be directed and approved by the court, to all the parties to the action and to such other persons as the court may direct. If the court on the hearing of the motion shall decide that adequate relief can be secured to the plaintiff and that the case is one in which the judgment sought to be enforced against the real property mentioned in said notice of pendency of action may be secured by the deposit of the amount claimed or by the giving of an undertaking, the court may make an order directing that the applicant make a deposit in court of a sum of money, or in the discretion of the court, give an undertaking with at least two sufficient sureties for the payment of any amount which the party filing such notice of pendency of action, or any other party

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to the action claiming an interest or lien upon such real property may recover in the action, and will pay the judgment sought to be enforced against said real property, in the event that a final judgment shall be recovered therein and conditioned for the performance of such other terms as the court may direct, and that thereupon, and upon such other terms, if any, as the court shall deem equitable, an order be made cancelling such notice of record. The sum required to be paid into court or the amount of the undertaking, shall be at least the amount claimed by the plaintiff or the value of the property affected by the action or the interest of the party filing such notice therein, with interest and costs, and if the court allow an undertaking to be given, a copy thereof with notice of filing of the same, shall be served upon the attorney for the plaintiff and upon such other parties as the court may direct and notice of not less than two days of the justification of the sureties. Upon the deposit of the sum required into court, or if an undertaking is given, upon the approval of such undertaking by the court or a judge thereof and the compliance with such other terms as may have been imposed, the court may direct that the notice of pendency of action be cancelled of record by a particular clerk or by all the clerks with whom it is filed and recorded, which cancellation must be made by a note to that effect, on the margin of the record, referring to the order. Unless the order is entered in the same clerk's office, a certified copy thereof must be filed therein, before the notice is cancelled. After a notice of pendency of action has been cancelled as herein provided, neither the proceedings in the action, nor any judgment which may be rendered therein, shall affect the real property described in any notice of pendency which has been cancelled pursuant to the provisions of this section.

Id.

Amended by chap. 60 of 1905.

a. When the complaint asks that a deed whereby the plaintiff conveyed to his copartner his undivided half interest in real estate be vacated and set aside, a *lis pendens* filed by the plaintiff should not be canceled, as adequate relief cannot be granted by the deposit of money or an undertaking; a deposit or undertaking is adequate relief only when it is apparent that the only relief to which plaintiff would be entitled would be a judgment for a sum of money which would be a lien upon the lands: Wolinsky v. Okun, 111 App. Div. 536; 97 N. Y. Supp. 943.

b. **Specific performance.**—When, in an action for specific performance, plaintiff shows that performance is impossible, a *lis pendens* should be canceled upon the defendant giving the undertaking provided by § 1671: Bresel v. Browning, 109 App. Div. 588; 96 N. Y. Supp. 402.

c. The right to the cancellation of a *lis pendens* in an action for specific performance must be determined upon the allegations of the complaint or facts clearly established; the court will not look into the facts as upon a trial nor search the complaint as upon a demurrer: Werner v. Jackson, 115 App. Div. 176.

d. In an action for specific performance, when the question of the marketable title of the lands is in issue, a *lis pendens* filed by the plaintiff should not be cancelled on the defendant's offering to give an undertaking: Mishkind-Feinberg Realty Co. v. Sidorsky, 115 App. Div. 115.

e. When a complaint sets out an action for the specific performance of a contract to convey lands, the court cannot determine the merits of the action and the right of the plaintiff to the relief sought on a motion to cancel a *lis pendens*, except where it is manifest from the complaint that specific performance is impossible: McCrum v. Lex Realty Co., 113 App. Div. 58; 98 N. Y. Supp. 1021.

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a. Although this section allows the cancellation of the *lis pendens* when "adequate relief can be secured to the plaintiff by a deposit of money or an undertaking," such *lis pendens* should not be canceled when it appears from the complaint or by established facts that the plaintiff may be entitled to specific performance of a contract to convey lands: Tishman v. Acritelli, 111 App. Div. 237; 97 N. Y. Supp. 668.

b. A motion to cancel a notice of pendency of action on depositing money or giving an undertaking is to be determined upon the allegations of the complaint; and where, in an action by the vendee under a contract to convey lands, it is alleged that the defects for which the title was rejected can be cured by the defendant and the complaint prays for specific performance, in case the defendant becomes able to perform, the motion should be denied: Kennedy v. Hall, 51 Misc. 78; 99 N. Y. Supp. 162, aff'g 114 App. Div. 913.

c. **Mortgage.**—Where, subsequently to the filing of the *lis pendens* in an action to foreclose a second mortgage, a materialman files a notice of lien under § 21 of the Lien Law against the interests of a title company, the holder of a building loan mortgage, and also against the interests of the holder of a second mortgage and of the owner of the premises, the plaintiff in an action to foreclose the lien, though not made a party to the mortgage foreclosure action, is bound by the judgment entered therein only to the extent of all proceedings taken in the action after the filing of the *lis pendens*, and the judgment entered in that action operates as a bar only in so far as it prevents the plaintiff from foreclosing its lien against the property: Penn. Steel Co. v. Title G. & T. Co., 50 Misc. 51.

d. **Fraud.**—A motion to cancel a notice of pendency of action on depositing money or giving an undertaking, in an action brought by a tenant to set aside a surrender of his lease, on the ground that it was induced by fraud, and to be restored to the possession of the demised premises, should be denied: Schenkein v. Horowitz, 51 Misc. 31.

e. **Marketable title.**—A *lis pendens* does not in itself constitute a cloud or incumbrance upon lands, and the question as to whether the title to such lands is marketable depends on the validity of the claim represented by the *lis pendens*, which matter will be considered by the court when a vendee refuses to complete his purchase: Baecht v. Hevesy, 115 App. Div. 509.

§ 1673. Notice of pendency of action by defendant.

See § 1670, ante, Notice of pendency of action by plaintiff.

§ 1674. When and how lis pendens cancelled.

See § 711, ante, Cancellation of notice in attachment proceedings.

f. **Final judgment.**—Under § 1674, in regard to the cancellation of notices of *lis pendens*, discretion is conferred on the court as to the cancellation of the notices, only where the plaintiff "unreasonably neglects to proceed in the action;" where an appeal to the appellate division taken by the plaintiff in an action of ejectment from a judgment dismissing the complaint upon the merits, is dismissed for a failure to prosecute it, such judgment is a final one within § 1674, and the defendant is entitled as a matter of right to have the notice of *lis pendens* cancelled: Jarvis v. American Forcite Powder Mfg. Co., 95 App. Div. 234; 88 N. Y. Supp. 737, aff'g 183 N. Y. 129.

g. **Dismissal of complaint.**—A *lis pendens* can be cancelled only under the specific terms of § 1674, and that section gives the court no power to cancel it upon a mere dismissal of the complaint: St. Regis Paper Co. v. Santa Clara Lum. Co., 34 Misc. 428; 69 N. Y. Supp. 904.

h. Where the complaint, in an action to recover a deposit made by a vendee on a contract to purchase real estate, together with expenses of searching title, alleges no facts showing plaintiff's right to resort to equity or that he has not a full and adequate remedy at law, a *lis pendens* filed in the action will be cancelled on motion: Krainin v. Coffey, 53 Misc. 6.

i. **Specific performance.**—The right to file a *lis pendens* in an action to compel specific performance of an executory contract for the sale of real estate is an absolute right, and the *lis pendens* can only be cancelled as provided by § 1674; on the motion to cancel, the court cannot consider the question whether the action can be maintained, as that is a question for the trial court: Shandley v. Levine, 44 Misc. 23.

j. **Discretion.**—A defendant who is aggrieved by the failure of the plaintiff to serve the summons after the filing of a *lis pendens* within the time set by § 1670, should move for the cancellation thereof under § 1674, in which case the cancellation is in the discretion of the court: Levy v. Kon, 114 App. Div. 795.

k. The right to file a *lis pendens* is an absolute right, not resting in the discretion of the court, but conferred by statute, and when once properly filed cannot be canceled except pursuant to § 1674; if the complaint sets out a cause of action entitling the plaintiff to file a

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lis pendens, the merits thereof cannot be determined on a motion to cancel a *lis pendens:* Lindheim v. Central Nat. Realty Co., 111 App. Div. 275; 97 N. Y. Supp. 619.

a. No express power is given the court to cancel a notice of pendency of action and an order of the Appellate Division reversing an order of the Special Term is erroneous and must be reversed: Schomacker v. Michaels, 189 N. Y. 61, rev'g 117 App. Div. 125.

§ 1675. When and how court may compel delivery of real property to purchaser.

See § 8, ante, Criminal contempts.

See § 1373, ante, Execution for the delivery of possession of real property.

b. If a purchaser, after the delivery of the referee's deed, is refused possession, the law affords him ample remedy under the provisions of § 1675: Union Trust Co. v. Driggs, 62 App. Div. 214-219; 70 N. Y. Supp. 947.

c. **Wrong remedy.**—Where the purchaser at a mortgage foreclosure sale, when he was refused possession of the premises, procured an order to show cause why a writ of assistance should not be issued directing the sheriff to place him in possession, and the mortgagor failed to show cause, the latter is not entitled to a reversal of the order directing the issuance of the writ upon the ground that the remedy of the purchaser was by an order under § 1675 rather than by a writ of assistance: Title Guarantee & T. Co. v. Am. P. & C. Co., 95 App. Div. 192.

§ 1676. Upon sale of real property, officer to pay taxes, etc.

See § 1688, post, When special proceeding to recover real property, not allowed.

d. **First department rule.**—Special term rule No. 16, in the first judicial district provides that the memoranda of the approximate amount of taxes, assessments and other liens shall be annexed to the notice of sale, but such memoranda does not bind the referee or the parties to pay taxes, which were not a lien upon the property at the time of the sale: Coudert v. Huerstel, 60 App. Div. 83; 69 N. Y. Supp. 778.

e. **Judgment.**—Where, in an action brought to foreclose a mortgage upon real property, the judgment of foreclosure and sale, in conformity with the direction of § 1676, provides that the referee shall pay, out of the proceeds of the sale, all taxes and assessments upon the premises, the plaintiff in the action, who becomes the purchaser at the sale, has no power, over the objection of the owner of the equity of redemption, to waive such provision of the judgment, and the owner of the equity of redemption is entitled to an order requiring the referee to pay such taxes and assessments: Shaw v. Youmans, 105 App. Div. 329.

§ 1678. Sale; notice of; how conducted.

See rule 62 (Sup. Ct.), Place of sale of real property in certain cities designated.

See rule 67 (Sup. Ct.), Notice of motion for stay of sale in partition and foreclosure.

See §§ 1242-1244, ante, Sale of real property and effect of conveyance.

See § 1430 et seq., ante, Sale of real property by virtue of an execution.

See § 1622, ante, Sale under an interlocutory judgment in an action for dower.

See § 2345 et seq., post, Sale of real property of incompetent.

See § 3297, post, Fees for sale of real property.

f. **Resale.**—When a resale will not be ordered where a subsequent lienor has waived notice of all proceedings except notice of sale and has not had notice thereof: Frazier v. Swimm, 79 App. Div. 53; 79 N. Y. Supp. 787.

g. **Referee.**—A referee to sell, appointed in an action to foreclose a mortgage upon real property, has power to grant the plaintiff in the action, over the objection of the purchaser at the sale, an adjournment beyond the time fixed for the completion of the purchase, in order to enable the plaintiff to remove alleged defects in the title: Moir v. Flood, 66 App. Div. 544; 73 N. Y. Supp. 364.

h. **Infants.**—The appointment in an action to foreclose a mortgage in Kings county, of a referee to sell without the consent of the guardian *ad litem* of four infants in violation of chap. 167 of 1899, constitutes a mere irregularity, which does not affect the title acquired by the purchasers, where it does not appear that the rights of any of the infants were prejudiced: Spoule v. Davies, 69 App. Div. 502; 75 N. Y. Supp. 229.

i. **Auctioneer's power.**—Real property must be sold at a judicial sale to the highest bidder, and this means the highest bidder at the sale who is then and there willing and financially able to carry out

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the terms of the sale, and an auctioneer has a right to ignore or reject the bid of an irresponsible person: Irvings Savings Institution v. Robinson, 35 Misc. 449.

a. **Parcels.**—Selling separate parcels to divers purchasers: Titcomb v. Fonda J. & G. R. R. Co., 38 Misc. 630; 78 N. Y. Supp. 226.

b. **Newspaper.**—A statement that a newspaper is not a daily newspaper within the meaning of § 1678, etc., is not actionable *per se*, and special damages must be alleged and proven: Le Massena v. Storm, 62 App. Div. 150; 70 N. Y. Supp. 882; 32 Civ. Pro. 119.

c. **Covenants.**—When the terms of sale do not give notice of certain restrictive covenants running with the lands sold, and it is shown that the purchaser had no knowledge thereof and that such covenants lessened the value of the property, he should be relieved from his purchase; the provisions of § 1678 that, if the property be subject to rights of dower, charge or lien, that fact must be declared at the time of sale, applies to restrictive covenants in the nature of a charge or lien on the premises: Conlen v. Rizer, 109 App. Div. 537.

d. **Time of publication.**—Where the sale took place on Tuesday, January 8, 1907, a notice of sale published twice in each week for three successive weeks immediately preceding the sale, the first publication being Tuesday, December 18, 1906, is sufficient; and a contention that both the first and last days of publication should be excluded is erroneous: Cortland Savings Bank v. Lighthall, 53 Misc. 426.

§ 1679. Purchases by certain officers prohibited. Penalty.

e. **Title.**—When title is in vendor personally and not as trustee: Kullman v. Cox, 167 N. Y. 411.

f. **Partition.**—Previous to 1880 the purchase of property under sale in partition by a guardian *ad litem* was void and, by the provisions of § 1679, the provision was extended to foreclosure sales: Dugan v. Sharkey, 89 App. Div. 161; 85 N. Y. Supp. 778.

§ 1682. When order for survey may be made.

g. In an action against a municipal corporation to recover damages for a trespass upon plaintiff's realty, committed by establishing driven wells, the defendant has no right, under § 1682, providing a remedy in the nature of recovery or inspection, to an order requiring plaintiff to permit defendant to enter upon his real property for the purpose of making a survey; affidavit to obtain an order under § 1682 held insufficient: Sutter v. City of New York, 89 App. Div. 494.

§ 1686. Infant may maintain, etc., real action in his own name.

See § 468 et seq., ante, Infant parties.

§ 1689. Joinder of action with others.

§ 1331 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

See § 1687, ante, Joinder of real actions with others.

§ 1690. When it cannot be maintained.

§ 1331 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

h. **Administrator.**—An action of replevin cannot be maintained against an administrator, but should be brought against him individually: Reimers v. Schmitt, 68 App. Div. 299; 74 N. Y. Supp. 122.

i. **Ownership.**—A complaint in an action for wrongful detention, which alleges absolute ownership in the plaintiff, need not allege that the plaintiff is entitled to immediate possession of the chattels in question, as ownership imports right to possession: Griswold v. Manning, 67 App. Div. 372; 73 N. Y. Supp. 702.

j. **Conversion.**—Allegations in a complaint in an action of replevin; *Held* to be those showing damages for detention of the property, rather than such as would allege a cause of action in conversion; a cause of action for conversion is utterly inconsistent with one for replevin: Hitchcock v. Wimpleberg, 103 App. Div. 53.

k. **Complaint.**—A complaint in an action of replevin, brought upon the ground that title to the chattels sold never passed to the defendants because of their fraud, properly and sufficiently describe the chattels, where it states them as "373 2-8 yards of cloth, whether manufactured or unmanufactured, or in process of manufacture, but capable of identification;" if property can be identified in the hands of a wrongdoer, the true owner may replevy it, although it no longer remains in its original form; the same particularity of description of the chattels in suit is not required in the complaint in replevin, as is necessary in the affidavit

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to be delivered to the sheriff: Clemmons v. Brinn, 36 Misc. 157; 72 N. Y. Supp. 1066.

a. **Defense.**—When plaintiffs sue in replevin it is no defense to allege that in another action brought by the defendant against the plaintiffs, the latter set out a claim for damages sustained by reason of the defendant's refusal to sell and deliver the goods which are now sought to be replevied, and have thus elected to base their claim upon contract: Porter v. Fuld & Hatch Knitting Co., 114 App. Div. 292.

§ 1691. Id.; after judgment against the plaintiff.

§ 1331 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. Where the judgment in an action of replevin simply awarded the possession of the property and did not fix the plaintiff's damages under § 1730, such judgment is a bar to the maintenance of a second action to recover the value of such property: Brawner v. Fahy, 64 App. Div. 122.

§ 1692. Id.; by an assignee.

§ 1331 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1693. Jurisdiction, etc., when replevin precedes summons.

See § 416, ante, Time when court acquires jurisdiction.

§ 1695. Affidavit therefor, before commencement of action.

§ 1332 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

c. **Complaint.**—A complaint in an action of replevin, brought upon the ground that title to the chattels sold never passed to the defendants because of their fraud, properly and sufficiently described the chattels where it states them, as "373 2-8 yards of cloth whether manufactured or unmanufactured or in process of manufacture, but capable of identification;" if property can be identified in the hands of a wrongdoer, the owner may replevy it although it no longer remains in its original form; the same particularity of description of the chattels in suit is not required in the complaint in replevin, as is necessary in the affidavit to be delivered to the sheriff: Clemmons v. Brinn, 36 Misc. 157; 72 N. Y. Supp. 1066.

§ 1696. Id.; after commencement of action.

See § 1693, ante, Jurisdiction, etc., when replevin precedes summons.

§ 1697. Id.; where several chattels are to be replevied.

§ 1332 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1699. Plaintiff's undertaking for replevin.

§ 1332 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

See § 810 et seq., ante, General provisions relating to bonds and undertakings.

See § 1736, post, Abatement and revival of action.

d. In an action upon an undertaking given by the plaintiff in a replevin action, which was afterwards discontinued, the defendant's liability is limited to a return of the property replevied or the payment of its value; in order to establish such liability it must be shown that the plaintiff in the replevin action took possession of the chattel by virtue of the writ of replevin: Pettit v. Allen, 64 App. Div. 579; 72 N. Y. Supp. 287.

e. **Costs.**—An undertaking given in replevin by the defendant, in order to retain the chattel, and conditioned among other things for the payment to the plaintiff of such sum "as may for any cause be recovered" against the defendant covers the plaintiff's costs of the action: John Church Co. v. Dorsey, 38 Misc. 542; 77 N. Y. Supp. 1065.

f. **Security for costs.**—Where a foreign corporation, plaintiff in an action of replevin, has given the undertaking required by § 1699, it cannot be compelled to give security for costs under § 3268: Vulcanite Cement Co. v. Williams, 46 Misc. 405.

g. As §§ 1730, 1731 and 1733 preclude the rendition of an affirmative judgment

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in favor of the defendant in replevin, for damages not connected with the chattels, the damages recoverable upon the plaintiff's undertaking are only such as the statute authorizes in a replevin suit: Dickson v. Bickershoff, 48 Misc. 353.

§ 1700. How chattel to be replevied.

§ 1334 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

See § 1698, ante, Provision where a part only is replevied.

a. If any. chattel described in the affidavit is found in the possession of the defendant or his agent, the sheriff to whom the affidavit is directed must forthwith replevy it by taking it into his possession: Albany Belt & Supply Co. v. Grell, as Sheriff, 67 App. Div. 81; 73 N. Y. Supp. 580.

§ 1701. Id.; how taken from a building, etc.

See § 104, ante, Sheriff may command the power of the county.

See § 105, ante, Names of resisters to be certified.

See § 1694, ante, Plaintiff may require sheriff to replevy.

§ 1334 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1702. Replevied chattel; how kept, etc.

See § 3307, post, Fees of sheriff.

§ 1704. When defendant may reclaim chattel; proceedings thereupon.

§ 1337 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. The value of a horse which died after possession had been retaken by the defendant may not be recovered by the plaintiff: Burke v. Graham, 106 App. Div. 108.

c. **Liability.**—A liability to the plaintiff by his recovery of a judgment in an action for replevin, arising out of an undertaking given the sheriff by the defendant in order to procure the return of chattels replevied and executed in the form required by § 1704, subd. 2, is a liability too contingent to be provable, as a debt by the plaintiff, as a creditor, in the defendant's voluntary proceedings in bankruptcy: Clemmons v. Brinn, 36 Misc. 157; 72 N. Y. Supp. 1066.

d. **Return.**—A defendant in a replevin suit, who wishes to have the replevied chattels returned to him without giving a counter undertaking and reclaiming under § 1704, must either demand their return in his answer or by notice under § 1725: Freeman v. U. S. Fidelity & Guar. Co., 43 Misc. 364.

§ 1706. When and to whom sheriff must deliver chattel.

e. The words "either party" in § 1707 mean the parties mentioned in § 1706. These two sections read together refer to a delivery by the sheriff to parties to the action, and those parties are the defendant or the plaintiff in the action and no one else. The claims of third parties are regulated by other sections of the Code, and in this respect the provisions of § 1707 differ materially from the provisions of § 18 of title 12, of chap, 8, of part 3, of the Revised Statutes regulating, prior to the Code of Procedure, the action of replevin: Albany Belting & Supply Co. v. Grell, 67 App. Div. 81; 73 N. Y. Supp. 580.

§ 1707. Penalty for wrong delivery by sheriff.

f. The words "either party" in § 1707 mean the parties mentioned in § 1706. These two sections read together refer to a delivery by the sheriff to parties to the action, and those parties are the defendant or the plaintiff in the action and no one else. The claims of third parties are regulated by other sections of the Code, and in this respect the provisions of § 1707 differ materially from the provisions of § 18 of title 12 of chap 8 of part 3 of the Revised Statutes regulating, prior to the Code of Procedure, the action of replevin: Albany Belting & Supply Co. v. Grell, 67 App. Div. 81; 73 N. Y. Supp. 580.

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§ 1709. Claim of title by third person; proceedings thereupon.

§ 1341 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. **Third party.**—The first sentence of § 452 applies only to equitable actions; under the latter part the application to be brought in as a party must be made by the party to be brought in; whether the party applies or resists defines an important difference, for, if he chooses to litigate his title in the action, he takes the disadvantage incident to his choice, but, if he is brought in against his will, he is deprived of the benefit of § 1709: Goldstein v. Shapiro, 85 App. Div. 83; 82 N. Y. Supp. 1038.

b. Where, in an action of replevin, the sheriff, after taking possession of the property, delivers it to the plaintiff, upon the latter giving the usual undertaking, if a third party interposes a claim to the possession of the property under § 1709, and the defendant makes no claim whatever to the property, the court will make an order interpleading the third party in the place of the defendant, but will make no direction as to the disposition of the property pending the action: Wright Stm. Eng. Wks. v. N. Y. Eng. Co., 44 Misc. 580.

c. **Claim.**—Under § 1709, providing for the claim of a chattel in replevin by third parties, a claim must be made against the defendant and must be made before the chattel is actually delivered to either party; an application under § 452 shall not be granted where the controversy between the parties can be completely determined without the intervention of others: Reimers v. Schmitt, 68 App. Div. 299; 74 N. Y. Supp. 122.

d. **Execution.**—Personal property seized by a marshal of the city of New York under an execution, cannot, while in the custody of the marshal, lawfully be taken by another marshal, under a writ of replevin; the marshal who has made the levy under the execution has a special interest in the property, which will entitle him to maintain another action of replevin against the marshal who seized the property under the writ of replevin, and is not obliged to resort to the remedy furnished by § 1709: Pracht v. Gunn, 69 App. Div. 396; 74 N. Y. Supp. 991.

e. **Sheriff.**—§§ 1709 and 1710, in regard to the claim of title by a third person of articles replevied, were not intended to protect an officer who took articles into his possession, not called for by the papers, but of an officer who replevied articles called for by the papers in the action: Einstein v. Dunn, 61 App. Div. 195; 70 N. Y. Supp. 520; 32 Civ. Pro. R. 64.

§ 1710. Action against sheriff upon such claim.

§ 1341 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

f. §§ 1709 and 1710, in regard to the claim of title by a third person of articles replevied, were not intended to protect an officer who took articles into his possession not called for by the papers, but of an officer who replevied articles called for by the papers in the action: Einstein v. Dunn, 61 App. Div. 195; 70 N. Y. Supp. 520; 32 Civ. Pro. R. 64.

§ 1711. Indemnity to sheriff against such action.

§ 1341 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

See § 576, ante, Examination and justification of bail.

See § 810 et seq., General provisions relating to bonds and undertakings.

§ 1712. When agent, etc., may make affidavit for replevin or return.

§ 1341 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

g. **Affidavits** on behalf of defendant to obtain the return of a replevied check, made by his attorney, who does not disclose his authority to act for defendant and who states the ground of his belief to be certain letters, communications and conversations, but does not give the statements, conversations and letters themselves, nor how the informants derived their information, are insufficient; and a motion that the check replevied be delivered to the plaintiff must be granted: Agnew v. Latham, 54 Misc. 61.

§ 1714. Replevin, where order of arrest has been granted.

See § 549, subd. 2, ante, Order of arrest granted in action of replevin.

See § 550, subd. 1, ante, When the right to arrest depends partly upon extrinsic facts.

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§ 1716. Id.; how compelled.

See § 14, ante, Neglect to return is civil contempt.

See rule 6 (Sup. Ct.), How sheriff's return compelled.

§ 1717. Replevin papers to be made part of judgment-roll, etc.

See §§ 1237-1239, ante, Contents of, preparation and filing of judgment-roll.

§ 1719. When and how plaintiff may abandon his claim as to part.

See § 1728, post, Verdict for part of several chattels.

§ 1720. Title; how stated in pleading.

a. It is sufficient to allege that plaintiffs were the owner of the property without alleging facts upon which the ownership is based and that the ownership existed at the time of the commencement of the action: Burdick v. Chesebrough, 94 App. Div. 532; 88 N. Y. Supp. 13.

§ 1721. Taking, etc.; how stated in complaint.

b. Where the original taking was wrongful, it is not necessary to allege that a demand was made: Milligan v. Brooklyn Warehouse Co., 34 Misc. 55; 68 N. Y. Supp. 744.

c. A complaint in an action for the wrongful detention of chattels sufficiently complies with the provisions of § 1721 which alleges that plaintiff's intestate at the time of her death was the owner of and entitled to the immediate possession of chattels, that plaintiff was duly appointed her administrator, that defendants are in possession of the chattels and that plaintiff has demanded their delivery to him and that the demand has been refused: Rogers v. Conde, 67 App. Div. 130.

§ 1722. Damages when chattel injured, etc., by defendant.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1725. Defendant may demand judgment for return.

d. A defendant in a replevin suit, who wishes to have the replevied chattels returned to him without giving a counter undertaking and reclaiming under § 1704, must either demand their return in his answer or by notice under § 1725: Freeman v. U. S. Fidelity & Guar. Co., 43 Misc. 364.

e. Under a judgment in favor of the plaintiff in replevin, he is required to take the chattel, if possession thereof can be had, and is compensated in damages for its depreciation or injury while in the defendant's possession down to the time of the trial: Pabst's Brewing Co. v. Rapid Safety F. Co., 54 Misc. 305.

§ 1726. Verdict, etc., what to state.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

f. **Value of property.**—This section requires that the value of the property shall be determined as of the date of the trial, and the value should not be determined from an affidavit made by the plaintiff over two years prior to the trial: Gilroy v. Everson-Hickok Company, 103 App. Div. 574.

g. When, in an action to recover certain shares of stock at the value thereof, the court charges that the defendant must return the stock or pay the value thereof, "which, on the evidence, I charge you is $1,740," the defendant cannot, on appeal, raise the point that the value was not the proven value at the time of trial, when he has taken no exception to such charge: Macdonald v. Macdonald, 112 App. Div. 330.

h. A judgment in replevin not determining the value of the property is a bar to a subsequent action for its value: Brawner v. Fahy, 64 App. Div. 122; 71 N. Y. Supp. 834.

i. **Damages.**—By § 1726, the verdict in an action of replevin must fix the damages, if any, of the prevailing party, and when it awards to the plaintiff a chattel which has not been replevied, it must also fix the value of the chattel at the time of the trial; under a verdict for a specified sum of money under the charge of the court directing the jury to find who was entitled to the chattel and, if plaintiff, the value of the chattel, the court should enter a judgment in the alternative form required by § 1730: Hitchcock v. Wimpleberg, 103 App. Div. 53.

j. Under a judgment in favor of the plaintiff in replevin, he is required to take the chattel, if possession thereof can be had, and is compensated in dam-

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ages for its depreciation or injury while in the defendant's possession down to the time of the trial: Pabst's Brewing Co. v. Rapid Safety F. Co., 54 Misc. 305.

a. **Municipal court.**—The jurisdiction of the municipal court of the city of New York in an action of replevin is limited and determined by the value of the chattels, and there is no limit to the amount of the damages, those being incidental to the right of possession: Barnard v. Devine, 34 Misc. 182; 68 N. Y. Supp. 859.

§ 1727. Substitute in certain cases for finding as to value.

b. This section is applicable only when the action has terminated favorably to the defendant on some pertinent issue raised by the answer: Roach v. Curtis, 115 App. Div. 765.

c. Where the defendant has a special property in the goods replevied, the verdict must fix the value of the special property of the defendant: Sprague v. King, 37 Misc. 792; 76 N. Y. Supp. 897.

§ 1728. Verdict, etc., for part of several chattels; judgment thereupon.

See § 1719, ante, When and how plaintiff may abandon his claim as to part.

§ 1730. Final judgment; docketing the same.

See § 1245 et seq., ante, Docketing a judgment.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

d. **Verdict.**—By § 1726, the verdict in an action of replevin must fix the damages, if any, of the prevailing party, and when it awards to the plaintiff a chattel which has not been replevied, it must also fix the value of the chattel at the time of the trial; under a verdict for a specified sum of money under the charge of the court directing the jury to find who was entitled to the chattel and, if plaintiff, the value of the chattel, the court should enter a judgment in the alternative form required by § 1730: Hitchcock v. Wimpleberg, 103 App. Div. 53.

e. **Damages.**—Where the judgment simply awarded the possession of the property and did not fix the plaintiff's damages, under § 1730, such judgment is a bar to the maintenance of a second action to recover the value of such property: Brawner v. Fahy, 64 App. Div. 122.

f. As §§ 1730, 1731 and 1733 preclude the rendition of an affirmative judgment in favor of the defendant in replevin for damages not connected with the chattels, the damages recoverable upon the plaintiff's undertaking are only such as the statute authorizes in a replevin suit: Dickson v. Bickershoff, 48 Misc. 353.

§ 1731. Execution; contents thereof.

See § 1405 et seq., ante, Executions against personal property.

See § 1430 et seq., ante, Execution sale of realty.

g. **Damages.**—As §§ 1730, 1731 and 1733 preclude the rendition of an affirmative judgment in favor of the defendant in replevin for damages not connected with the chattels, the damages recoverable upon the plaintiff's undertaking are only such as the statute authorizes in a replevin suit: Dickson v. Bickershoff, 48 Misc. 353.

§ 1732. Id.; sheriff's power to take chattel.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1733. Action on undertaking; when maintainable.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

h. **Bond.**—An action may be maintained on the bond of a plaintiff in a replevin action, and he is guilty of a breach of the condition of the replevin bond, if he does not continue his replevin action: Verra v. Constantino et al. 84 N. Y. Supp. 222; 33 Civ. Pro. R. 189.

i. **Damages.**—As §§ 1730, 1731 and 1733 preclude the rendition of an affirmative judgment in favor of the defendant in replevin for damages not connected with the chattels, the damages recoverable upon the plaintiff's undertaking are only such as the statute authorizes in a replevin suit: Dickson v. Bickershoff, 48 Misc. 353.

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§ 1734. Sheriff's return, evidence therein.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1735. Injury, etc., no defense.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1736. Abatement and revival of action.

See § 755, ante, When action not to abate.

See § 761, ante, When court may order action abated.

§ 1737. Action; when and in what courts maintainable.

See § 1159, ante, Commissioner's other wilful neglect, a misdemeanor.

a. **Chattel mortgage.**—A suit in equity to foreclose a chattel mortgage is proper whenever the legal remedy of the holder of the mortgage is inadequate; and in such a suit the form of pleading, mode of procedure and jurisdiction of the court are the same as in an action to foreclose a mortgage on real property: Lembeck & Betz Brewing Co. v. Sexton, 184 N. Y. 185 mod'y 96 App. Div. 613; 88 N. Y. Supp. 1068.

§ 1738. Warrant to seize chattel; proceedings thereupon.

See § 1159, ante, Commissioner's other wilful neglect, a misdemeanor.

§ 1740. Action in inferior court.

§ 1330 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1741. Application of this article.

See § 1331 of the Consolidation Act, etc.

§ 1742. Action by woman, married under 16, to annul marriage.

b. A woman is not compelled to bring an action on the ground that she had not attained the age of legal consent at the time of her marriage under this section, but she may bring it under § 1743: Wander v. Wander, 111 App. Div. 189.

c. The necessity and usefulness of § 1742, which states the circumstances under which a married woman under the age of eighteen may maintain an action to procure a judgment annulling the marriage, is obsolete and the action should be brought under § 1743 of the Code: Conte v. Conte, 82 App. Div. 335; 81 N. Y. Supp. 923; 34 Civ. Pro. R. 50.

d. Where the plaintiff at the time of her marriage was under the age of legal consent as fixed by the Domestic Relations Law, chap. 272 of 1896, she is entitled to maintain an action for the annulment of her marriage under §§ 1743 and 1744 and is not governed by the provisions of § 1742: Dickinson v. Earle, 96 App. Div. 639; 89 N. Y. Supp. 1102.

e. **Alimony.**—An application for alimony may be made pending an appeal to the court of appeals from a judgment reversing a judgment in favor of the wife: Di Lorenzo v. Di Lorenzo, 78 App. Div. 577; 79 N. Y. Supp. 566.

§ 1743. In what other cases marriage may be annulled.

See Penal Code, § 281, Compelling woman to marry against her will is a felony.

See § 4, The Domestic Relations Law, chap. 272 of 1896.

f. Marriage covers with oblivion ante-nuptial incontinence and lapses from virtue, and the concealment by a husband of the fact that previous to his marriage he unlawfully cohabited with a woman and had children by her is not a ground for the annulment of the marriage, as the fraud which will authorize such annulment under § 1743, subd. 4, is one relating to the essentials of the contract of marriage: Glean v. Glean, 70 App. Div. 576; 75 N. Y. Supp. 622.

g. **Age.**—Where the plaintiff at the time of her marriage was under the age of legal consent as fixed by the Domestic Relations Law, chap. 272 of 1896, she is entitled to maintain an action for the annulment of her marriage under §§ 1743 and 1744 and is not governed by the provisions of § 1742: Dickinson v. Earle, 96 App. Div. 639; 89 N. Y. Supp. 1102.

h. A woman may bring an action under this section when she had not at the time of her marriage attained the age of legal

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consent although the parties have cohabited and the parents of the plaintiff consented to the marriage: Wander v. Wander, 111 App. Div. 189.

a. Where an infant marries under the age of legal consent and never thereafter cohabits with her husband, she is entitled to have her marriage annulled upon the ground that she had not attained the age of legal consent: Silveira v. Silveira, 34 Misc. 267; 69 N. Y. Supp. 634.

b. **Fraud.**—Where it appears that the consent of the plaintiff in an action for the annulment of the marriage was obtained by a fraudulent representation, such misrepresentation must be deemed of a material nature under subd. 4, of this section, and the court may properly annul the marriage, if it appears that the plaintiff has not with full knowledge of the facts cohabited with the defendant: Di Lorenzo v. Di Lorenzo, 174 N. Y. 467; 34 Civ. Pro. R. 105, rev'g 71 App. Div. 509; 75 N. Y. Supp. 878.

c. Equity will annul a marriage on the ground of fraud where one of the parties at the time of its celebration was afflicted with a chronic, contagious and hereditary venereal disease, which fact was known to but concealed by him: Svenson v. Svenson, 178 N. Y. 54.

d. **Corroboration.**—Where it appears that the plaintiff in an undefended action to annul a marriage for fraud, married defendant with full knowledge of her advanced state of pregnancy, his uncorroborated testimony does not warrant a judgment in his favor: Bang v. Bang, 46 Misc. 196.

e. **Lunatic.**—In an action by a daughter to annul the marriage of her mother upon the ground that, at the time of the marriage, the mother was a lunatic and that the marriage was procured by the fraud and undue influence of the defendant, the incompetent is a necessary party and should be brought in upon her own motion: Coddington v. Larner, 75 App. Div. 532; 78 N. Y. Supp. 276.

f. In an action brought by a wife against her husband to annul their marriage on the ground that the husband was insane at the time the marriage was contracted, the supreme court has no power to award the plaintiff counsel fees and alimony *pendente lite:* Jones v. Brinsmade, 183 N. Y. 258, rev'g 104 App. Div. 619.

g. **Physical incapacity.**—Where a husband sues to annul his marriage on the ground of the physical incapacity of his wife and moves for a physical examination before trial and the defendant replies that she has been examined by three physicians whose privilege she will waive, the court, in denying the motion, should require a stipulation waiving the privilege to be signed by the attorneys of the parties: Geis v. Geis, 116 App. Div. 362.

h. **Uncle and niece.**—The marriage of an uncle and niece, before such marriages were made incestuous and void by statute, will not be annulled when the wife was not under any disability at the time of the marriage, and there was no fraud or concealment of the relationship, and she voluntarily cohabited with her husband and has had two children: Weisberg v. Weisberg, 112 App. Div. 231.

i. **Pleading capacity.**—The circumstances stated in the Domestic Relations Law, § 3, under which a marriage by a person whose husband or wife is living is not absolutely void need not be specifically negatived in pleading capacity to marry, and a reply to the defendant's allegation that the plaintiff was incompetent to enter into a contract of marriage by reason of the fact that another husband was living, is sufficient when it alleges that at the time of her former marriage the other party was married to another woman now living and that no divorce or annulment of that marriage had been obtained: Stein v. Dunne, 119 App. Div. 2.

§ 1744. Action when party was under the age of consent.

j. **Cohabitation.**—A woman may bring an action under this section when she had not at the time of her marriage attained the age of legal consent, although the parties have cohabited and the parents of the plaintiff consented to the marriage: Wander v. Wander, 111 App. Div. 189.

k. Where the plaintiff at the time of her marriage was under the age of legal consent as fixed by the Domestic Relations Law, chap. 272 of 1896, she is entitled to maintain an action for the annulment of her marriage under §§ 1743 and 1744 and is not governed by the provisions of § 1742; where the plaintiff has an absolute statutory right to an annulment of her marriage because contracted under the age of eighteen years, she does not lose such right merely because, after her complaint was drawn but before the action was commenced, she returned for a period to live with her husband, such transactions being before she had arrived at the age of eighteen: Dickinson v. Earle, 96 App. Div. 639; 89 N. Y. Supp. 1102.

l. **Counterclaim.**—A counterclaim interposed by a wife, to an action brought under the statute by her mother-in-law to annul her son's marriage upon the ground that he had not attained the

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age of legal consent, alleging the son's adultery and demanding a divorce from him, is demurrable for insufficiency as the son is not a party to the action and relief against him is impossible therein: Slocum v. Slocum, 37 Misc. 143; 74 N. Y. Supp. 447.

a. **Party.**—A father cannot maintain an action under § 1744 to annul the marriage of his infant daughter upon the ground that she had not at the time of the marriage attained the age of legal consent unless she is made a party to the action: Wood v. Baker, 43 Misc. 310.

§ 1747. Id.; where party was a lunatic.

b. **Counsel fees.**—In an action brought by a wife against her husband to annul their marriage on the ground that the husband was insane at the time the marriage was contracted, the supreme court has no power to award the plaintiff counsel fees and alimony *pendente lite:* Jones v. Brinsmade, 183 N. Y. 258, rev'g 104 App. Div. 619.

c. **Parties.**—An incompetent is a necessary party to an action to dissolve her marriage because of her incompetency and of fraud practiced on her: Coddington v. Larner, 75 App. Div. 532; 78 N. Y. Supp. 276.

§ 1749. Issue; when entitled to succeed, etc.

A child of a marriage, which is annulled on the ground of the idiocy or lunacy of one of its parents, is deemed, for all purposes, the legitimate child of the parent who is of sound mind. A child of a marriage, which is annulled on the ground that one or both of the parties had not attained the age of legal consent, is deemed, for all purposes, the legitimate child of both parents.

Id., § 28.

Amended by chap. 225 of 1903.

d. The necessity and usefulness of § 1742, which states the circumstances under which a married woman under the age of eighteen may maintain an action to procure a judgment annulling the marriage is obsolete, and the action should be brought under § 1743 of the Code: Conte v. Conte, 82 App. Div. 335; 81 N. Y. Supp. 923; 34 Civ. Pro. R. 50.

§ 1750. Action on the ground of force, fraud, etc.

e. **Fraud.**—A marriage will not be annulled on the ground of fraud, if it appears that before the commencement of the action the parties voluntarily cohabited with full knowledge of the facts constituting the fraud: Steimer v. Steimer, 37 Misc. 26; 74 N. Y. Supp. 714.

f. Equity will annul a marriage on the ground of fraud where one of the parties, at the time of its celebration, was afflicted with a chronic, contagious and hereditary venereal disease, which fact was known to but concealed by him: Svenson v. Svenson, 178 N. Y. 54.

g. **Parties.**—Where an action is brought under § 1750 to have an infant's marriage annulled on the ground that his consent was obtained by force, duress or fraud, the infant is a necessary party, and a demurrer to a complaint in which he is not either a party plaintiff or defendant is properly sustained: Fero v. Fero, 62 App. Div. 470; 70 N. Y. Supp. 742.

h. A father cannot maintain an action under § 1744 to annul the marriage of his infant daughter upon the ground that she had not, at the time of her marriage, attained the age of legal consent, unless she is made a party to the action: Wood v. Baker, 43 Misc. 310; 88 N. Y. Supp. 854.

§ 1751. Custody, maintenance, etc., of issue of such marriage.

See § 21, Domestic Relations Law, chap. 272 of 1896, Husband cannot contract to alter or dissolve the marriage, or to relieve husband from supporting his wife.

§ 1753. Certain proceedings regulated in action to annul marriage.

See § 1012, ante, Appointment of referee.

See § 1229, ante, Judgment in matrimonial actions.

See § 1757, post, Mode of trial in matrimonial actions.

i. A marriage cannot be annulled upon the confession of the defendant alone, and the fact that the plaintiff was permitted by the referee to confirm the confession, does not alter the rule or corroborate the confession: Steimer v. Steimer, 37 Misc. 26; 74 N. Y. Supp. 714.

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§ 1754. Judgment annulling a marriage; how far conclusive.

a. **Surrogate.**—A surrogate has power to decide whether the supreme court acquired jurisdiction in an action to annul a marriage: Matter of McCarren, 112 App. Div. 503.

§ 1756. In what cases action may be maintained.

See rule 18 (Sup. Ct.), Proof of service of summons in an action for divorce.

See rule 75 (Sup. Ct.), Questioning legitimacy of children.

See Penal Code, § 376, Assuming to grant a divorce is a misdemeanor.

See § 1768, post, When married woman deemed a resident.

b. **Residence.**—Although a wife was temporarily residing with her mother outside of the state, yet her legal residence will be presumed to be that of her husband: Harris v. Harris, 83 App. Div. 123; 82 N. Y. Supp. 568.

c. **Adultery.**—When in an action for absolute divorce the defendant recriminates and demands affirmative judgment, the special term should not refuse to confirm the report of a referee in favor of the plaintiff when the countercharge of adultery is only shown by the testimony of a single witness, which bears the stamp of improbability and is categorically denied by the plaintiff: De Marco v. De Marco, 116 App. Div. 304.

§ 1757. Answer; mode of trial; judgment by default.

See rules 72-76 (Sup. Ct.), Rules applying to actions for divorce.

See § 1012, ante, Appointment of referee.

See § 1229, ante, Judgment in action for divorce.

See § 1774, post, Regulations respecting judgment.

d. **Co-respondent—costs.**—Where, in an action for a divorce, a co-respondent is served with a copy of the summons and complaint, and thereupon appears, serves an answer, defends and fails in his defense, the court has a discretion as to the allowance of costs against him: Billings v. Billings, 73 App. Div. 69; 76 N. Y. Supp. 628.

e. The appearance of a co-respondent in an action for divorce does not invalidate the proceedings in such action prior to his appearance, and he is not entitled to a new trial of the issues already disposed of: Boller v. Boller, 111 App. Div. 240.

f. **Jury trial.**—The intent of the legislature in enacting § 1757, subd. 2, was to give a co-respondent all the rights of a party, and where a husband sues for an absolute divorce and his wife denies adultery and sets up a counterclaim of his adultery with an unmarried woman, and he does not reply thereto, the co-respondent is entitled to intervene, answer, and demand and have a jury trial of the issues so far as they affect her: Rixa v. Rixa, 35 Misc. 227; 71 N. Y. Supp. 815.

g. A party to an action for separation from bed and board is not entitled, as a matter of right, to have the issues of fact tried by a jury, even though the validity of the marriage is involved in the action and may be determined by the final judgment: Packard v. Packard, 88 App. Div. 339; 84 N. Y. Supp. 1090.

h. When in an action for divorce the alleged adultery has been put in issue by the answer, the defendant has a right to a jury trial. There is no waiver of this right on the part of the defendant by serving a notice for trial at special term after the plaintiff had served a similar notice. The sending of the issue to the jury leaves the trial at special term; rule 31 of the general rules of practice, providing that in certain instances a party desiring a jury trial shall give notice of special motion therefor, does not apply, as the right to a jury trial on the issue of adultery is given by § 1757: Wilcox v. Wilcox, 116 App. Div. 423.

i. **Reference.**—On the hearing of a motion to confirm the report of a referee authorizing the entry of a judgment of absolute divorce, it is the duty of the court to examine the testimony, and, although the reference was to hear, try and determine, it may refuse to confirm the report, unless it is satisfied, upon the whole case, that the divorce should be granted: Galloway v. Galloway, 92 App. Div. 300; 86 N. Y. Supp. 1078.

j. **Verdict.**—A verdict rendered upon issues framed in an action for divorce to try an allegation of adultery disputed by the defendant, is not one to enlighten the conscience of the court, but is governed by the same rules as apply to a verdict in any action at law triable by a jury, and is conclusive unless set aside for some proper reason: Fries v. Fries, 34 Misc. 478; 70 N. Y. Supp. 295.

k. **Alimony.**—While the court in an action for divorce has no power to strike out defendant's answer for his failure to obey an order to pay alimony *pendente lite*, it may stay affirmative proceedings on his part, such as moving the case for trial: Harney v. Harney, 110 App. Div. 20.

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a. A husband who has failed to pay alimony and counsel fees after being ordered so to do, is not entitled to move for a preference under § 791: Fennessy v. Fennessy, 111 App. Div. 181.

b. **Adultery.**—Where, in an action for absolute divorce, the plaintiff relies upon circumstantial evidence and situations claimed to necessitate the conclusion of adulterous conduct, upon the part of defendant, the court must inquire whether opportunity for and inclination toward wrongdoing have been sufficiently proved: Hutchinson v. Hutchinson, 53 Misc. 441.

c. **Service by publication.**—An action of divorce is an action *in rem* and service on the defendant without the state may be made by publication; but unless the defendant appear or jurisdiction has been obtained by attachment, a judgment for alimony and costs cannot be entered; an execution on a judgment for costs improperly entered will be vacated, though it would be better practice to move to set aside the judgment: Burch v. Burch, 116 App. Div. 865.

§ 1758. When divorce denied, although adultery proved.

See rule 72 (Sup. Ct.), Complaint must allege that adultery was committed without consent, etc.

d. **Condoned.**—The defendant will not be deemed to have condoned the offense, though she occupied the same room with the defendant after discovery of certain facts denied by the defendant: Harris v. Harris, 83 App. Div. 123; 82 N. Y. Supp. 568.

e. When at the trial of an action for divorce the defendant admits that he committed adultery in company with a detective whom the plaintiff had employed to watch him, and there is evidence that the offense was committed without the consent, procurement or connivance of the plaintiff, and it appears from the defendant's testimony that he acted intentionally and deliberately, judgment for the plaintiff on the report of a referee should be entered: Tuck v. Tuck, 117 App. Div. 421.

f. **Support.**—Though a wife's adultery has been established in a prior action for divorce, brought by the husband, which failed because of the husband's equal guilt, he is not released from his duty to support her, nor does such action bar a subsequent action by the wife for separation on the ground of abandonment; if the duty to support remains, counsel fees are proper in such action: Hawkins v. Hawkins, 110 App. Div. 42.

§ 1759. Regulations when action brought by wife.

See § 1769, post, Alimony; expenses of action; and costs; how awarded.

g. **Constitutionality.**— Constitutionality of chap. 742 of 1900, amending § 1759, authorizing modification of judgments for alimony — not decided: Livingston v. Livingston, 65 App. Div. 242; 72 N. Y. Supp. 487.

h. A final judgment granting a divorce and directing the payment of alimony and for the education and maintenance of plaintiff's children, creates and vests substantial rights which constitute property of the plaintiff, of which she cannot be deprived without due process of law, and chap. 742 of 1900, amending § 1759, permitting the court upon the application of either party to vary, or modify, or annul a judgment heretofore or hereafter granted providing for such alimony, is unconstitutional in so far as it attempts to confer a power upon the court to amend or vary final judgments rendered before the enactment of the amendment: Livingston v. Livingston, 173 N. Y. 377, aff'g 74 App. Div. 261; 77 N. Y. Supp. 476.

i. **Children.**—Every final decree of divorce or separation, in making a provision for the maintenance and education of minor children should contain a clause, reserving to the court the authority to require suitable provision therefor at any time in the future; if the final decree contains no provision for the support and education of the children the court is without power subsequently to incorporate such a direction in the decree: Salomon v. Salomon, 101 App. Div. 588; 34 Civ. Pro. R. 113.

j. When a wife, defendant in an action for divorce, has been guilty of gross misconduct and the final judgment has given the exclusive custody of the children to the husband and several applications by the wife for permission to see them at certain times have been denied, it is an abuse of discretion to grant such permission in the face of the former decisions to the contrary: Powers v. Powers, 119 App. Div. 436.

k. **Alimony.**—Subdivision 2 of this section, as amended by chap. 891 of 1895, does not give the court authority to open and rehear the question of alimony on the ground of newly discovered evidence which would not only defeat the award of alimony, but also the decree as well; the amendment of this subdivision by chap. 742 of 1900, although in terms retroactive, has no application to the decree previously made, as alimony allowed by a decree of divorce becomes a vested property right and may not be affected either by subsequent events or legisla-

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tion: Goodsell v. Goodsell, 82 App. Div. 65; 34 Civ. Pro. R. 76.

a. Alimony reduced in view of wife's remarriage and proof of facts showing ability of second husband to support her: Kiralfy v. Kiralfy, 36 Misc. 409; 73 N. Y. Supp. 708.

b. Alimony, awarded in an action for divorce, is not subject to be appropriated to the payment of debts and liabilities disconnected from necessary support and maintenance: Matter of Bolles, 78 App. Div. 180; 79 N. Y. Supp. 530.

c. Where, upon defendant's motion to be relieved from the further payment of alimony, directed by the final judgment, it appears that plaintiff has remarried and that the available income of her present husband approximates twice the income of the defendant, whose financial circumstances have probably deteriorated, the court, in its discretion, under §§ 1759 and 1771, may modify the judgment by annulling and setting aside the provisions therein regarding alimony: Comstock v. Comstock, 49 Misc. 599.

d. A decree of divorce in favor of a wife, fixed her status, and she may not assert the contrary, notwithstanding that her husband might have been in a position to assail the decree for lack of jurisdiction as to him: Buxbaum v. Mason, 48 Misc. 396.

e. **Dower.**—When plaintiff obtains a foreign divorce, even though it would not be a valid divorce in this state, she is bound by the decree and cannot recover dower in lands thereafter acquired by her husband: Voke v. Platt, 48 Misc. 273.

§ 1760. Id.; when action brought by husband.

See § 1606, ante, Complaint.

f. A husband who leaves his wife in this state and procures an absolute divorce from her in another state, may not impeach the decree on the ground of lack of jurisdiction in a proceeding against him for the non-support of the second wife: People ex rel. Shrady v. Shrady, 47 Misc. 333.

§ 1762. For what causes action may be maintained.

g. In an action brought by a wife against her husband to obtain a separation on the ground of cruel and inhuman treatment, a picture of the previous married life of the parties is essential to an intelligent and fair conclusion as to the effect which should be given to a particular act of cruelty on the part of the husband: Powers v. Powers, 84 App. Div. 588; 82 N. Y. Supp. 1022.

h. The action of a husband in charging his wife, in the hearing of their infant child and various other persons, with being unfaithful to him, may constitute cruel and inhuman treatment, entitling the wife to maintain an action for a separation: Smith v. Smith, 92 App. Div. 442; 87 N. Y. Supp. 137.

i. **Extravagance.**—The facts that a wife forged her husband's name on notes, that she was extravagant and exceeded her household allowance, does not, in the absence of other proof, constitute cruel and inhuman treatment entitling the husband to a separation under § 1762: Weaver v. Weaver, 74 App. Div. 591; 77 N. Y. Supp. 568.

j. **Jury trial.**—In an action for a separation, a party is not entitled, as a matter of right, to a jury trial: Packard v. Packard, 88 App. Div. 339; 84 N. Y. Supp. 1090.

k. **Abandonment.**—In an action for separation brought by a wife on the ground of abandonment, her testimony that she did not now want her husband to come back, that she was satisfied when he left the house, that she would no go back to him, etc., does not show a consent to the abandonment which prevents a decree of separation when the evidence as a whole shows that, when the husband announced his intention to go, she asked him to support her: Curtin v. Curtin, 111 App. Div. 447.

l. **Guardian.**—A judgment of separation in favor of a defendant husband will be vacated where it appears that the plaintiff was an infant and no guardian *ad litem* had been appointed; the failure to appoint such guardian is an error for which judgment may be vacated at any time within two years, under § 1290: Byrnes v. Byrnes, 109 App. Div. 535.

m. Though a wife's adultery has been established in a prior action for divorce brought by the husband, which failed because of the husband's equal guilt, he is not released from his duty to support her, nor does such action bar a subsequent action by the wife for separation on the ground of abandonment; if the duty of support remains, counsel fees are proper in such action: Hawkins v. Hawkins, 110 App. Div. 42.

n. **Ante-nuptial agreement.**—Where parties in anticipation of marriage enter into an agreement by which among other things, the woman agrees to release the man from any and all claims or demands as a husband, such as support of herself and her children, and it appears that the parties did not at the time of their marriage expect to have a common home for the present but to continue living separately as before, the wife cannot after marriage maintain an action for separation on the ground of

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abandonment until some attempt on her part to require her husband to live with her or effort on her part to live with him in a common home: Dennison v. Dennison, 52 Misc. 37.

a. **Cruelty.**—When, in an action for separation on the ground of cruelty, it is shown that the plaintiff's husband on several occasions beat and kicked her and falsely accused her of adultery and other misconduct, it is error to dismiss the complaint: McNulty v. McNulty, 119 App. Div. 150.

b. **Injunction.**—In an action for a separation brought by a wife against her husband, an order will not be made restraining and enjoining the defendant from living and cohabiting with another woman: Ellis v. Ellis, 55 Misc. 34.

§ 1763. Id.; in what cases.

c. **Removal from the state.**—When parties were married in this State which was the matrimonial domicile of both, the husband, by removing from the state after being defeated in an action for divorce brought against his wife in the courts of this state, does not oust the state of jurisdiction of a subsequent suit for separation brought by the wife: Woolworth v. Woolworth, 115 App. Div. 405.

§ 1764. Requisites of complaint.

See rule 76 (Sup. Ct.), Officer of court not to allow copy of pleading to be taken.

§ 1765. Defendant may set up plaintiff's misconduct.

See rule 74 (Sup. Ct.), Answer may set up adultery of the plaintiff as a defense.

See § 1012, ante, Qualification of the last section.

d. **Separation.**—In an action brought by a wife against her husband to obtain a separation on the ground of cruel and inhuman treatment, a picture of the previous married life of the parties is essential to an intelligent and fair conclusion as to the effect which should be given to a particular act of cruelty on the part of the husband: Powers v. Powers, 84 App. Div. 588; 82 N. Y. Supp. 1022.

e. Though a wife's adultery has been established in a prior action for divorce brought by the husband which failed because of the husband's equal guilt, he is not released from his duty to support her, nor does such action bar a subsequent action by the wife for separation on the ground of abandonment; as the duty of support remains, counsel fees are proper in such action: Hawkins v. Hawkins, 110 App. Div. 42.

§ 1766. Support, maintenance, etc., of wife and children.

See § 21, Domestic Relations Law, chap. 272 of 1896, Husband cannot contract to alter or dissolve the marriage, or to relieve husband from supporting his wife.

f. **Excessive.**—While a judgment for alimony obtained by a wife in a former action brought by her for separation remains in force, the court has no power to grant her temporary alimony as defendant in an action for absolute divorce; though the court may have power to modify such former decree, it can only be done by application in that action; when, in the action for divorce, the defendant wife denies the allegations and recriminates, counsel fees are proper, but an award of $1,000 is excessive and should be reduced to $500: Schmalholz v. Schmalholz, 111 App. Div. 543.

g. **Service by publication.**—Where a decree of separation was obtained on service by publication, the husband, the defendant, is the only person interested in that part of the judgment which required him to pay alimony, and if he recognizes its validity the vice in the decree is cured: Tisdale v. Rider, 119 App. Div. 594.

§ 1768. Married woman deemed a resident in certain cases.

h. Facts considered and held sufficient to establish that a wife, at the time she commenced a divorce action, dwelt within the state of New York, as required by § 1768: Doeme v. Doeme, 96 App. Div. 284; 89 N. Y. Supp. 215.

§ 1769. Alimony, expenses of action and costs; how awarded.

See § 21, Domestic Relations Law, chap. 272 of 1896, Husband cannot contract to alter or dissolve the marriage, or to relieve husband from supporting his wife.

i. Where, in a husband's action for divorce, the wife denies, under oath, the charge of adultery, she will be allowed counsel fees; the fact that defendant left the plaintiff, went to another state to live and there obtained a divorce

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from him, which, under the authorities of this state, was not binding upon him, is not a bar to her right to counsel fees: Dean v. Dean, 48 Misc. 149.

a. While a judgment for alimony obtained by a wife in a former action brought by her for separation remains in force, the court has no power to grant her temporary alimony as defendant in an action for absolute divorce; though the court have power to modify such former decree, it can only be done by application in that action; when, in the action for divorce, the defendant wife denies the allegations and recriminates, counsel fees are proper, but an award of $1,000 is excessive and should be reduced to $500: Schmalholz v. Schmalholz, 111 App. Div. 543.

b. **Preference.**—A husband who has failed to pay alimony and counsel fees, after being ordered so to do, is not entitled to move for a preference under § 791; the wife is entitled to have a counsel fee paid a reasonable time before trial of the action so that the case may be properly prepared: Fennessy v. Fennessy, 111 App. Div. 181.

c. **Stay of proceedings.**—While the court, in an action for divorce, has no power to strike out the defendant's answer for his failure to obey an order to pay alimony *pendente lite*, it may stay affirmative proceedings on his part, such as moving the case for trial: Harney v. Harney, 110 App. Div. 20.

d. **Subsequent action.**—Though a wife's adultery has been established in a prior action for divorce, brought by the husband, which failed because of the husband's equal guilt, he is not released from his duty to support her, nor does such action bar a subsequent action by the wife for separation on the ground of abandonment; if the duty to support remains, counsel fees are proper in such action: Hawkins v. Hawkins, 110 App. Div. 42.

e. **Appeal.**—The supreme court of the state of New York has power, under § 1769, to allow temporary alimony and counsel fees in an action for a separation pending an appeal from the court of appeals to the supreme court of the United States: Haddock v. Haddock, 109 App. Div. 502.

f. **Insane.**—In an action brought by a wife against her husband to annul their marriage on the ground that the husband was insane at the time the marriage was contracted, the supreme court has no power to award the plaintiff counsel fees and alimony *pendente lite:* Jones v. Brinsmade, 183 N. Y. 258, rev'g 104 App. Div. 619; 93 N. Y. Supp. 1136.

g. **Demand.**—Where a judgment of divorce directs a husband to pay alimony, a demand for the payment of such alimony made upon the husband by the wife's attorney in the action who, at the time of making the demand, did not exhibit to the husband any authority from the wife to make the demand or receive the alimony, is not sufficient to authorize the institution of contempt proceedings: Kalmanowitz v. Kalmanowitz, 108 App. Div. 296; 95 N. Y. Supp. 627.

h. **Adequately supported.**—In an action by a wife for a separation on the ground of cruel and inhuman treatment, consisting of charging her in the hearing of their children as being unfaithful to him, the wife should not be granted alimony, but should be granted counsel fees where it appears that she is living in her husband's home and being adequately supported by him: Smith v. Smith, 92 App. Div. 442; 87 N. Y. Supp. 137.

i. **Annulment.**—In an action to annul a marriage, the court has inherent jurisdiction aside from that granted by statute; an award of alimony *pendente lite* to a woman suing for absolute divorce should not embrace an allowance for the support and maintenance of her stepson: Wood v. Wood, 61 App. Div. 96; 70 N. Y. Supp. 72.

j. **Refusal to pay alimony.**—In an action for a separation, the husband's answer cannot be stricken out because of a refusal to pay alimony and counsel fees: Sibley v. Sibley, 76 App. Div. 132; 78 N. Y. Supp. 743.

k. **Disagreement of jury.**—In an action for a separation, where the issue raised was as to whether there had been a marriage between the parties which resulted in a disagreement of the jury, alimony may be granted; the expense of obtaining stenographer's minutes denied: Herrmann v. Herrmann, 88 App. Div. 76.

l. **Justification.**—In an action for separation the wife is entitled to alimony and counsel fees where her affidavits indicate that her husband's course of conduct towards her has justified her in leaving him and entitles her to live apart from him: Miers v. Miers, 35 Misc. 476; 71 N. Y. Supp. 1058.

m. **Execution.**—§ 779, authorizing an execution for the enforcement of an order directing the payment of "costs of a motion" or any other sum of money, does not authorize an execution to enforce an order made under §§ 1769 and 1771 for the support of the wife and the care and maintenance of the children, pending a suit for separation or divorce, the enforcement of which, by sequestration or contempt proceedings, is provided by §§ 1772 and 1773: Weber v. Weber, 93 App. Div. 149.

n. **Payment of debts.**—Alimony, awarded in an action for divorce, is not subject to be appropriated to the payment of debts and liabilities disconnected from necessary support and maintenance: Matter of Bolles, 78 App. Div. 180; 79 N. Y. Supp. 530.

o. **Appeal.**—In order to support an award of alimony to a wife, pending an appeal by her husband from a judgment

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granting her an absolute divorce and a reference upon the question of alimony, the wife must establish both her inability to support herself pending such reference and appeal, and the husband's ability to pay alimony: Poillon v. Poillon, 75 App. Div. 536; 78 N. Y. Supp. 323.

a. In an action by a husband to annul a marriage, where the appellate division reverses a judgment in the husband's favor and grants a new trial, the stay obtained by the husband under § 1310 by perfecting an appeal to the court of appeals, will not prevent the wife from making a motion for the payment of alimony, and the application for alimony is not to be regarded as having been made after final judgment but rather before trial, and the right to the relief sought is within the express provisions of § 1769: Di Lorenzo v. Di Lorenzo, 78 App. Div. 577.

b. **Counsel fee.**—Counsel fee allowed pending an action for separation cannot be collected from the husband's executor's after his death: Kellogg v. Stoddard, 89 App. Div. 137; 84 N. Y. Supp. 1015.

c. **Contempt.**—Proceedings to punish a husband for contempt for non-payment of alimony are to be construed *stricti juris* and all rights of the defendant must be carefully protected, and he cannot be adjudged guilty of contempt unless there has been a literal compliance with the law: Goldie v. Goldie, 77 App. Div. 12; 79 N. Y. Supp. 268.

d. When process in contempt proceedings for failure to pay alimony may be served without the state: Woolworth v. Woolworth, 115 App. Div. 405.

e. **Costs against co-respondent.**—Costs may be awarded against a co-respondent who appears: Billings v. Billings, 73 App. Div. 69; 76 N. Y. Supp. 628.

f. **Prima facie case.**—Where a wife presents a *prima facie* case in an action for separation or divorce, or a *prima facie* defense to such an action, and there is reasonable ground to believe that she will succeed, there is no propriety in the supreme court refusing to exercise the authority conferred by § 1769, of making temporary provision for her support and the support of the children, pending the action, and relegating her and them to courts of limited jurisdiction to there institute proceedings of a criminal nature against the husband and father: Weigand v. Weigand, 103 App. Div. 42; 34 Civ. Pro. R. 186.

g. **Separation agreement.**—A separation agreement executed between husband and wife when they are living together as such is void and does not prevent the court from granting permanent alimony in a subsequent action for divorce: Maney v. Maney, 119 App. Div. 765.

h. **Service by publication.**—A judgment for alimony and costs cannot be awarded against a defendant in an action for divorce, if he was served by publication, and did not appear in the action: Edwards v. Edson, 119 App. Div. 684.

i. **Alimony pendente lite.**—To entitle a wife to alimony *pendente lite* in an action for separation, she must present to the court evidence to show that she had reasonable grounds to commence the action, and that there is reasonable probability that she will succeed; alimony should not be granted when it appears that the wife left her home after one night's absence by her husband, necessitated by his business, and that the abandonment alleged occurred after such departure by the wife: Heyman v. Heyman, 119 App. Div. 182.

§ 1770. What is deemed a counterclaim.

j. By § 1770, the legislature intended to enable the parties in such cases to settle their whole controversy in one action; it is not a fatal objection that an answer does not in express terms label as a counterclaim, the matter set up as such, where it distinctly appears by the relief demanded that it was intended as a counterclaim: Mason v. Mason, 34 Civ. Pro. R. 193.

k. **Parties.**—A counterclaim interposed by a wife, to an action brought under the statute by her mother-in-law to annul her son's marriage upon the ground that he had not attained the age of legal consent, alleging the son's adultery and demanding a divorce from him, is demurrable, for insufficiency, as the son is not a party to the action and relief against him is impossible therein: Slocum v. Slocum, 37 Misc. 143; 74 N. Y. Supp. 447.

l. **Annulment.**—In an action for a separation a defense by way of counterclaim upon facts which would authorize the annulment of the marriage is not provided for in § 1770 and does not seem to be authorized by any other statute; § 1770 makes provision for a defense by way of counterclaim, but its application is limited to an action for a divorce *a vinculo* and *a mensa et thoro:* Durham v. Durham, 99 App. Div. 450; 34 Civ. Pro. R. 141; 91 N. Y. Supp. 295.

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§ 1771. Custody and maintenance of children, and support of plaintiff.

Where an action is brought by either husband or wife, as prescribed in either of the last two articles, the court must, except as otherwise expressly prescribed in those articles, give, either in the final judgment, or by one or more orders, made from time to time, before final judgment, such directions as justice requires, between the parties, for the custody, care, education, and maintenance of any of the children of the marriage, and where the action is brought by the wife, for the support of the plaintiff. The court may, by order, upon the application of either party to the action, after due notice to the other, to be given in such manner as the court shall prescribe, at any time after final judgment, annul, vary or modify such directions. But no such application shall be made by a defendant unless leave to make the same shall have been previously granted by the court by order made upon or without notice as the court in its discretion may deem proper after presentation to the court of satisfactory proof that justice requires that such an application should be entertained. Where an action is brought by a wife, as prescribed in article second of this chapter, and a final judgment of divorce has been rendered in her favor, the court, upon the application of the defendant on notice, and on proof of the marriage of the plaintiff after such final judgment, must by order modify such final judgment and any orders made with respect thereto, by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the plaintiff.

2 R. S. 147, § 59.

Amended by chap. 891 of 1895 and chap. 339 of 1904.

a. **Decree.**—A re-marriage of a wife who has obtained a divorce constitutes a very important factor in the determination of an application of former husband for modification of decree in regard to alimony: Kiralfy v. Kiralfy, 36 Misc. 407; 73 N. Y. Supp. 708.

b. § 1771 authorizing the court, upon the application of either party upon due notice to the other party, to annul, vary or modify a direction contained in a final decree of divorce respecting the support and maintenance of the children of the marriage and for the support of the wife, only applies where the final decree contained such a provision; the legislature in changing "may" to "must," when enacting § 1771 did not intend to make it mandatory upon the court to make provision for the support and education of the children before a decree or in every decree of divorce, but to make the action of the court, granting or refusing to make provision, reviewable on appeal: Salomon v. Salomon, 101 App. Div. 588; 34 Civ. Pro. R. 113.

c. **Execution.**—§ 779 authorizing an execution for the enforcement of an order directing the payment of "costs of a motion" or any other sum of money, does not authorize an execution to enforce an order made under §§ 1769 and 1771 for the support of the wife and the care and maintenance of the children, pending a suit for separation or divorce, the enforcement of which by sequestration or contempt proceedings is provided by §§ 1772 and 1773: Weber v. Weber, 93 App. Div. 149.

d. **Alimony.**—In an action to annul a marriage, the court has inherent jurisdiction, aside from that granted by statute; an award of alimony *pendente lite* to a woman suing for absolute divorce should not embrace an allowance for the support and maintenance of her stepson: Wood v. Wood, 61 App. Div. 96; 70 N. Y. Supp. 72.

e. Where, upon defendant's motion to be relieved from the further payment of alimony directed by the final judgment, it appears that the plaintiff has remarried and that the available income of her present husband approximates twice the income of the defendant whose financial circumstances have probably deteriorated, the court in its discretion, under §§ 1759 and 1771, may modify the judgment by

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annulling and setting aside the provisions therein regarding alimony: Comstock v. Comstock, 49 Misc. 599.

a. **Habeas corpus.**—When, by consent of parties on *habeas corpus* to obtain possession of a child, the court has ordered that the child be put in a Roman Catholic institution there to be educated until its majority, and that the father pay for its support and for the services of the mother's counsel, said father cannot be punished as for a contempt in failing to make such payments, when the child was not in fact placed in such Roman Catholic institution, but was placed in some other institution by consent of the parties: People ex rel. Barker v. Stringer, 110 App. Div. 364.

§ 1772. Support, maintenance, etc., of wife and children. Sequestration.

Where a judgment rendered, or an order made, as prescribed in this article, or in either of the last two articles, or a judgment for divorce or separation rendered in another state, upon the ground of adultery upon which an action has been brought in this state, and judgment rendered therein, requires a husband to provide for the education or maintenance of any of the children of a marriage, or for the support of his wife, the court may, in its discretion, also direct him to give reasonable security, in such a manner, and within such a time, as it thinks proper, for the payment, from time to time, of the sums of money required for that purpose. If he fails to give the security, or to make any payment required by the terms of such a judgment or order, whether he has or has not given security therefor; or to pay any sum of money which he is required to pay by an order, made as prescribed in section 1769 of this act; the court may cause his personal property, and the rents and profits of his real property, to be sequestered, and may appoint a receiver thereof. The rents and profits, and other property, so sequestered, may be, from time to time, applied, under the direction of the court, to the payment of any of the sums of money specified in this section, as justice requires.

2 R. S. 147, § 60.

Amended by chap. 318 of 1904.

See § 21, Domestic Relations Law, chap. 272 of 1896, Husband cannot contract to alter or dissolve the marriage, or to relieve husband from supporting his wife.

b. **Death of husband.**—An obligation to pay alimony ceases at the death of the husband and although a decree awarding to the wife as alimony a certain sum annually "as long as she shall live," and requiring the husband under § 1772 to give the wife a mortgage on real estate, yet, the lien of the mortgage terminates with the death of the husband: Wilson v. Hinman, 182 N. Y. 408, rev'g 99 App. Div. 41; 90 N. Y. Supp. 746.

c. **Receiver.**—A husband cannot, because of the omission from an order appointing a receiver that he should give a bond, legally refuse to deliver his property to the receiver: Matter of Spies, 92 App. Div. 175; 86 N. Y. Supp. 1043.

d. **Execution.**—§ 779 authorizing an execution for the enforcement of an order directing the payment of "costs of a motion" or any other sum of money, does not authorize an execution to enforce an order made under §§ 1769 and 1771 for the support of the wife and the care and maintenance of the children, pending a suit for separation or divorce, the enforcement of which by sequestration or contempt proceedings is provided by §§ 1772 and 1773: Weber v. Weber, 93 App. Div. 149.

e. **Discretion.**—Under § 1772 the court has absolute discretion to require a defendant to give security for the payment of alimony: Maney v. Maney, 119 App. Div. 765.

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§ 1773. Id.; when enforced by punishment for contempt.

See § 14, ante, Civil contempts.

See § 2266 et seq., post, Proceedings to punish civil contempts.

a. The enforcement of the payment of alimony by proceedings for contempt is governed by § 1773 and not by the general provisions of § 1241; after the personal service of a certified copy of the decree, a personal demand, and a failure of the defendant to comply therewith, he is in contempt: Stanley v. Stanley, 116 App. Div. 544.

b. **Execution.**—§ 779 authorizing an execution for the enforcement of an order directing the payment of "costs of a motion" or any other sum of money, does not authorize an execution to enforce an order made under §§ 1769 and 1771 for the support of the wife and the care and maintenance of the children, pending a suit for separation or divorce, the enforcement of which by sequestration or contempt proceedings is provided by §§ 1772 and 1773: Weber v. Weber, 93 App. Div. 149.

c. **Circumstances.**—A defendant, who has refused to pay alimony awarded against him by a decree in an action for absolute divorce, cannot excuse the contempt by showing that his pecuniary circumstances are such that he cannot make the payments decreed to be made: Young v. Young, 35 Misc. 335; 71 N. Y. Supp. 744.

d. **Demand.**—Under chap. 17, title 3, which by § 1773 governs proceedings instituted for contempt for a failure to pay temporary alimony, it is necessary that a personal demand be made upon the defendant for the payment of the alimony, and that the order to show cause why he should not be punished for contempt be served on him personally; the service of such an order to show cause upon his attorney is not sufficient: Goldie v. Goldie, 77 App. Div. 12; 79 N. Y. Supp. 268.

e. **Trust fund.**—When a wife may reach, for arrears of alimony and counsel fee in her action for separation, the surplus of income of a trust fund created for her husband's benefit: McGlynn v. McGlynn, 37 Misc. 12; 74 N. Y. Supp. 744.

f. **Reduction of alimony.**—Application to reduce alimony will not be heard while husband is in contempt and without the jurisdiction of the court: Sibley v. Sibley, 66 App. Div. 552; 73 N. Y. Supp. 244.

g. **Demand.**—Where a judgment of divorce directs a husband to pay alimony, a demand for the payment of such alimony made upon the husband by the wife's attorney in the action, who, at the time of making the demand, did not exhibit to the husband any authority from the wife to make the demand or receive the alimony, is not sufficient to authorize the institution of contempt proceedings: Kalmanowitz v. Kalmanowitz, 108 App. Div. 296; 95 N. Y. Supp. 627.

h. In a proceeding to punish a party for contempt for failing to pay alimony, it must be shown that a demand for payment was made by a person authorized to receive payment: Conklin v. Conklin, 113 App. Div. 743.

i. When, by consent of parties on *habeas corpus* to obtain possession of a child, the court has ordered that the child be put in a Roman Catholic institution, there to be educated until its majority, and that the father pay for its support and for the services of the mother's counsel, said father cannot be punished as for a contempt in failing to make such payments when the child was not in fact placed in such Roman Catholic institution, but was placed in some other institution by consent of the parties: People ex rel. Barker v. Stringer, 110 App. Div. 364.

j. When an order for alimony and counsel fees *pendente lite* has been entered on defendant's stipulation, and the order therefor has been personally served on him within the state, and such order has been subsequently, on his motion to vacate the same as not being filed in the proper county, been ordered to be filed in the proper county *nunc pro tunc*, such second order and an order to show cause why he should not be punished for contempt, and his proceedings stayed for his failure to pay alimony, may be served on defendant in another state: Harney v. Harney, 110 App. Div. 20.

k. A husband who has failed to pay alimony and counsel fees, after being ordered so to do, is not entitled to move for a preference under § 791: Fennessy v. Fennessy, 111 App. Div. 181.

§ 1774. Regulations respecting judgment.

In an action brought as prescribed in this title, a final judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either the summons and a copy of the complaint were personally served upon the defendant; or the copy of the summons delivered to the defendant, upon personal service of the summons, or delivered to him without the state, or published, pursuant to an order for

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that purpose, obtained as prescribed in chapter fifth of this act, contains the following words, or words to the same effect, legibly written or printed upon the face thereof, to wit: " Action to annul a marriage; " " Action for a divorce; " or " Action for a separation; " according to the article of this title, under which the action is brought. Where the summons is personally served, but a copy of the complaint is not served therewith; or where a copy of the summons and copy of the complaint are delivered to the defendant without the state, the certificate or affidavit proving service must affirmatively state, in the body thereof, that such an inscription, setting forth a copy thereof, was so written or printed upon the face of the copy of the summons delivered to the defendant. No final judgment annulling a marriage, or divorcing the parties and dissolving a marriage, shall be entered, in an action brought under either article first or article second of this title, until after the expiration of three months after the filing of the decision of the court or report of the referee. Such decision or report must be filed and interlocutory judgment thereon must be entered within fifteen days after the party becomes entitled to file or enter the same, and cannot be filed or entered after the expiration of said period of fifteen days unless by order of the court upon application and sufficient cause being shown for the delay. Within thirty days after the expiration of said period of three months final judgment shall be entered as of course upon said decision or report, unless for sufficient cause the court in the meantime shall have otherwise ordered. Upon filing the decision of the court or report of the referee, a judgment annulling a marriage or divorcing the parties and dissolving a marriage, shall be interlocutory only and shall provide for the entry of final judgment granting such relief three months after entry of interlocutory judgment unless otherwise ordered by the court. The final judgment must be entered within thirty days after the expiration of said period of three months and cannot be entered after the expiration of such period of thirty days except by order of the court on application and sufficient cause being shown for the delay. The interlocutory judgment may, in the discretion of the court, provide for the payment of alimony until the entry of final judgment; it may include a judgment for costs, when costs are awarded, in which case said judgment for costs shall be docketed by the clerk, and thereupon shall have the same force and effect as if docketed upon the entry of final judgment therein, except that it shall not be enforceable by execution or punishment until the entry of final judgment in said action.

New. Amended by L. 1902, c. 364; L. 1903, c. 488; L. 1905, c. 537 (in effect Sept. 1, 1905).

Amended by chap. 364 of 1902, chap. 488 of 1903 and chap. 537 of 1905.

See § 1757, ante, Judgment by default in divorce actions.

a. Rule 76 of the general rules of practice, which provides that: " No judgment in an action for a divorce shall be entered except upon the special direction of the court," is not inconsistent with the provision of § 1774, which directs that: "After the expiration of said period of three months final judgment shall be en-

tered, as of course, upon said decision or report unless for sufficient cause the court in the meantime shall have otherwise ordered: Phillips v. Phillips, 45 Misc. 232.

a. An interlocutory judgment of divorce in the form prescribed by § 1774 is ineffectual to dissolve the marriage relation between the parties: Pettit v. Pettit, 105 App. Div. 312.

b. **Filing judgment.**—In an action for divorce where no defense is interposed, a final judgment cannot be granted, unless the interposed judgment was filed more than three months; filing an interposed judgment with the clerk of a particular part of the supreme court is not sufficient; it is not sufficient that the interposed judgment was signed three months before: Rothstein v. Rothstein, 40 Misc. 101; 81 N. Y. Supp. 343.

c. **Collusion.**—The fact that, at or about the time when a wife obtained a judgment of absolute divorce from her husband, certain financial transactions between the husband and wife are settled, or that the wife voluntarily made and the husband accepted a provision for his future maintenance and support, is not a badge of fraud or collusion or even a suspicious circumstance requiring investigation: Doeme v. Doeme, 96 App. Div. 284; 89 N. Y. Supp. 215.

d. **Nunc pro tunc.**—An interlocutory decree of divorce may not be filed *nunc pro tunc;* but sufficient cause being shown, it may be filed forthwith: Townsend v. Townsend, 50 Misc. 277.

e. A decree of absolute divorce should not be refused if the guilt of the defaulting defendant is established, merely because the plaintiff's evidence as to the date of the marriage did not correspond to the date of the marriage contract not put in evidence: Suffin v. Suffin, 119 App. Div. 852.

§ 1776. When proof of corporate existence unnecessary.

f. Where an answer does not deny that the defendant is a corporation, it is not necessary for the plaintiff to make affirmative proof in regard to that fact: Blackburn v. American News Co., 89 App. Div. 82; 85 N. Y. Supp. 440.

g. **Evidence.**—What evidence that the defendant is a foreign corporation, based upon information to that effect derived from private publications called the "partnership and corporation directory" and the "directory of foreign corporations," and upon a telegram from the secretary of state of the state in which the corporation is alleged to be incorporated, is sufficient to support the attachment, considered: Steele v. Gilmour Manuf. Co., 77 App. Div. 199; 78 N. Y. Supp. 1078.

§ 1777. Misnomer; when waived.

h. Although a corporation sues under a wrong name, the defect must be raised unequivocally by the answer or it is waived; the question of misnomer is not raised by a mere allegation that the plaintiff is not incorporated: Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12.

§ 1778. Action against a corporation upon a note, etc.

i. § 1778 is a part of art. 1, of title 11, of chap. 15, of the Code of Civil Procedure, and as § 1804 expressly exempts municipal corporations from the operation of articles second, third and fourth of that title, the court found that it was "plainly to be inferred that the provisions of article first of that title are intended to be applied:" Rosenstock and Mayer v. City of New York, 101 App. Div. 9; 34 Civ. Pro. R. 16; 91 N. Y. Supp. 737.

j. **Service of order.**—In an action on a note given by a corporation, § 1778 in regard to the service of an order directing the trial of the issues only applies where the instrument shows on its face that the plaintiff is entitled to the amount sought to be recovered: Tautphoeus v. Harbor & Surburban Assn., 96 App. Div. 23.

k. **Justice's court.**—§ 1778 does not apply to an action against a domestic corporation upon a note brought in justice's court: Center v. Hoosick River Pulp Co., 43 Misc. 247.

§ 1779. When foreign corporation may sue.

See § 525, ante, Verification of pleading by foreign corporation.

See § 3268, post, Foreign corporation may be required to give security for costs.

See § 3343, subd. 18, post, Defining "domestic corporation," and "foreign corporation."

l. **Doing business.**—Proof that New York city commission merchants took from a dealer there an order for goods, forwarded it to a foreign corporation in Boston, Mass., and that the latter sent the goods direct to the dealer, does not show that the foreign corporation was "doing business" in the state of New York; and hence, where its assignee sues for the price of the goods, the vendee cannot defeat the

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action by insisting that, as the corporation had never procured a certificate of authority from our secretary of state nor paid our license tax, neither it nor its assignee can sue in our courts: Waller v. Rothfield, 36 Misc. 177; 73 N. Y. Supp. 141.

a. A foreign banking corporation may maintain an action on a note in the courts of the state of New York, without filing the instrument in writing required by the Banking Law, chap. 689 of 1892, §§ 31 and 32, as the mere bringing of such an action does not constitute "doing business" within the state of New York: Citizens' State Bank v. Cowles, 89 App. Div. 281; 86 N. Y. Supp. 38.

b. What does not constitute "doing business" in the state of New York: Cummer L. Co. v. Assoc. Mfrs.' Ins. Co., 67 App. Div. 151; 73 N. Y. Supp. 668.

c. **English court.**—No such jurisdiction is acquired over a New York stockholder in an English corporation by serving him in New York with a process in an action in an English court, as will support a personal judgment and which will have force and bind either him or his property: Bank of China, etc., v. Morse, 168 N. Y. 458, aff'g 44 App. Div. 435; 61 N. Y. Supp. 268.

d. **License fee.**—A foreign corporation doing business in the state of New York must, in order to maintain an action therein, show, in addition to fact that it has procured a certificate from the secretary of state as provided by the General Corporation Law, § 15, chap. 687 of 1892, that it has paid the license fee and obtained the receipt required by the Tax Law, § 181, chap. 908 of 1896: Parmele Co. v. Haas, 67 App. Div. 457; 73 N. Y. Supp. 986.

e. **Contract.**— A deposit of money with a promise to repay, made in this state, is the making of a contract within this state, sufficient to give the courts jurisdiction: Munger Vehicle Tire Co. v. Rubber Goods Mfg. Co., 39 Misc. 817; 81 N. Y. Supp. 302.

f. **Non-resident.**—A foreign corporation transacting business within the state of New York is not regarded as a non-resident as to the business, which it carries on within the jurisdiction of the courts of the state of New York: India Rubber Co. v. Katz, 65 App. Div. 349; 72 N. Y. Supp. 658.

g. **Municipal court.**—A foreign corporation, having a place for the regular transaction of business in the state of New York is included in the term "person" used in § 1370 of Greater New York charter, chap. 378 of 1897, and may bring an action in the municipal court of the city of New York: Scharmann & Sons v. De Palo, 66 App. Div. 29; 72 N. Y. Supp. 1008.

h. **The right of a foreign** corporation, authorized to do business in this state, to maintain an action in like manner and subject to the same regulations as a domestic corporation, is not affected by the extension of the jurisdiction of the municipal court to actions against foreign corporations having an office in the city of New York: Western Nat. Bank v. Kelly, 48 Misc. 366.

i. **Complaint.**—When the complaint of a foreign corporation sets out only two isolated contracts for the sale of goods, and the breach thereof by the defendant, it is not necessary that the complaint allege that the plaintiff has complied with the provisions of § 15 of the General Corporation Law: Ozark Cooperage Co. v. Quaker City Cooperage Co., 112 App. Div. 62.

j. **Presumption.**—The presumption is that a foreign corporation has a right to sue in this state, and none but foreign stock corporations are within the prohibition: South Bay Co. v. Howey, 113 App. Div. 382; 98 N. Y. Supp. 909.

k. **Appeal.**—A foreign corporation, under § 1779, is given the same right to appeal to the courts of this state as a domestic corporation, except in the special instances referred to in sections of the General Corporation Law and the Tax Law: Matter of Estate of Rosenblatt, 52 Misc. 659.

§ 1780. When foreign corporation may be sued.

See § 315, ante, Jurisdiction of the city court of New York in regard to foreign corporations.

See § 432, ante, Personal service upon a foreign corporation.

See § 3343, subd. 18, post, Defining "foreign corporation."

l. Under § 1780, the court obtains jurisdiction of a foreign corporation, at the instance of a non-resident only where the contract was made within the state, or relates to property situate within the state at the time of making thereof, or where the cause of action arose within the state: Morse et al. v. Acme Cycle Co., 38 Misc. 817; 78 N. Y. Supp. 1127.

m. Except as expressly provided in § 1780, the supreme court of this state has no jurisdiction of an action brought by one foreign corporation against another: Snow, Church & Co. v. Snow-Church Co., 80 App. Div. 40.

n. **Demurrer.**—§ 1786 does not relate to a cause of action, but merely to the jurisdiction of the court to entertain the action, and unless it appears on the face of the complaint that the action is one not permitted by this section of the Code, an objection will be unavailing on de-

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murrer; it will be assumed, for the purpose of the sufficiency of the complaint, that the plaintiff is a resident of the state, and, therefore, competent to bring the action: MacGinniss v. Amalgamated Copper Co., 45 Misc. 106; 91 N. Y. Supp. 591.

a. A complaint in an action against a foreign corporation which does not show that the plaintiff is a resident of this state is not demurrable on the ground that the plaintiff has not legal capacity to maintain the action under § 1780, as the fact does not appear on the face of the complaint; the objection that the facts stated in the complaint do not constitute a cause of action has no application to the question whether the plaintiff has legal capacity to maintain the action: Herbert v. Montana Diamond Co., 81 App. Div. 212.

b. **Stockholder.**—Where an action may be maintained by a minority stockholder of a foreign corporation residing in this state against two foreign corporations to procure an adjudication setting aside the cancellation of a lease on the ground of fraud; the action could not be maintained under § 1781 when the directors and officers of the interested corporations were not parties; one of the corporations could not maintain the same action against the other corporation under § 1780 in the courts of this state: Jacobs v. Mexican Sugar Refining Co., Ltd., 104 App. Div. 242.

c. **Attachment.**—§ 1780 is an enlargement, not a restriction, of the jurisdiction of the supreme court where attachment proceedings are attempted to be taken against a foreign corporation; in order to sustain an attachment brought against a foreign corporation upon a promissory note it is necessary for the plaintiff to show either that they are residents of this state or that the cause of action arose within this state: Coolidge v. American Realty Co., 91 App. Div. 14.

d. **Injunction.**—An injunction will not be granted in the state of New York regulating the internal management of a foreign corporation, and an injunction will not issue against a non-resident national bank not served with the summons: Hallenborg v. Greene, 66 App. Div. 590; 73 N. Y. Supp. 403.

e. **Breach of contract.**—Actions between non-residents and foreign corporations may be maintained in this state under § 1780 if the breach of the contract occurred within this state, no matter where the contract was made: Rosenblatt v. Jersey Novelty Co., 45 Misc. 59.

f. **Services rendered.**—An action may be maintained in the courts of this state under § 1780, subd. 3, by a non-resident against a foreign corporation for services performed, where it is alleged in the complaint and proved on the trial that plaintiff had an office in the state and that some of the services were performed here: Strawn v. Brandt-Dent Co., 71 App. Div. 234; 75 N. Y. Supp. 698.

g. **Surrogate.**—A surrogate has no power to grant to the public administrator of the county of New York letters of administration upon the estate of a non-resident, who left no property within the state: Hoes v. N. Y., N. H. & H. R. R. Co., 173 N. Y. 435.

h. **Judgment.**—The cause of action mentioned in this section, particularly under subd. 3, must be one local in its nature, with reference to the state, and a judgment recovered by one foreign corporation against another in the state of their domicile which has failed of enforcement in the jurisdiction where rendered, cannot be regarded, when sued upon within this state, as a cause of action arising therein, upon which an action may be maintained: Anglo-American Provision Co. v. Davis Prov. Co., 169 N. Y. 506, aff'g 50 App. Div. 273; 63 N. Y. Supp. 987.

i. **Municipal court.**—The right of a foreign corporation, authorized to do business in this state, to maintain an action in like manner and subject to the same regulations as a domestic corporation, is not affected by the extension of the jurisdiction of the municipal court to actions against foreign corporations having an office in the city of New York: Western Nat. Bank v. Kelly, 48 Misc. 366.

j. **Foreign.**—When foreign plaintiff suing foreign defendant cannot attach debt due defendant from foreign corporation: Bridges v. Wade, 113 App. Div. 350.

§ 1781. Action against directors, etc., of a corporation, for misconduct.

An action may be maintained against one or more trustees, directors, managers, or other officers of a corporation, to procure a judgment for the following purposes, or so much thereof as the case requires:

1. Compelling the defendants to account for their official conduct, including any neglect of or failure to perform their duties, in the management and disposition of the funds and property, committed to their charge.

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2. Compelling them to pay to the corporation, which they represent, or to its creditors, any money, and the value of any property, which they have acquired to themselves, or transferred to others, or lost, or wasted, by or through any neglect of or failure to perform or by other violation of their duties.

3. Suspending a defendant from exercising his office, where it appears that he has abused his trust.

4. Removing a defendant from his office, upon proof or conviction of misconduct, and directing a new election to be held by the body or board duly authorized to hold the same, in order to supply the vacancy created by the removal; or, where there is no such body or board, or where all the members thereof are removed, directing the removal to be reported to the governor, who may, with the advice and consent of the senate, fill the vacancies.

5. Setting aside an alienation of property, made by one or more trustees, directors, managers or other officers of a corporation, contrary to a provision of law, or for a purpose foreign to the lawful business and objects of the corporation, where the alienee knew the purpose of the alienation.

6. Restraining and preventing such an alienation, where it is threatened, or where there is good reason to apprehend that it will be made.

7. The court must, upon the application of either party, make an order directing the trial by a jury of the issue of neglect or failure of defendants to perform their duties; and for that purpose the questions to be tried must be prepared and settled as prescribed in section nine hundred and seventy of this act.

Amended by chap. 157 of 1907. In effect Sept. 1, 1907, but shall not apply to or affect any litigation at that time pending.

See Penal Code, §§ 610-614, Penalties for misconduct of officers and directors of corporations.

See § 2463 et seq., post, Supplementary proceedings may not be maintained against domestic, etc., corporation.

a. **Construction.**—§ 1781, authorizing an action by the attorney-general to remove directors and other officers of a corporation for misconduct, should not be so construed as to prevent the removal of directors for their misconduct as officers; one who is at the same time a director and an executive officer of a corporation and is guilty of misconduct in one capacity cannot insist that he is entitled to remain in partial control of the company in the other capacity: People v. Lyon, 119 App. Div. 361.

b. An action may be maintained under §§ 1781 and 1782 against the directors of a corporation, even though they are out of office: Jacobus v. Diamond Soda Water M. Co., 94 App. Div. 366; 88 N. Y. Supp. 302.

c. **Foreign corporation.**—§§ 1781 and 1782 apply only to domestic corporations and are not extended to foreign corporations by §§ 1809-1812; a director of a foreign corporation cannot maintain, in this state, an action under §§ 1781 and 1782 against the corporation and the other directors to compel the other directors to pay to the corporation funds belonging to it which they have wasted by a violation of their duties: Miller v. Barlow, 88 App. Div. 529; 85 N. Y. Supp. 310.

d. Where an action may be maintained by a minority stockholder of a foreign corporation residing in this state against two foreign corporations to procure an adjudication setting aside the cancellation of a lease on the ground of

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fraud; the action could not be maintained under § 1781 when the directors and officers of the interested corporations were not parties; one of the corporations could not maintain the same action against the other corporation under § 1780 in the courts of this state: Jacobs v. Mexican Sugar Refining Co., Ltd., 104 App. Div. 242.

a. §§ 1781 and 1782 are not restricted in their operation to domestic corporations and to directors thereof, and a director of a foreign corporation, having its principal office in this state, may maintain an action against former directors for an accounting and restoration of moneys of such corporation wasted by them: Miller v. Quincy, 179 N. Y. 294; 34 Civ. Pro. R. 118, rev'g 88 App. Div. 529; 85 N. Y. Supp. 310.

b. **Receiver.**—A director of a foreign corporation, under § 1781, may maintain an action against an officer and director of the corporation to account for his official conduct as a director and president of the corporation in the management and disposition of the funds and property committed to his charge, and to compel him to pay to the corporation the money and the value of the property which he has acquired to himself, or lost or wasted by a violation of his duty; the courts of this state have no authority to appoint a general receiver of the corporation and to enjoin it from exercising the powers granted by a sister state or a foreign government: Acken v. Coughlin, 103 App. Div. 1; 34 Civ. Pro. R. 200

c. In an action brought by a creditor of a corporation under this section to compel the officers of the corporation to account for property thereof, the fact that the corporation has been dissolved and a receiver appointed constitutes a sufficient excuse for the failure of the plaintiffs to obtain a judgment against the corporation and issue execution thereon before beginning a suit against its officers; the receiver of the corporation is not a necessary party to such an action even though he has been discharged prior to the commencement thereof: Lilienthal v. Betz, 108 App. Div. 222; 95 N. Y. Supp. 849, rev'd 185 N. Y. 153.

d. The right of action to compel an officer of a corporation to account for property of a corporation, which it is claimed that he has unlawfully obtained, inheres in the corporation, and in the event of the dissolution of the corporation passes to the receiver thereof; the discharge of the receiver does not divest him of the cause of action; either the receiver of the corporation or the directors thereof are necessary parties to an action brought by a stockholder of the corporation on behalf of himself and of all other stockholders to enforce such cause of action; Michael v. Betz, 108 App. Div. 241; 95 N. Y. Supp. 844.

e. Under §§ 1781 and 1782 an action may be maintained by the holder of a certificate of an insurance association in behalf of herself and parties similarly situated to establish her claim to compel the directors to account for moneys which they had misappropriated and to procure the removal of the receiver of the association and the appointment of a new receiver: Powell v. Hinkley, 93 App. Div. 138; 87 N. Y. Supp. 2.

f. **Contract.**—An action by stockholders of a corporation in its behalf, to cancel a contract made by its directors and for damages is not the statutory action provided for by §§ 1781 and 1782, but is an equitable action: Loewenstein v. Diamond Soda Water M. Co., 94 App. Div. 383; 88 N. Y. Supp. 313.

g. **Parties.**—In an action against officers of a corporation for misappropriation by one or more of the directors, the corporation is a necessary party defendant, but creditors and persons entitled to sue under § 1781 are not necessary parties: Miller v. Barlow, 78 App. Div. 331; 79 N. Y. Supp. 964.

h. **Mortgage.**—Where the control of one corporation is obtained by another, which improperly instigates the foreclosure of a mortgage on the property of the former, the right of action for the wrong vests in the injured corporation itself and not in its stockholders: Niles v. N. Y. C. & H. R. R. R., 69 App. Div. 144; 74 N. Y. Supp. 617.

i. **Trustee.**—Under §§ 1781 and 1782, a trustee of a domestic corporation may, where he seeks no receiver, maintain, without joining it as a party defendant, an action to prevent his co-trustees from making a threatened unlawful alienation of the property of the corporation, detrimental to it and its stockholders: Green v. Compton, 41 Misc. 21.

j. **Insolvent corporation.**—An action cannot be maintained under §§ 1781 and 1782 by the creditors of a dissolved insolvent corporation against an officer of such corporation upon his unfulfilled promise to pay the debts of such corporation if allowed to purchase its property at a judicial sale for less than its real value: Lilienthal v. Betz, 185 N. Y. 153.

k. **Malfeasance.**—An action may be maintained against officers and directors of a corporation by the attorney-general under §§ 1781 and 1782 for losses sustained in consequence of their malfeasance or official corruption, though the corporation itself, or its receiver, might have a remedy at law for the same misfeasance or neglect, and though each instance of loss does not involve every defendant: People v. Equitable Life Assurance Soc., 51 Misc. 339.

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§ 1782. By whom action to be brought.

a. An action may be maintained under §§ 1781 and 1782 against the directors of a corporation, even though they are out of office: Jacobus v. Diamond Soda Water M. Co., 94 App. Div. 366; 88 N. Y. Supp. 302.

b. **Foreign corporations.**—§§ 1781 and 1782 are not restricted in their operation to domestic corporations and to directors thereof, and a director of a foreign corporation, having its principal office in this state, may maintain an action against former directors for an accounting and restoration of moneys of such corporation wasted by them: Miller v. Quincy, 179 N. Y. 294, rev'g 88 App. Div. 529; 85 N. Y. Supp. 310; 34 Civ. Pro. R. 118.

c. A director of a foreign corporation may, under § 1781, maintain an action against an officer and director of the corporation to account for his official conduct as a director and president of the corporation in the management and disposition of the funds and property committed to his charge, and to compel him to pay to the corporation money and the value of the property which he has acquired to himself, or lost or wasted by a violation of his duty; the courts of this state have no authority to appoint a general receiver of the corporation and to enjoin it from exercising the powers granted by a sister state or a foreign government: Acken v. Coughlin, 103 App. Div. 1; 34 Civ. Pro. R. 200.

d. **Partnership.**—Where funds of a partnership have been misappropriated by some of the officers and directors and an action is brought, the partnership is not a necessary party in an action brought by one of the directors under § 1782 to compel the delinquent officers and directors to account for the fund misappropriated, and for the appointment of a permanent receiver; in such a case the plaintiff director stands in the position of a trustee with respect to the creditors of the corporation and need not make such creditors parties nor any of the other persons who would have been entitled to maintain the action under the provisions of § 1782: Miller v. Barlow, 78 App. Div. 331; 79 N. Y. Supp. 964.

e. **Trustee.**—Under §§ 1781 and 1782, a trustee of a domestic corporation may, where he seeks no receiver, maintain, without joining it as a party defendant, an action to prevent his co-trustees from making a threatened unlawful alienation of the property of the corporation detrimental to it and its stockholders: Green v. Compton, 41 Misc. 21.

f. **Contract.**—An action by stockholders of a corporation, in its behalf, to cancel a contract made by its directors and for damages is not the statutory action provided for by §§ 1781 and 1782 but is an equitable action: Lowenstein v. Diamond Soda Water Co., 94 App. Div. 383; 88 N. Y. Supp. 313.

g. **Insolvent corporation.**—An action cannot be maintained under §§ 1781 and 1782 by the creditors of a dissolved insolvent corporation against an officer of such corporation upon his unfulfilled promise to pay the debts of such corporation if allowed to purchase its property at a judicial sale for less than its real value: Lilienthal v. Betz, 185 N. Y. 153.

h. In an action brought by a creditor of a corporation under § 1781 to compel the officers of the corporation to account for property thereof, the fact that the corporation has been dissolved and a receiver appointed constitutes a sufficient excuse for the failure of the plaintiffs to obtain a judgment against the corporation and issue execution thereon before beginning a suit against its officers; the receiver of the corporation is not a necessary party to such an action, even though he has been discharged prior to the commencement thereof: Lilienthal v. Betz, 108 App. Div. 222; 95 N. Y. Supp. 849, rev'd 185 N. Y. 153.

i. An action may be maintained against officers and directors of a corporation by the attorney-general under §§ 1781 and 1782 for losses sustained in consequence of their malfeasance or official corruption, though the corporation itself, or its receiver, might have a remedy at law for the same misfeasance or neglect, and though each instance of loss does not involve every defendant: People v. Equitable Life Assurance Soc., 51 Misc. 339.

§ 1784. Action by judgment creditor for sequestration, etc.

See rule 80 (Sup. Ct.), Where motion for sequestration to be made.

See 1871 et seq., post, judgment creditor's action.

See § 1804 et seq., post, Supplementary proceedings may not be maintained against domestic, etc., corporation.

j. A judgment creditor's action to sequestrate the property of a corporation and a proceeding taken by its directors to procure a voluntary dissolution of it are of equal dignity: Matter of Hoagland, Robinson Co., 36 Misc. 28; 72 N. Y. Supp. 435.

k. **Receiver.**—In an action for sequestration of the property of a domestic corporation, an order appointing a tempo-

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rary receiver should be granted on an affidavit and not on the complaint alone; such relief should not be granted until final judgment unless it satisfactorily appears that it is necessary for the protection of the plaintiff's rights: Kieley v. Barron & Cooke H. & P. Co., 87 App. Div. 817; 84 N. Y. Supp. 306.

a. A receiver of a trust and life insurance company organized under the Insurance Law appointed in sequestration proceedings instituted under § 1784, represents the stockholders, policyholders and creditors of the corporation, is vested with title to all its property and choses in action and may maintain an action to set aside an illegal transfer of all its property made by it or its officers: Raymond v. Security Trust & Ins. Co., 44 Misc. 31; 89 N. Y. Supp. 753, aff'g 101 App. Div. 546, rev'g 111 App. Div. 191.

b. **Parties.**—Stockholders and trustees of a corporation, who are personally liable to its creditors, may be made parties to an action to set aside a fraudulent conveyance by it and to sequestrate its property: Bagley & Sewall Co. v. Lennig, 61 App. Div. 26; 70 N. Y. Supp. 242.

c. **Creditor.**—When, in a judgment creditor's action under § 1784, brought to sequester the property of the defendant, judgment for the plaintiff has been entered, another creditor of the defendant should not be allowed to open the judgment and defend when it is not shown that she has any defense on the merits; the validity of such claim should be determined under the judgment, which, pursuant to § 1793, provided for the exhibit and proof of all claims against the defendant: Trowbridge v. Troy & N. E. R. Co., 113 App. Div. 325.

§ 1785. Action to dissolve a corporation.

See § 1787, post, Temporary injunction.

See § 1809, Requisites of injunction against corporations.

See § 2419 et seq., post, Proceedings for voluntary dissolution.

d. § 1798 applies in actions seeking to enforce a forfeiture or annulment of the charter or franchise of a corporation for certain specific offenses, while § 1785 controls actions brought to dissolve a corporation which has become insolvent or discontinued its business: Hagmayer v. Alten, 36 Misc. 59; 72 N. Y. Supp. 623.

e. **Complaint.**—A complaint in an action by the attorney-general to procure a judgment against a real estate corporation for the annulment of its charter and the appointment of a receiver is demurrable, which merely contains a statement of the opinion of the superintendent of banks and the attorney-general that it is unsafe and inexpedient for the defendant to continue to transact business: People v. Manhattan Real Estate and L. Co., 175 N. Y. 133, rev'g 74 App. Div. 535; 77 N. Y. Supp. 837.

f. A complaint in an action by a stockholder under § 1785, to procure the dissolution of a corporation, fails to state a cause of action when it does not allege that notice to the stockholders as required by § 57 of the Stock Corporation Law has not been published, or that no notice has been mailed to or served upon the stockholders: Knickerbocker v. Groton Bridge & Mfg. Co., 111 App. Div. 145.

In an action under this section, directors are not necessary parties unless a personal judgment is asked against them. Id.

g. **Loan association.**—An action can be brought or maintained by the attorney-general in the name of the people of the state of New York, under and pursuant to § 18 of the Banking Law, and §§ 1785, 1786 and 1808 of the Code, where a loan association organized under the Banking Law has been insolvent for more than a year and the superintendent of banks notifies the attorney-general that he deems it unsafe for the corporation to continue business: People v. Manhattan Real Estate Co., 74 App. Div. 535; 77 N. Y. Supp. 837.

h. **Foreign corporation.**—When a foreign corporation is dissolved by judicial decree, and a permanent receiver appointed, it ceases to exist, and an order obtained subsequent to such dissolution decreeing an executrix to be in contempt for failure to obey a direction to pay over moneys to said corporation, should be set aside: Matter of Skelly, 109 App. Div. 58.

i. **Receiver.**—Where the permanent receiver of a banking corporation appointed in an action brought under the provisions of § 1785, subd. 4, refuses to sue stockholders upon their individual statutory liability because the action would be defeated by the statute of limitations, there is no authority in any provision of the Code by which a creditor may obtain an order compelling the attorney-general to bring the stockholders into his action so that their liability may be determined; § 1786 provides for a separate action by a creditor where the attorney-general, after notice, omits to sue, and it is only to this § 1786 that §§ 1790 and 1795, authorizing the making of stockholders parties, apply: People v. Commercial Bank, 37 Misc. 16; 74 N. Y. Supp. 806.

j. **Good faith.**—When an action to dissolve a corporation is brought by the attorney-general under § 1785 upon the ground that the defendant has remained insolvent and has failed to discharge its notes for one year, after a hearing upon notice to the defendant in which the insolvency and the failure to pay the

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notes were admitted, the action is justified, and it cannot be said that it was not brought in the discharge of a public duty and in good faith: People v. Troy Chemical Co., 118 App. Div. 437.

§ 1786. Id.; by whom to be brought.

a. An action can be brought or maintained by the attorney-general in the name of the people of the state of New York, under and pursuant to § 18 of the Banking Law, and §§ 1785, 1786 and 1808 of the Code, where a loan association organized under the Banking Law has been insolvent for more than a year, and the superintendent of banks notifies the attorney-general that he deems it unsafe for the corporation to continue business: People v. Manhattan Real Estate Co., 74 App. Div. 535; 77 N. Y. Supp. 837.

b. **Receiver.**—Where the permanent receiver of a banking corporation appointed in an action brought under the provisions of § 1785, subd. 4, refuses to sue stockholders upon their individual statutory liability because the action would be defeated by the statute of limitations, there is not authority in any provision of the Code by which a creditor may obtain an order compelling the attorney-general to bring the stockholders into his action so that their liability may be determined; § 1786 provides for a separate action by a creditor where the attorney-general, after notice, omits to sue and it is only to this § 1786 that §§ 1790 and 1795, authorizing the making of stockholders parties, apply: People v. Commercial Bank, 37 Misc. 16; 74 N. Y. Supp. 806.

c. **Complaint.**—A complaint in an action by a stockholder under § 1785, to procure the dissolution of a corporation, fails to state a cause of action when it does not allege that notice to the stockholders as required by § 57 of the Stock Corporation Law has not been published, or that no notice has been mailed to or served upon the stockholders: Knickerbocker v. Groton Bridge & Mfg. Co., 111 App. Div. 145.

§ 1787. Temporary injunction.

See § 602, ante, Writ of injunction abolished and order substituted.

See § 634, ante, Proof upon questions of fact.

d. §§ 1787, 1788 and 1789 apply generally to actions brought under the provisions of § 1781, to dissolve a corporation and actions by a judgment creditor for sequestration: Acken v. Coughlin, 103 App. Div. 1; 34 Civ. Pro. R. 200.

§ 1788. Receiver may be appointed. Permanent and temporary receiver. Powers, etc., of temporary receiver.

See rule 80 (Sup. Ct.), Motion for receiver, where made.

See rule 81 (Sup. Ct.), Power of receiverto employ counsel.

See § 90, ante, Officials not eligible to appointment as referee.

See § 1810, post, When receiver for the property of a corporation can be appointed.

See § 2423, post, Appointment of areceiver in proceedings for the voluntary dissolution of a corporation.

See § 3320, post, Receiver's commission.

e. §§ 1787, 1788 and 1789 apply generally to actions brought under the provisions of § 1781, to actions brought to dissolve a corporation and actions by a judgment creditor for sequestration: Acken v. Coughlin, 103 App. Div. 1; 34 Civ. Pro. R. 200.

f. A temporary receiver will be appointed where facts and circumstances are shown which render the appointment of a temporary receiver necessary in order to render effectual a final judgment in favor of the plaintiff: Kieley v. Barron & Cooke H. & P. Co., 87 App. Div. 317; 84 N. Y. Supp. 306.

g. **Rent.**—The occupation by a temporary receiver of premises which the corporation had rented for an unexpired year, the receiver promising to apply to the court for permission to pay the landlord rent for a portion of the premises occupied, does not make him personally liable for the rent: Metropolitan Life Ins. Co. v. Sanborn, 34 Misc. 531; 69 N. Y. Supp. 1009.

h. **Dissolution.**—In an action brought by a creditor of a corporation, under § 1781, to compel the officers of the corporation to account for property thereof, the fact that the corporation has been dissolved and a receiver appointed, constitutes a sufficient excuse for the failure of the plaintiffs to obtain a judgment against the corporation and issue execution thereon before beginning a suit against its officers; the receiver of the corporation is not a necessary party to such an action, even though he has been discharged prior to the commencement thereof: Lilienthal v. Betz, 108 App.

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Div. 222; 95 N. Y. Supp. 849, rev'd 185 N. Y. 153.

a. A receiver appointed in dissolution proceedings of an insolvent corporation, who is discharged before the commencement of an action by the creditors of such corporation against an officer thereof, under § 1781, is not a necessary party to such action: Lilienthal v. Betz, 185 N. Y. 153.

b. The right of action to compel an officer of a corporation to account for property of the corporation, which it is claimed that he has unlawfully obtained, inheres in the corporation, and in the event of the dissolution of the corporation passes to the receiver thereof; the discharge of the receiver does not divest him of the cause of action; either the receiver of the corporation or the directors thereof are necessary parties to an action brought by a stockholder of the corporation on behalf of himself and of all other stockholders to enforce such cause of action: Michel v. Betz, 108 App. Div. 241; 95 N. Y. Supp. 844.

§ 1789. Additional powers and duties may be conferred upon temporary receiver.

c. §§ 1787, 1788 and 1789 apply generally to actions brought under the provisions of § 1781, to actions brought to dissolve a corporation and actions by a judgment creditor for sequestration: Acken v. Coughlin, 103 App. Div. 1; 34 Civ. Pro. R. 200.

§ 1790. Making stockholders, etc., parties.

d. Where the capital stock of an insolvent corporation has not been fully paid and it has sufficient solvent defendant stockholders to pay the debt of a plaintiff creditor, who, by his assignee, sues as well for all others similarly situated, and no other creditors are or have made themselves parties to the action, the court will not attempt to reach and impound therein all possible assets of the corporation nor will it make its general assignee, theretofore created, account, but will impose the creditor's debt on the solvent defendant stockholders in proportion to the amounts of their stock: Hallett v. Metropolitan Messenger Co., 35 Misc. 659; 32 Civ. Pro. R. 346; 72 N. Y. Supp. 370.

e. §§ 1790, 1791 and 1792 are in *pari materia* and are to be construed together: Hallett v. Metropolitan Messenger Co., 69 App. Div. 258; 74 N. Y. Supp. 639.

f. **Receiver.**—Where the permanent receiver of a banking corporation appointed in an action brought under the provisions of § 1785, subd. 4, refuses to sue stockholders upon their individual statutory liability because the action would be defeated by the statute of limitations, there is no authority in any provision of the Code by which a creditor may obtain an order compelling the attorney-general to bring the stockholders into his action so that their liability may be determined; § 1786 provides for a separate action by a creditor where the attorney-general, after notice, omits to sue and it is only to this § 1786 that §§ 1790 and 1795, authorizing the making of stockholders parties, apply: People v. Commercial Bank, 37 Misc. 16; 74 N. Y. Supp. 806.

g. **Parties.**—In an action brought by a judgment creditor of a corporation to procure a dissolution thereof and a sequestration of property fraudulently transferred by it, the persons or corporations who hold such property in their possession may be joined as parties defendant: Matter of Sayre, 70 App. Div. 329; 75 N. Y. Supp. 286.

h. **Fraud.**—A judgment creditor of a corporation organized under chap. 40 of 1848 may maintain an action to set aside a trust deed made by the corporation on the ground of fraud, and, in the same action, may, under the provisions of § 1790, enforce the liabilities of the shareholders of the corporation for failure to pay the capital stock subscribed by them and also enforce the personal liabilities of the trustees for filing a false certificate of payment of one-half the capital stock: Bagley & Sewall Co. v. Lennig, 61 App. Div. 26.

§ 1791. When separate action may be brought against them.

i. §§ 1790, 1791 and 1792 are in *pari materia* and are to be construed together: Hallett v. Metropolitan Messenger Co., 69 App. Div. 258; 74 N. Y. Supp. 639.

§ 1792. Proceedings in either action.

j. Where the capital stock of an insolvent corporation has not been fully paid and it has sufficient solvent defendant stockholders to pay the debt of a plaintiff creditor, who, by his assignee, sues as well for all others similarly situated, and no other creditors are or have made themselves parties to the action, the court will not attempt to reach and impound therein all possible assets of the corporation nor will it make its general assignee, theretofore created, account, but will impose the creditor's debt on the solvent defendant stockholders in proportion to the amounts of their stock: Hallett v. Metropolitan

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Messenger Co., 35 Misc. 659; 32 Civ. Pro. R. 346; 72 N. Y. Supp. 370.

a. §§ 1790, 1791 and 1792 are in *pari materia*, and are to be construed together: Hallett v. Metropolitan Messenger Co., 69 App. Div. 258; 74 N. Y. Supp. 639.

§ 1793. Judgment; property of corporation to be distributed.

b. The words, "prescribed by law," as used in § 1793, refer to part 3, chap. 8, title 4, art 3, of the Revised Statutes, where § 79 directs the order in which receivers shall distribute money in payment of debts, and § 83 provides that, if, after the payment of the final dividend, any surplus remains, they "shall distribute the same among the stockholders of such corporation, in proportion to the respective amounts paid in by them, severally, on their shares of stock:" People v. Anglo-American S. & L. Assn., 60 App. Div. 389; 69 N. Y. Supp. 1054.

c. The term, "fair and honest creditors," used in § 1793, relating to the just and fair distribution of the property of a corporation in an action for its dissolution, includes not only those whose diligence has given direction to the conduct of the proceeding, but all creditors who are within the descriptive terms of the statute: People v. American Loan & Trust Co., 177 N. Y. 231, mod'y 87 App. Div. 139; 84 N. Y. Supp. 114.

d. **Receiver.**—Rule 30 of the supreme court, relating to the filing of exceptions to referees' reports, so far as it conflicts with § 1793, relating to the just and fair distribution of the assets of a corporation among its fair and honest creditors in an action for its involuntary dissolution, must yield, and the statute controls; therefore, all the unpreferred creditors whose claims have been duly proved or admitted are entitled to a ratable division among them of the fund to be distributed among the unpreferred creditors, notwithstanding that some of them failed to file exceptions to the referee's report, allowing interest to the preferred creditors, and were not represented upon appeals from the judgment entered thereon, which was reversed and the fund thereby created, except as they were represented by the receiver, since his appearance in all matters relating to the liquidation of the corporate affairs must be deemed an appearance for all concerned therein: People v. American Loan & Trust Co., 177 N. Y. 467.

e. **Creditor.**—When, in a judgment creditor's action under § 1784, brought to sequester the property of the defendant, judgment for the plaintiff has been entered, another creditor of the defendant should not be allowed to open the judgment and defend when it is not shown that she has any defense on the merits; the validity of such claim should be determined under the judgment which pursuant to § 1793 provided for the exhibit and proof of all claims against the defendant: Trowbridge v. Troy & N. E. R. Co., 113 App. Div. 325.

§ 1794. Id.; stock subscriptions to be recovered.

f. A complaint in an action brought by a creditor of a corporation against a stockholder thereof, under § 54 of the Stock Corporation Law, upon the ground that his stock had not been fully paid up, is demurrable where the allegation as to the defendant's indebtedness upon the stock relates to the time when the indebtedness of the corporation to the plaintiff was contracted, and not to the time when the plaintiff recovered judgment against the corporation upon such indebtedness: Dyer v. Drucker, 108 App. Div. 238.

§ 1795. Id.; as to liabilities of directors and stockholders.

g. Where the permanent receiver of a banking corporation appointed in an action brought under the provisions of § 1785, subd. 4, refuses to sue stockholders upon their individual statutory liability because the action would be defeated by the statute of limitations, there is no authority in any provision of the Code by which a creditor may obtain an order compelling the attorney-general to bring the stockholders into his action so that their liability may be determined; § 1786 provides for a separate action by a creditor where the attorney-general, after notice, omits to sue, and it is only to this § 1786 that §§ 1790 and 1795, authorizing the making of stockholders parties, apply: People v. Commercial Bank, 37 Misc. 16; 74 N. Y. Supp. 806.

§ 1798. Id.; by leave of court.

See § 1808, post, When attorney-general must bring action.

h. § 1798 applies in an action seeking to enforce a forfeiture or annulment of the charter or franchise of a corporation for certain specified offenses, while § 1785 controls actions brought to dissolve a corporation which has become

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insolvent or discontinued its business: Hagmayer v. Alten, 36 Misc. 59; 72 N. Y. Supp. 623.

a. **Railroad.**—The attorney-general is authorized to bring an action against a railroad company to vacate its charter for any violation of law of which it is guilty, such as the refusal to give a passenger a transfer without extra charge: People ex rel. Lehmaier v. Interurban Ry. Co., 177 N. Y. 296, dismissing appeal from 85 App. Div. 405; 83 N. Y. Supp. 622.

§ 1804. Certain corporations excepted from certain articles of this title.

See § 2463 et seq., post, Supplementary proceedings may not be maintained against domestic, etc., corporation.

Articles second, third, and fourth of this title do not apply to a religious corporation; or to a municipal or other political corporation, created by the constitution, or by or under the laws of this state; or to any corporation which the regents of the university have power to dissolve, except upon the application of the regents, or of the trustees of such a corporation; and in aid of its liquidation under such dissolution.

2 R. S. 466 (Part 3, c. 8, tit. 4), § 57.

Amended by chap. 290 of 1903, and chap. 501 of 1904, see chap. 501 of 1904, § 2, proceedings instituted after April 24, 1903, under arts. 2, 3 and 4 of chap. 15, tit. 2, of the Code validated and confirmed.

See § 1781, ante, Action against directors, etc., of a corporation for misconduct.

See § 1803, ante, Copy of judgment-roll to be filed and published.

b. § 1778 is a part of article 1 of title 2 of chap. 15 of the Code of Civil Procedure, and as § 1804 expressly exempts municipal corporations from the operation of articles second, third and fourth of that title, the court found that it was "plainly to be inferred that the provisions of article first of that title are intended to be applied:" Rosenstock and Mayer v. City of New York, 101 App. Div. 9; 34 Civ. Pro. R. 16; 91 N. Y. Supp. 737.

§ 1806. Injunction staying actions by creditors.

c. An injunction will not be granted under § 1806 to restrain a person holding a mortgage covering real estate of a corporation from commencing an action to foreclose such mortgage, on the ground that an appeal is pending from a judgment declaring another mortgage executed by the corporation to be void, particularly where the person sought to be restrained has obtained an order of the court permitting him to maintain the action of foreclosure: Davidson v. The John Good Cordage Co., 63 App. Div. 366.

§ 1808. When attorney-general must bring action.

d. Requisites of complaint in action by attorney-general to dissolve a corporation subject to the Banking Law: People v. Manhattan Real Estate and L. Co., 175 N. Y. 133, rev'g 74 App. Div. 535; 77 N. Y. Supp. 837.

§ 1809. Requisites of injunction against corporations in certain cases.

See § 1787, ante, Action to dissolve corporation; temporary injunction.

See § 1919, post, Actions against associations.

e. §§ 1781 and 1782 are not restricted in their operation to domestic corporations and to directors thereof, and a director of a foreign corporation, having its principal office in this state, may maintain an action against former directors for an accounting and restoration of moneys of such corporation wasted by them: Miller v. Quincy, 179 N. Y. 294; 34 Civ. Pro. R. 118, rev'g 88 App. Div. 529; 85 N. Y. Supp. 310.

f. **Testamentary injunction.**—A testamentary injunction restraining a telephone company from erecting telephone lines in front of plaintiff's premises does not suspend the ordinary and general business of the defendant corporation in violation of the provisions of this section: Royce v. Bell Telephone Co., 187 N. Y. 543, aff'g 115 App. Div. 920; 101 N. Y. Supp. 1142.

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§ 1810. Id.; of order appointing a receiver in certain cases.

A receiver of the property of a corporation can be appointed only by the court, and in one of the following cases:

1. An action, brought as prescribed in article second, third or fourth of this title.

2. An action brought for the foreclosure of a mortgage upon the property, of which the receiver is appointed, where the mortgage debt, or the interest thereupon, has remained unpaid, at least thirty days after it was payable, and after payment thereof was duly demanded by the proper officer of the corporation and where either the income of the property is specifically mortgaged, or the property itself is probably insufficient to pay the mortgage debt.

3. An action brought by the attorney-general, or by a stockholder, to preserve the assets of a corporation, having no officer empowered to hold the same.

4. A special proceeding for the voluntary dissolution of a corporation.

5. Upon the application of the regents of the university, in aid of the liquidation of a corporation whose dissolution they contemplate or have decreed; or upon the application of the trustees of such a corporation, with notice to the regents.

Where the receiver is appointed in an action, otherwise than by or pursuant to a final judgment, notice of the application for his appointment must be given to the proper officer of the corporation.

L. 1870, c. 151, § 3.
Amended by chap. 290 of 1903.

a. §§ 1810 and 1812 do not interfere with the inherent power in the supreme court to appoint a receiver of the property of a corporation, as distinguished from a receiver of the corporation itself: Popper v. Supreme Council, 61 App. Div. 405; 70 N. Y. Supp. 637.

b. § 1810, subd. 3, was never designed to permit the officers of a corporation to abandon their posts of duty and abdicate their official functions for the express purpose of shifting their burdens to the shoulders of the court: Zeltner v. Zeltner Brewing Co., 85 App. Div. 387; 83 N. Y. Supp. 366.

c. **Officers.**—After all the officers and directors of a corporation had resigned, an order was made under § 1810, subd. 3, appointing a receiver and restraining the creditors from taking further proceedings, and a creditor obtained an order vacating the order and allowing him to continue his action; after judgment was entered by such creditor the receiver made a motion to vacate the judgment on the ground that there had been no service of process upon the corporation as the summons and complaint were served on the president three days after he had resigned; *held*, that such service conferred no jurisdiction upon the court to proceed against the corporation: Yorkville Bank v. Zeltner B. Co., 80 App. Div. 578; 80 N. Y. Supp. 839; 33 Civ. Pro. R. 348.

d. Where all the officers of a corporation (except the secretary) and all its directors, resign for the express purpose of instituting an action to procure the appointment of a receiver under subd. 3 of § 1810, such resignations are not effected, and if the interest of the stockholders require it, the officers of the corporation may ask for its dissolution and for the appointment of a receiver under §§ 2419-2423, in which case the officers are not required to resign, but the action is instituted in their official capacity: Zeltner v. Zeltner Brewing Co., 174 N. Y. 247, aff'g 79 App. Div. 136; 80 N. Y. Supp. 338.

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§ 1812. Application of the last three sections.

See § 2463, post, Supplementary proceedings, application of Code provisions.

a. §§ 1810 and 1812 do not interfere with the inherent power in the supreme court to appoint a receiver of the property of a corporation as distinguished from a receiver of the corporation itself: Popper v. Supreme Council, 61 App. Div. 405; 70 N. Y. Supp. 637.

b. **Foreign corporations.**—§§ 1781 and 1782 apply only to domestic corporations and are not extended to foreign corporations by §§ 1809-1812; a director of a foreign corporation cannot maintain, in this state, an action under §§ 1781 and 1782 against the corporation and the other directors to compel the other directors to pay to the corporation funds belonging to it which they have wasted by the violation of their duties: Miller v. Barlow, 88 App. Div. 529; 85 N. Y. Supp. 310.

§ 1814. Action, etc., by and against executor, etc., to be brought in representative capacity.

See § 383, ante, Within three years.

See § 391, ante, When person liable, etc., dies without the state.

See § 392, ante, Cause of action accruing between the death of a testator or intestate, and the grant of letters.

See §§ 505-506, ante, Counterclaims in actions by and against executors and administrator.

See § 755 et seq., ante, Abatement of actions.

See § 1371, ante, Execution against an executor or administrator.

See § 1869, post, Receiver as successor of surviving executor, etc.

c. In an action by a tenant against executors who withhold possession of premises demised by them under a power in their testator's will, such executors are liable individually: Williamson v. Stevens, 84 App. Div. 518; 82 N. Y. Supp. 1047.

d. In an action against an executor, the fact that the word "as" is omitted between the executor's name and the word "executor" is not important: Pryor v. Milburn, 51 Misc. 596.

§ 1815. When personal and representative causes of action may be joined.

See § 484, subd. 9, ante, What causes of action may be joined.

e. **Appearance.**—Appearance of one sued individually and as executor in each capacity by a different attorney: Roche v. O'Connor, 95 App. Div. 496; 88 N. Y. Supp. 968.

f. **Equity.**—Even where causes of action were stated against the defendants individually and in their respective capacities, yet having arisen out of transactions connected with the same subject of action, they might properly be joined under § 1815, particularly as the action, being one in equity, it is not necessary that the causes of action should affect all of the defendants to the same extent or in the same way: Rogers v. Wheeler, 89 App. Div. 435.

g. **Arbitration.**—Where an administrator wrongfully revokes an agreement to arbitrate a matter connected with his decedent's estate, the other party may, under § 1815, sue the administrator both as such and individually to recover damages; it seems that the administrator in such a case is liable individually; the administrator is a party to the submission within the meaning of § 2384, that "where a party expressly revokes a submission, * * * any other party to the submission may maintain an action against him," but § 2384 does not afford an exclusive remedy for the wrongful revocation of a submission to arbitration: Magoun v. Magoun, 84 App. Div. 232.

h. **Torts.**—Torts committed by an executor in a continuance of the business of his testator are not committed in his representative capacity, and even the contracts of the business carried on by him under the authority of the will are his individual contracts: Blum v. Dabritz, 39 Misc. 800; 33 Civ. Pro. R. 290.

§ 1816. Id.; separate dockets and executions.

See § 1836, post, Costs, against executor when awarded.

See § 3246, post, Costs by or against an executor.

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§ 1817. Regulations, when some of the executors, etc., are not summoned.

a. In an action by a creditor to reach a fund conveyed by one since deceased in fraud of creditors, the general appearance of one of the executors of such deceased is, under § 1817, sufficient to bind both of his executors: Montgomery v. Boyd, 78 App. Div. 64; 79 N. Y. Supp. 879.

§ 1819. Action by legatee, etc., against executor, etc.

See § 1827, post, Security may be required from a legatee.

b. **Statute of limitations.**—In an application by a residuary legatee of the original testator, under § 2606, to require the executrix of the deceased executor to file an account, the statute of limitations does not commence to run until the accounts of the executor have been judicially settled: Matter of Irwin, 68 App. Div. 158; 74 N. Y. Supp. 443.

c. A motion to compel the executrix of a trustee to account to a successor trustee, to the end that the latter be paid a judgment, which he recovered as trustee in an action brought against the executrix for an accounting of the trust, is a proceeding to recover a demand that was due and, as such, is not governed by the ten years' statute of limitations and is barred by the lapse of six years—in analogy to an action at law: Matter of Cruikshank, 40 Misc. 325; 81 N. Y. Supp. 1029.

d. **Codicil.**—An action under § 1819 to recover two general legacies where the defendant alleged that the legacies were revoked by a codicil to a will, is an action at law and, if decided in favor of the defendant, the latter is entitled to costs, under § 3229, as a matter of right: Ladies' Union Benevolent Soc. v. Van Natta, 96 App. Div. 99; 88 N. Y. Supp. 1083.

e. **Chattel.**—An assignee of a legatee of a chattel is not entitled, under § 2727, to maintain a proceeding to compel the executrix, who is sole legatee of the remainder of the property, to render an account, where it appears that there are no outstanding debts; in such a case, the remedy of the assignee is to bring an action against the executrix, under § 1819 of the Code, to recover the chattel in question: Matter of Egan, 89 App. Div. 565; 85 N. Y. Supp. 663.

f. **Insurance policy.**—Where the amount of an insurance policy passes to a legatee named in the will of the assured, it may be recovered by such legatee and an action brought therefor within one year is not premature: Leonard v. Harney, 63 App. Div. 294; 71 N. Y. Supp. 546.

g. **Lien.**—In an action to enforce the payment of a legacy which, by the terms of the will, is made a lien upon real property devised under such will, the plaintiff is bound to prove, as a part of her substantiative case, that the legacy is a subsisting lien and remains unpaid, whether the action is one under § 1819 or an ordinary action for such relief in equity: Conkling v. Weatherwax, 90 App. Div. 585; 86 N. Y. Supp. 139.

h. **Counterclaim.**—In an action against an executor to compel the payment of a general legacy, he may not plead as a counterclaim that, after he had reduced the assets of the estate to possession, plaintiff's assignor forcibly took and converted a portion thereof: Lehleuter v. Schano, 49 Misc. 99.

i. **Surrogate's court.**—The provisions of § 1819, in regard to computing the time within which an action to recover a legacy, must be commenced, has no application to a proceeding in the surrogate's court to compel payment of the legacy: Matter of Cooper, 51 Misc. 381.

§ 1820. Id.; by infant; guardian's bond.

See § 475 et seq., ante, Security to infant by guardian.

§ 1821. When action barred by judgment against heir, etc.

j. Under § 2620, the will of a resident made and executed in this state and subscribed by witnesses residing here cannot be admitted to probate in this state, where its production is rendered impossible because it was filed in a probate court of another state, where it had previously been probated; such a will cannot be established by the issuance of a commission, as the commissioner would have no power to compel the attendance of the subscribing witnesses in the state in which the will was filed; it seems that in such a case an action to establish the will may be brought under § 1821: Matter of Law, 80 App. Div. 73; 80 N. Y. Supp. 410.

§ 1822. Limitation of action by creditor on claim rejected, etc.

See § 1836, post, Costs against executor, when awarded.

See § 2743, post, Decree for payment.

See § 3246, post, Costs against executor.

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a. **Disputed claim.**—Under §§ 1822 and 2743, as amended by chap. 595 of 1895, the surrogate has no power, even with the consent of the parties, to determine the validity of a disputed claim at any time except on the "judicial settlement of the accounts" although § 2743 authorizes the decree to provide for the payment of a debt, the validity of which is established "upon the final accounting or other proceeding:" Matter of Clark v. Hyland, 88 App. Div. 392; 84 N. Y. Supp. 640.

b. A filed written consent, as specified in § 1822, is necessary to give a surrogate jurisdiction to hear a disputed claim upon a judicial settlement; the oral consent of all the parties is insufficient, and as the surrogate cannot hear the claim, a referee, to whom the account of proceedings has been sent, has no power to allow it: Matter of Kirby, 36 Misc. 312; 73 N. Y. Supp. 509.

c. **Consent.**—Where an administratrix rejects a claim against her estate and the claimant does not sue at law within six months after such rejection and, within said six months, she files a written consent that the surrogate may determine the claim on her judicial settlement, she waives the defense created by § 1822 and the creditor may compel her to account, although he did not, until after the expiration of said six months, file his written consent that the surrogate might determine the claim: Matter of Fonda, 38 Misc. 407; 77 N. Y. Supp. 941.

d. Where parties consent in writing that the surrogate may hear a disputed claim upon the judicial settlement of the accounts of the executor or administrator, the surrogate has power to inquire into and pass upon the payments made and may determine the amount due and the person entitled to it: Matter of Browne, 35 Misc. 366; 71 N. Y. Supp. 1037.

e. **Notice of rejection.**—Where an attorney is authorized to present a claim against the estate of a decedent, he has the right to receive the notice of its acceptance or rejection and a notice of rejection sent to him is binding on the claimant, sufficient to start into operation the statute of limitations contained in § 1822: Heinrich v. Heidt, 106 App. Div. 179.

f. Under § 1822, where a claim is rejected and an administrator, within six months, files a consent that the claim be heard and determined on the judicial settlement of her accounts, the creditor cannot wait fourteen months after the rejection to file a consent, and the failure of the creditor to either file his claim or sue within six months bars his claim under the short statute of limitations; the failure of the administrator to give notice of a rejection of the claim for a considerable time after its presentation does not of itself preclude the representative from thereafter contesting its validity: Matter of Brown, 76 App. Div. 185; 78 N. Y. Supp. 297.

g. **Actual notice.**—The filing, in a proceeding instituted by the executor of the decedent's estate, to which the claimant was an involuntary party, of a notice of rejection, does not obviate the necessity of bringing knowledge of the rejection of the claim home to the claimant, in order that the six months' statute of limitations may be set running against her: Potts v. Baldwin, 67 App. Div. 434; 74 N. Y. Supp. 655, aff'd 173 N. Y. 335.

h. **Unliquidated claim.**—A surrogate has no jurisdiction to decree the payment of a non-liquidated claim except as provided by § 1822 upon the consent of all the parties; he has no power under § 2722: Matter of Walker, 70 App. Div. 263.

i. **Judgment.**—A judgment is not such a claim as can be rejected and referred within the contemplation of §§ 1822 and 2718 any more than can a judgment against an administrator: Matter of Wait, 39 Misc. 74; 78 N. Y. Supp. 869.

j. A judgment docketed against an intestate in his lifetime cannot be rejected and referred under the statute, as it is a debt which has been established by a court of competent jurisdiction: Matter of Browne, 35 Misc. 362; 71 N. Y. Supp. 1034.

k. **Costs.**—Under §§ 1822, 1835, 1836 and 3246, exempting executors from payment of costs unless payment of the claim was unreasonably resisted or neglected by them, such executors are entitled to one lawful trial and to exemption from costs until they have had one lawful trial, by which the Code means a binding and effective trial which lawfully determines their liability: Benjamin v. Ver Nooy, 168 N. Y. 578, mod'y 36 App. Div. 581; 55 N. Y. Supp. 796.

l. Costs may be awarded against a defendant executor under § 1836, although the defendant filed the consent provided for by § 1822, where it appears to the judge holding the trial that payment of the claim was unreasonably resisted: Ballantyne v. Steenwerth, 79 App. Div. 632; 80 N. Y. Supp. 37.

m. In all cases where disputed claims are submitted to a surrogate for determination on a judicial settlement, pursuant to § 1822, the allowance or disallowance of costs to the claimant is in the surrogate's discretion, limited only by § 2561: Matter of Coonley, 38 Misc. 219; 77 N. Y. Supp. 269.

n. **Accounting.**—When the claimant has by agreement with the executors filed a consent that the claim be determined on the final accounting pursuant to this section, such claimant cannot maintain an action at law on the claim after the six

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months' statute of limitations has run; if the executors unreasonably neglect to account, the claimant may compel an accounting under § 2727, or the surrogate may under § 2726: Clark v. Scovill, 111 App. Div. 35; 97 N. Y. Supp. 1117; appeal dis. 185 N. Y. 541.

a. **Rejection.**—When the executor claims that notice of the rejection of a claim was served, and that the claim was thus barred, and an attorney has testified that he drew the notice and delivered it to the attorney for the executor, and that he saw the constable serve it on the claimant, which is corroborated by the testimony of the constable, and there is also evidence that the notice was seen in the possession of the claimant's attorney, and that he asked for a waiver of the short statute of limitations, which evidence the claimant's attorney does not contradict, the fact of due rejection is so well established as to leave no question for the jury: Hummel v. Hurd, 112 App. Div. 547.

b. Where a creditor, through his agents, has had a claim presented to an administrator, it is immaterial whether such agent report to their principal the rejection of the claim, as notice to the agent is notice to the principal, and the short statute of limitations under this section is set in motion: Gardner v. Pitcher, 109 App. Div. 106; 95 N. Y. Supp. 678, aff'd 185 N. Y. 534.

c. Where an administrator *de bonis non* before the short statute of limitations has run admits the validity of a claim which was rejected by a former administratrix, the claim is not barred by the subsequent expiration of the short statute, for it is presumed that the claimant refrained from suit relying upon the acceptance of the claim and the withdrawal of the prior rejection; a part payment on a joint note by one of the makers at the request of and in the presence of the other from their joint moneys stops the running of the six years' statute of limitations: Matter of Hallenbeck, 119 App. Div. 758.

§ 1824. Want of assets not to be pleaded by executor, etc.

d. **Negligence.**—If a claim be established on an accounting before a surrogate where interested parties are heard, or if an action be brought or a reference had of the claim, which becomes an action and the claim be established by the evidence of an executor which is then competent, he cannot be charged with negligence, and the claim cannot be disallowed on the accounting even though because established by judgment, he had then become an interested party and an incompetent witness: Matter of Watson et al., Executors, 101 App. Div. 550; 34 Civ. Pro. R. 150.

e. In an action under § 1819 against an executor to recover two general legacies, where the complaint demands judgment for a sum of money only, the existence, sufficiency or want of assets should not be pleaded by either party, and the plaintiff's right to recover is not affected thereby except with respect to the costs to be awarded: Ladies' Union Benefit Soc. v. Van Natta, 96 App. Div. 99; 88 N. Y. Supp. 1083.

§ 1825. Leave to issue execution against executor, etc.

See § 1380, ante, Execution against decedent's property.

See § 2552, post, Decree permitting judgment creditor to issue an execution against executor.

f. **Costs.**—Costs against an executrix in an action brought by her on a claim alleged to be due decedent in his lifetime is not a "debt" of the intestate, nor is the judgment creditor a "creditor" of the estate within the meaning of §§ 2719 and 2722, and hence the surrogate should not grant the judgment creditor leave to issue execution under § 1825: Matter of Mahoney, 37 Misc. 472; 75 N. Y. Supp. 1056.

g. **Funds.**—On an application under §§ 1825 and 1826 for leave to issue an execution on a judgment against an executor, the petitioner is required to show either that the executor has funds of the estate on hand or that funds of the estate have been misapplied which should have been devoted to payment of the judgment: Matter of Warren, 105 App. Div. 582.

h. When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except on appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

i. A judgment against the executor of an estate cannot be enforced by a receiver appointed in proceedings supplementary to execution; such a judgment

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against a decedent's estate must be enforced in appropriate proceedings in the surrogate's court: Jones v. Arkenburgh, 112 App. Div. 483; 98 N. Y. Supp. 532.

a. The provision of § 1903 that the plaintiff may deduct from the damages recovered for the negligent death of deceased the reasonable funeral expenses of the deceased is imperative; and one who has recovered a judgment against the administrator for such funeral expenses shall have leave to issue execution to the amount of the fund arising from such source in the administrator's hands: Matter of McDermott, 49 Misc. 402.

§ 1826. Id.; how procured; order; and contents thereof.

See § 1381, ante, Leave to issue execution, how obtained.

See § 2725, subd. 1, post, Intermediate accounting when application is made for leave to issue execution against executor.

b. **Assets on hand.**—The surrogate will not grant the creditor of an intestate leave to issue execution against his property, in order to create a foundation for a creditor's suit to reach property alleged to have been fraudulently transferred by the intestate, nor will the surrogate direct an intermediate accounting to determine the proper amount of the execution, where the petitioning creditor fails to allege that there are assets now in the hands of the intestate's administrator: Matter of Thurber, 37 Misc. 155; 74 N. Y. Supp. 949.

c. A decree of the surrogate's court, entered against the administratrix of a deceased trustee in a proceeding for a judicial settlement of the accounts of the said trustee, is not conclusive evidence that there are sufficient assets in her hands as administratrix of the deceased trustee to satisfy the sum directed to be paid by the decree and an execution cannot be issued upon the decree against the individual property of the administratrix unless the leave of the surrogate is first obtained: Matter of Seaman, 63 App. Div. 49; 32 Civ. Pro. R. 194; 71 N. Y. Supp. 376.

d. On an application under §§ 1825 and 1826 for leave to issue an execution on a judgment against an executor, the petitioner is required to show either that the executor has funds of the estate on hand or that the funds of the estate have been misapplied which should have been devoted to the payment of the judgment; no preference can be given to judgment creditors under § 1826: Matter of Warren, 105 App. Div. 582.

e. **Judgment.**—§ 1826 clearly recognizes the right to allow execution for partial amounts from time to time, as the disclosed condition of the estate warrants and is not restricted to claims reduced to judgment: Matter of Miner, 39 Misc. 605; 80 N. Y. Supp. 643.

f. When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except on appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

§ 1827. Security may be required from a legatee.

g. A decree of the surrogate's court, entered against the administratrix of a deceased trustee in a proceeding for a judicial settlement of the accounts of the said trustee, is not conclusive evidence that there are sufficient assets in her hands as administratrix of the deceased trustee to satisfy the sum directed to be paid by the decree and an execution cannot be issued upon the decree against the individual property of the administratrix unless the leave of the surrogate is first obtained: Matter of Seaman, 63 App. Div. 49; 32 Civ. Pro. R. 194; 71 N. Y. Supp. 376.

§ 1829. Execution on former judgment.

See § 1376, ante, Execution after death of judgment creditor.

§ 1833. Liability for uncollected demands.

h. The estate of a deceased executor cannot be charged with the amount of uncollected debts and judgments owing to the estate of the testator: Matter of Walton, 112 App. Div. 176.

§ 1835. Costs; how awarded.

See § 3251, Amount of costs generally.

i. Where a disputed claim against a decedent's estate is referred by consent to the surrogate and is heard by him upon the judicial settlement, costs to the successful claimant are discretionary, their amount must be within the limits pre-

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scribed by § 2561, and should be determined upon the principles which govern the allowance or disallowance of costs in actions at law against such estates: Matter of Ingraham, 35 Misc. 577; 72 N. Y. Supp. 62.

a. **Costs.**—Under §§ 1822, 1835, 1836 and 3246, exempting executors from payment of costs unless payment of the claim was unreasonably resisted or neglected by them, such executors are entitled to one lawful trial and to exemption from costs until they have had one lawful trial, by which the Code means a binding and effective trial which lawfully determines their liability: Benjamin v. Ver Nooy, 168 N. Y. 578, mod'y 36 App. Div. 581; 55 N. Y. Supp. 796.

b. In an action in the supreme court against an administrator for goods sold and delivered the decedent, as the plaintiff recovered less than $50, though the claim was for more than that sum, and the court did not certify any of the facts mentioned in § 1836, neither party is entitled to costs under the provisions of §§ 1835 and 1836: German Am. Provision Co. v. Garrone, 73 App. Div. 409.

c. Costs cannot be awarded in favor of a claimant against an estate without a certificate or finding by the trial judge showing the facts upon which the award was founded: Scheu v. Blum, 119 App. Div. 825.

§ 1836. Costs; when awarded, etc.

Where it appears in a case specified in the last section that the plaintiff's demand was presented within the time limited by a notice published as prescribed by law, requiring creditors to present their claims and that the payment thereof was unreasonably resisted or neglected, or that the defendant did not file the consent provided in section eighteen hundred and twenty-two at least ten days before the expiration of six months from the rejection thereof the court may award costs against the executor or administrator to be collected either out of his individual property or out of the property of the decedent as the court directs, having reference to the facts which appear upon the trial. Where the action is brought in the supreme court, or any county court, the facts must be certified by the judge or referee before whom the trial took place.

2 R. S. 90, § 41.

Amended by chaps. 595 and 946 of 1895, chap. 469 of 1897 and chap. 60 of 1906.

See § 2718, post, Ascertainment of debts.

See § 3246, post, Costs against executors.

See § 3251, Amount of costs generally.

d. Costs should be awarded under § 1836 when the only issue presented was whether a promissory note had been presented and rejected: Gardner v. Pitcher, 109 App. Div. 106; 95 N. Y. Supp. 678, aff'd 185 N. Y. 534.

e. Costs cannot be awarded in favor of a claimant against an estate without a certificate or finding by the trial judge showing the facts upon which the award was founded: Scheu v. Blum, 119 App. Div. 825.

f. **Unreasonably resisted.**—Upon the reference of a disputed claim against the estate of a decedent, costs cannot be allowed against the executor or administrator, even though the claimant's recovery exceeds fifty dollars, in the absence of a certificate by the referee under § 1836 that payment of the claim was unreasonably resisted or neglected: Darde v. Conklin, 73 App. Div. 590.

g. Where, upon the trial of an action upon a disputed claim against an estate, the plaintiff voluntarily consents to a material reduction of his claim, it cannot be said that the defense was unreasonable, and a certificate made by the trial justice under § 1836 to the effect that payment of the claim had been unreasonably resisted and neglected, will be set aside: Healy v. Malcolm, 75 App. Div. 422.

h. The provisions of § 1836 are alternative and an award of costs may be based upon unreasonable resistance or neglect or the failure to file the consent as provided in § 1822: Pauley v. Millspaugh, 95 App. Div. 208; 88 N. Y. Supp. 565.

i. Costs may be awarded against a defendant executor under § 1836 although the defendant filed the consent provided for by § 1822 as it may appear to the judge holding the trial that payment of the claim was unreasonably resisted: Ballantyne v. Steenwerth, 79 App. Div. 632; 80 N. Y. Supp. 37.

j. Payment of a claim against a decedent's estate cannot be deemed to have

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been "unreasonably resisted or neglected" by the executor where, upon a jury trial of an action subsequently brought to enforce the claim, it is reduced forty per cent; where there is no proof in such an action that the defendant did not file the consent referred to in § 1836 at least ten days before the expiration of six months from the rejection of the claim nor any that the action was commenced within ten days before such expiration, the plaintiff is not entitled to costs; since the amendment made to § 1836 by chap. 469 of 1897, a refusal to refer does not subject an executor to costs; costs are waived by the plaintiff where he sues before expiration of five months and twenty days from the date of the rejection of the claim: Holcombe v. Nettleton, 41 Misc. 504.

a. **Less than fifty dollars.**—In an action in the supreme court against an administrator for goods sold and delivered the decedent, as the plaintiff recovered less than $50, though the claim was for more than that sum, and the court did not certify any of the facts mentioned in § 1836, neither party is entitled to costs under the provisions of §§ 1835 and 1836: German-Am. Provision Co. v. Garrone, 73 App. Div. 409.

b. **Discretion.**—Where disputed claims are submitted to a surrogate for determination on a judicial settlement, under authority of § 1822, the allowance of costs to the claimant is in the surrogate's discretion limited only by § 2561: Matter of Coonley, 38 Misc. 219; 77 N. Y. Supp. 269.

c. Under this section the plaintiff cannot recover costs against an executor unless the claim has been unreasonably resisted and even then there is a discretionary power in the court to determine, whether costs should be awarded out of the property of the decedent or imposed on the defendant personally: Osborne v. Parker, 66 App. Div. 277; 72 N. Y. Supp. 894.

d. **Referee.**—Where a referee, to whom an action against an executor has been referred, reports in favor of the plaintiff, with costs, and certifies that in his opinion the case is a difficult and extraordinary one within the meaning of § 3253 and that the plaintiff is entitled to an additional allowance, and upon the application for the additional allowance at special term, the defendant does not raise the objection that the referee made no certificate under § 1836 to the effect that payment of the claim had been unreasonably resisted or neglected by the executor, such an objection cannot be raised upon an appeal from the order granting the extra allowance, as it will be assumed that the referee granted the necessary certificate: Weeks v. Coe, 76 App. Div. 310.

e. **Court of appeals.**—Where the court of appeals reversed a judgment granted against executors and granted a new trial with "costs to abide the event" and a judgment was obtained against said executors on said new trial, the special term has no power to award the costs of both motions and both appeals since the provisions of § 3228 are general, and when read in connection with § 1836 become subordinate to the special rule governing costs against executors, and the judgment of reversal by the court of appeals "with costs to abide the event" must be read in the light of § 1836, and when thus read the word "event" means not only final success but a valid award of costs under § 1836: Benjamin v. Ver Nooy, 168 N. Y. 578, mod'y 36 App. Div. 581; 55 N. Y. Supp. 796.

Under §§ 1822, 1835, 1836 and 3246, exempting executors from payment of costs unless payment of the claim was unreasonably resisted or neglected by them, such executors are entitled to one lawful trial and to exemption from costs until they have had one lawful trial, by which the Code means a binding and effective trial which lawfully determines their liability. Id.

§ 1837. When action lies against next of kin, legatees, etc.

f. An action may be maintained under §§ 1837-1860, to establish the claims of all claimants, to subrogate them to the rights of the creditors of the estate, who have been paid with the money advanced to the executors by such claimants, to have their claims adjudged to be liens upon the real property and, if the proceeds thereof be insufficient, to be paid by the devisees and legatees under the will; it is unnecessary to determine whether such relief may be granted by court of equity, independent of the statutory provisions: Hamlin v. Smith, 72 App. Div. 601; 76 N. Y. Supp. 258.

g. **Trust fund.**—A judgment creditor of a decedent may sue the trustees to have his claim made a lien on a trust fund created by the beneficiaries of the testator: City of New York v. U. S. Trust Co., 78 App. Div. 366; 79 N. Y. Supp. 1010.

h. **Legacy.**—Where a testator bequeathed a legacy to a church payable at the death of his widow and the widow, who, as sole executrix, received sufficient property from the testator's estate to pay the legacy and died intestate and her estate was distributed, the church is entitled, under § 1837, or irrespective of that statute, to maintain an action against the heirs-at-law and next kin of the widow to recover the amount of the legacy: Trustees M. E. Church v. Reeve, 79 App. Div. 65.

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§ 1841. Requisites to recovery in action against legatee.

a. Where a son devises real estate to his mother subject to an understanding between them that she shall support his child and the mother devises all the real estate, romaining in her after certain conveyances made by her, to the infant, the latter, by accepting this devise, loses her lien for support out of the remaining land as the lien is merged in it, the land becomes subject thereafter to the debts of the said mother and may be reached by a creditor, secured by her will where he complies with the requirements of §§ 1841 and 1844: Howell v. Randall, 36 Misc. 35; 72 N. Y. Supp. 52.

§ 1843. Liability of heirs and devisees.

b. Application of § 1843 considered: Holly v. Gibrons, 176 N. Y. 520.

c. **Foreclosure.**—The heirs-at-law of a mortgagee are respectively liable under § 1843 for the debts of the decedent to the extent of any interest in the real property, that descends from him and should be made parties in an action to foreclose a mortgage on the real property descending to them by virtue of § 1627: Rowley v. Nellis, 41 Misc. 315; 84 N. Y. Supp. 841.

d. **Deed of trust.**—In an action under this and subsequent sections to charge the heirs-at-law and devisees with debts of their decedent to the extent of the estate, etc. *Held* that grantees under a deed of trust are not liable as heirs-at-law unless there is proof that the conveyance was made with intent to defraud creditors: Matteson v. Palser, 173 N. Y. 404, mod'y 56 App. Div. 91; 67 N. Y. Supp. 612.

e. **Partition.**—Where creditors, of a decedent intestate, whose personalty proved insufficient to pay his debts, and who, took no proceedings to sell his real estate for his debts within three years after letters of administration were first issued, are made parties to an action, brought by the heirs, to partition his real estate, and it therein appears that, on the final accounting of the administrator to the heirs of the decedent were parties, the claims of these creditors were established, the supreme court will, in an action of partition, protect the creditors and, to avoid multiplicity of actions, will not remit them to their action against the heirs under § 1843: Hughes v. Golden, 44 Misc. 128.

§ 1844. When action therefor may be brought.

f. Where a son devises real estate to his mother subject to an understanding between them that she shall support his child, and the mother devises all the real estate, remaining in her after certain conveyances made by her, to the infant, the latter, by accepting this devise, loses her lien for support out of the remaining land as the lien is merged in it, the land becomes subject thereafter to the debts of the said mother and may be reached by her creditor, secured by her will where he complies with the requirements of §§ 1841 and 1844: Howell v. Randall, 36 Misc. 35; 72 N. Y. Supp. 52.

§ 1847. Recovery to be apportioned.

g. The amount which the plaintiff is entitled to recover shall be apportioned among the heirs jointly as shall also be apportioned the costs of recovery: Rowley v. Nellis, 41 Misc. 315; 84 N. Y. Supp. 841.

§ 1854. How judgment taken, when land aliened.

h. A lienor of lands charged with the debts of a decedent is entitled to a deduction, not only for mortgages existing on the land, when the decedent died, but also for taxes which were then a lien: Lauby v. Gill, 42 Misc. 334; 86 N. Y. Supp. 718.

§ 1855. Classification of debts, to be enforced under this article.

See § 1845, ante, Effect of application to sell real property.

§ 1858. Action not suspended by infancy.

See § 1847, ante, Recovery to be apportioned.

§ 1860. One action, where same person is heir, devisee, etc.

i. A failure to recover against a defendant as heir-at-law does not preclude a recovery against him as devisee: Matteson v. Palser, 173 N. Y. 404, mod'y 56 App. Div. 91; 67 N. Y. Supp. 612.

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§ 1861. When action to establish a will may be brought.

a. An action may be maintained under § 1861 where the production of a will before a surrogate in this state is rendered impossible by the fact that it has been filed in a probate court of another state in which it had been previously probated: Matter of Law, 80 App. Div. 73; 80 N. Y. Supp. 410.

b. An action may be maintained by a legatee under a will attacking directly or collaterally the decision of the probate court of Connecticut, in regard to the residence of the testator: Plant v. Harrison, 36 Misc. 649; 74 N. Y. Supp. 411.

c. **Codicil.**—The complaint in an action under §§ 1861-1867, to establish a lost codicil alleged to leave the plaintiff a sum of money, need not allege that the sum alleged to have been bequeathed was not settled upon the plaintiff during the life of the testator and need allege the negative of § 1861, subd. 1, that the alleged codicil was lost or destroyed " before it was duly proved and recorded within the state:" Donlon v. Kimball, 61 App. Div. 31; 70 N. Y. Supp. 252.

§ 1865. Proof of lost will in certain cases.

d. A surrogate cannot admit a destroyed will to probate unless the will was in existence at the time of the testator's death or was fraudulently destroyed in his lifetime, and, hence, an accidental destruction of the will without his knowledge or consent while he was living and the will was in the care of a custodian is not enough to confer jurisdiction: Matter of Reiffeld, 36 Misc. 472.

e. **Animo revocandi.**—The failure to find a subsequent will after a testator's death raises a strong presumption that it was destroyed by the testator *animo revocandi*, and in the proceeding for the probate of such will, the burden of overcoming such presumption rests upon the petitioner, and it is not sufficient for the petitioner to show that someone whose interest was adverse to the will had an opportunity to destroy it, but he must show that the will was actually lost or destroyed: Matter of Barnes, 70 App. Div. 523; 75 N. Y. Supp. 373.

f. No presumption as to the continued existence of a will arises from proof of its execution so as to establish its existence at the time of the death of the testatrix, and the presumption is that the decedent herself destroyed it, *animo revocandi:* Matter of Kennedy, 167 N. Y. 163.

g. **Ejectment.**—§ 1866 does not authorize the maintenance of an action in equity, where the sole purpose is to test the legal title to real property, and an action of ejectment would afford a full and adequate remedy: McKinlay v. Van Dusen, 76 App. Div. 200; 78 N. Y. Supp. 377.

h. **Evidence.**—In an action for partition of property of which a decedent died seized, a defendant may prove and read in evidence an unprobated will of such decedent; plaintiff and another defendant may also show that a subsequent will was made by decedent which the contesting defendant had endeavored to establish but had failed on the sole ground that the contents of such will could not be established by the testimony of two witnesses as required by § 1865: Whitney v. Whitney, 171 N. Y. 176, aff'g 56 App. Div. 629; 67 N. Y. Supp. 1150.

i. What evidence held sufficient, taken together with a copy of the will borrowed from the surrogate's office and lost, to authorize surrogate under § 1865, to admit the lost will to probate and establish the copy as a correct draft: Matter of Granacher, 74 App. Div. 567; 77 N. Y. Supp. 748.

j. **Discretion.**—The action of the surrogate in refusing to adjourn a trial until an insane person could be produced as a witness does not constitute an abuse of discretion, it appearing that it would certainly be months before the proposed witness would possibly be in a condition to testify, and that he might never be in such a condition: Matter of Burbank, 104 App. Div. 312; 34 Civ. Pro. R. 247.

§ 1866. Action to establish, etc., will, relating to real property.

k. A person having a lien upon a future expectant estate created by a will cannot maintain an action under § 1866. to obtain an equitable adjudication that such estate was in fact created, upon the theory that somebody else might claim a different construction: Higgins v. Downs, 101 App. Div. 119; 34 Civ. Pro. R. 85.

l. **Executor.**—An executor holding in his hands a trust fund, which his testator held as a trustee, may bring an action for the construction of the will creating the trust and may obtain the direction of the court as to the proper disposition of the fund: Leggett v. Stevens, 185 N. Y. 70.

m. Where, subsequently to the making of his last will, a testator is judicially declared an incompetent person and his wife, as his committee, sells certain real estate for the payment of debts, at a time when the personalty is sufficient therefor and in ignorance of the fact that said real estate had been devised to her by said will, she is, in an action for the construction thereof, en-

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titled to a decree that she paid out of the personal estate the amount received from the sale of the real estate devised to her: Brandreth v. Brandreth, 54 Misc. 158.

§ 1867. Retrospective effect of this article.

a. The complaint in an action under §§ 1861-1867 to establish a lost codicil, alleged to leave the plaintiff a sum of money, need not allege that the sum alleged to have been bequeathed was not settled upon the plaintiff during the life of the testator and need not allege the negative of § 1861, subd. 1, that the alleged codicil was lost or destroyed "before it was duly proved and recorded within the state:" Donlon v. Kimball, 61 App. Div. 31; 70 N. Y. Supp. 252.

§ 1870. Next of kin defined.

See § 1905, post, Next of kin defined.

See § 2514, subd. 12, post, Next of kin defined.

§ 1871. When judgment creditor may bring action.

See § 604, ante, Injunction to restrain debtor from disposing of his property.

b. **Trust funds.**—A creditor of a beneficiary of trust funds cannot bring an action, under 1 R. S. 729, § 57, to reach the surplus of such trust funds beyond the amount necessary to support such beneficiary, unless he first recovers a judgment against such beneficiary and execution thereon is returned partly or wholly unsatisfied: Dittmar v. Gould, 60 App. Div. 94; 69 N. Y. Supp. 708.

c. Where a judgment creditor of the life beneficiary of a trust created by a will made by a non-resident and probated in another state brings an action in the state of New York against the life beneficiary and the trustee to compel the application of the income of the trust fund, which was situated in the state of New York, to the payment of the plaintiff's judgment, the fact that under the law of the other state, the income of a trust fund is subject to the claims of creditors is not controlling upon the right of the plaintiff to relief, but such right will be determined solely under the laws of this state; an action of this character cannot be maintained under §§ 1871-1879, or because of any inherent jurisdiction in the court; it would seem that the remedy of the plaintiff is by an action under § 78 of the Real Property Law, to have the surplus income applied to the payment of the judgment: Keeney v. Morse, 71 App. Div. 104; 75 N. Y. Supp. 728.

d. **Complaint.**—Complaint in an action brought by a creditor of a bankrupt to reach the surplus income of a trust fund to which the bankrupt was entitled, held insufficient: Brown v. Barker, 68 App. Div. 592; 74 N. Y. Supp. 43.

e. Complaint in an action brought by a creditor to reach the surplus income of a trust fund created for the benefit of his debtor, held demurrable: Sherman v. Tucker, 60 App. Div. 127; 69 N. Y. Supp. 850.

f. A dismissal of the complaint in a judgment creditor's action to set aside the conveyance on the ground that the plaintiff had not made out a case for equitable relief is justified: Colnon v. Buckley, 117 App. Div. 742.

g. The income from a trust fund, from which the income is to be paid for the beneficiary not to exceed five years, is not subject to the payment of claims of judgment creditors where it is no more than necessary for the support and maintenance of the beneficiary: Everett v. Peyton, 167 N. Y. 117, rev'g 49 App. Div. 630; 62 N. Y. Supp. 910.

h. A complaint in a judgment creditor's action held sufficient to state cause of action; when several defendants demur only one decision is necessary which should determine their several rights: Pritz v. Jones, 117 App. Div. 643.

i. The trustee in bankruptcy of a beneficiary under a will is not entitled to maintain an action under § 78 of the Real Property Law, to reach the surplus income of the trust estate: Butler v. Baudouine, 84 App. Div. 215; 82 N. Y. Supp. 773.

j. **Evidence.**—A judgment creditor who assails a conveyance made by a judgment debtor cannot impose upon the grantee the onus of showing good faith; fraudulent intent in such a case is a question of fact, and it is error to refuse to admit in evidence testimony offered by the judgment debtor and the grantee showing that the grantee had advanced money for the purchase of property and that the purchase was supported by a valid consideration: Fitzpatrick v. Fox, 80 App. Div. 345; 80 N. Y. Supp. 677.

k. **Burden of proof.**—In an action brought on behalf of a judgment creditor to set aside a transfer of property from a husband to his wife, where it appears that the motive actuating the transfer was not only to prevent the husband from dissipating his property, but also to insure to his wife the repayment of an indebtedness due her from her husband, it is incumbent upon the wife to establish definitely the nature and amount of such

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indebtedness and, if she neglects to do so, it is improper to dismiss the complaint in the action: Tanner v. Eckhardt, 107 App. Div. 79.

a. Under what circumstances a conveyance from a husband to his wife for a nominal consideration is not fraudulent as to creditors; the burden of showing a fraudulent conveyance is on the persons seeking to set aside the conveyance: Kalish v. Higgins, 70 App. Div. 192; 75 N. Y. Supp. 397.

b. **Assignment.**—Action on behalf of plaintiff and other creditors to set aside, for fraud, an assignment for creditors is not binding on creditors who have not been notified to appear therein: Matter of Thoesen & Bro., 62 App. Div. 87; 70 N. Y. Supp. 924.

c. **Bankruptcy.**—A trustee in bankruptcy of a firm and its members has power to maintain an action to set aside transfers made by the firm and its members with intent to defraud creditors: Barker v. Franklin, 37 Misc. 292; 75 N. Y. Supp. 305.

d. **Dower.**—A wife's inchoate right of dower cannot, during the husband's life time, be reached in a judgment creditor's action as it is not a chose in action, within the provisions of §§ 1871 and 1873, as it seems that the terms "chose in action" is properly applied to the wife's dower right when it becomes consummate by the death of the husband and before it has been admeasured: Sherman v. Hayward, 98 App. Div. 254; 90 N. Y. Supp. 481.

e. **Equity.**—The jurisdiction of a court of equity is not circumscribed, exactly defined, nor entirely limited by the provisions of §§ 1871-1879, and there are actions which a court of equity may entertain outside of those provided for in the Code: Stetson v. Hopper, 60 App. Div. 277.

f. **Good faith.**—Where an insolvent debtor, to secure a creditor, surrenders a demand note secured by a chattel mortgage in place of an unsecured and unmatured note, the good faith of the debtor is not impaired by his acknowledgment of the debtor's intent to delay his creditors: N. Y. County Nat. Bank v. Am. Surety Co., 69 App Div. 153; 74 N. Y. Supp. 692.

g. **Chattel mortgage.**—What is sufficient proof to warrant a finding that a chattel mortgage given by a man to his wife was fraudulent as to creditors: Levy v. Hamilton, 68 App. Div. 277; 74 N. Y. Supp. 159.

h. **Mortgagor.**—A mortgagor who sells an equity of redemption in land to one who does not assume the mortgage remains primarily liable, and property conveyed by a vendee to a holder of a deficiency judgment need not be applied for its payment before the filing of a creditor's bill against the mortgagor: Baker v. Potts, 73 App. Div. 29; 76 N. Y. Supp. 406.

i. When it is not essential to the maintenance of a creditor's action that the plaintiffs first recover judgment upon their claim and issue execution thereon and that the same be returned unsatisfied: Newton v. Jay, 107 App. Div. 457.

j. **Decree.**—A decree in a judgment creditor's suit to set aside the conveyance of land by a father to his children, in consideration that the latter pay income of property to him for life, directing part of payment of income to creditor does not relieve the children from contract: Ellis v. Cole, 188 N. Y. 395, rev'g 105 App. Div. 48.

§ 1872. To what county execution must have issued.

See § 2458, post, Upon what judgment and to what county the execution must have issued.

k. Issuance and return of an execution unsatisfied are the necessary preliminaries to obtain standing for the maintenance of an action in equity to reach other property to pay the judgment: Baker v. Potts, 73 App. Div. 29; 76 N. Y. Supp. 406.

l. **Trust fund.**—In order to maintain a creditor's action to apply the income of a trust fund to a judgment, it is necessary to show that the judgment was obtained and an execution returned unsatisfied: Ditmar v. Gould, 60 App. Div. 94; 69 N. Y. Supp. 708.

m. **Dower.**—A wife's inchoate right of dower cannot, during the husband's life time, be reached in a judgment creditor's action as it is not a chose in action, within the provisions of §§ 1871 and 1873, as it seems that the term "chose in action" is properly applied to the wife's dower right when it becomes consummate by the death of the husband and before it has been admeasured: Sherman v. Hayward, 98 App. Div. 254; 90 N. Y. Supp. 481.

§ 1874. Interest of judgment debtor in land may be reached.

See § 645, ante, Interest in land contract may be attached.

See § 1250, ante, Land held under contract not bound by judgment.

§ 1876. Injunction may be issued.

See § 602 et seq., ante, General provisions in regard to injunctions.

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§ 1877. Receiver may be appointed.

See § 713 et seq., ante, Provisions relating to receivers.

§ 1879. Application of this article; what property cannot be reached.

See § 1775 et seq., ante, Sections applicable when judgment debtor is a corporation.

See § 1391, ante, Proceedings to reach earnings of judgment debtor.

a. **Trust fund.**—A creditor of a beneficiary of trust funds cannot bring an action under 1 R. S. 729, § 57, to reach the surplus of such trust funds beyond the amount necessary to support such beneficiary unless he first recovers a judgment against such beneficiary and an execution thereon is returned partly or wholly unsatisfied: Dittmar v. Gould, 60 App. Div. 94; 69 N. Y. Supp. 708.

b. Where a judgment creditor of the life beneficiary of a trust created by a will made by a non-resident and probated in another state brings an action in the state of New York against the life beneficiary and the trustee to compel the application of the income of the trust fund, which was situated in the state of New York, to the payment of the plaintiff's judgment, the fact that, under the law of the other state, the income of a trust fund is subject to the claims of creditors, is not controlling upon the right of the plaintiff to relief, but such right will be determined solely under the laws of this state; an action of this character cannot be maintained under §§ 1871-1879, or because of any inherent jurisdiction in the court; it would seem that the remedy of the plaintiff is by action under § 78 of the Real Property Law, to have the surplus income applied to the payment of the judgment: Keeney v. Morse, 71 App. Div. 104; 75 N. Y. Supp. 728.

c. The restriction contained in § 1879 providing for judgment creditors' actions, to the effect that such provisions do not apply to property held in trust for a judgment debtor, was intended to refer to the interest of a beneficiary inalienable under the Personal Property Law, and a judgment creditor may reach a judgment debtor's interest in remainder in a fund held by a trustee for the benefit of a third person: Bergmann v. Lord, 51 Misc. 214.

§ 1880. Application for leave to sue sheriff's bond; proof required.

See §§ 158, 159, ante, Sheriff's liability for escapes.

See § 587, ante, Sheriff's liability as bail.

See § 426, ante, Service of summons upon sheriff.

§ 1887. Action upon a county treasurer's bond.

d. A county treasurer's bond "to the county of Tompkins" cannot be enforced by a town and a supervisor thereof as an action can be maintained upon a sealed instrument only by those who are named therein: Town of Ulysses v. Ingersoll, 81 App. Div. 304; 80 N. Y. Supp. 924, rev'd 182 N. Y. 369.

§ 1888. Actions upon official bonds of other officers.

e. Under § 1888, a town is entitled to prosecute the sureties on an official bond of a defaulting county treasurer to the county in which the town is situated to recover school moneys apportioned to the town in which the defaulting officer had never paid to the town or any officer; the statute should be liberally construed: Town of Ulysses v. Ingersoll, 182 N. Y. 369, rev'g 81 App. Div. 304; 80 N. Y. Supp. 924.

§ 1892. Application may be made ex parte.

See rule 25 (Sup. Ct.), *Ex parte* application — Statement as to previous application.

§ 1893. Action by person specially aggrieved.

See §§ 383, 387, ante, Statute of limitations.

See § 1961 et seq., post, Action to recover a penalty.

f. **Pleadings.**—A person seeking to maintain an action for a statutory penalty must state every fact required to enable the court to judge whether he has a cause of action under the statute; in such an action the pleadings are strictly construed: Ithaca Fire Department v. Rice, 108 App. Div. 100; 95 N. Y. Supp. 464.

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§ 1894. Action by common informer.

See § 384, ante, Statute of limitations, action for a penalty.

§ 1897. Indorsement upon summons.

a. § 1897, providing that the copy of the summons served be endorsed with a general reference to the statute under which a penalty or forfeiture is claimed, when a copy of the complaint is not also served, does not apply to an action to recover treble damages for injury to property in a cause of action granted by § 654 of the Penal Code: Layton v. McConnell, 61 App. Div. 447.

b. Where the complaint is served with the summons, it is not necessary to indorse the reference to the statute upon the summons: People v. Bootman, 40 Misc. 27; 81 N. Y. Supp. 195.

§ 1899. Civil and criminal prosecutions not merged.

c. Where the legislature prohibits an act and prescribes a punishment for a violation of the statute, the punishment furnishes a conclusive remedy for the wrong so far as the public is concerned, and the statute cannot be made the basis of a civil action by an individual for the recovery of damages unless he has been injured in his person or property and the damages are the direct and approximate result of the illegal act: Mairs v. B. & O. R. R. Co., 175 N. Y. 409, aff'g 73 App. Div. 265; 76 N. Y. Supp. 838.

§ 1900. Action for suing, etc., in name of another. Made also a misdemeanor.

See Penal Code, § 148, Misconduct by attorneys.

See § 67 et seq., ante, Provisions relating to misconduct of attorneys.

§ 1901. Treble and other increased damages to be recovered.

See § 1020, ante, Decision of court, double or increased damages.

See § 1184, ante, How increased damages found and awarded.

§ 1902. Action for causing death by negligence, etc.

See § 384, ante, Statute of limitations, action for causing death by negligence.

See § 1905, post, Next of kin defined.

d. An action under this section is an action for personal injuries within the meaning of chap. 572 of 1886: Crapo v. City of Syracuse, 183 N. Y. 395.

e. Where it is desired to bring an action under § 1902 and it appears that the widow and next kin of the decedent resided in Italy, the court granted administration to a person who was described in the petition as the nearest friend of the decedent: Matter of Paola, 36 Misc. 514; 73 N. Y. Supp. 1062.

f. Where an action could have been maintained by the person injured, § 1902, authorizes a recovery by his administrator: Koch v. Fox, 71 App. Div. 288; 75 N. Y. Supp. 913.

g. **Common law.**—§ 1902 gives a right unknown to common law and limits the time in which an action shall be brought to assert it and, therefore, the statutory limitation measures the extent and qualifies the nature of the right conferred: Rosin v. Lidgerwood Mfg. Co., 89 App. Div. 245; 86 N. Y. Supp. 49.

h. § 1902 was enacted after the repeal of chap. 450 of 1847, and was a substitute for it; where an action is brought in one state to recover damages resulting from the death of a person who was killed in an accident occurring in another state, if the statutes of both states permit the maintenance of an action to recover damages in such a case, the right of recovery stands precisely the same as if the common law in both states allowed such a recovery: McCarthy v. Packard Co., 105 App. Div. 436; 94 N. Y. Supp. 203, aff'd 182 N. Y. 555.

i. **Public administrator.**—The public administrator of the county of New York has no right to bring an action to recover damages for the death of a resident of Connecticut who left no property in this state: Hoes v. N. Y., N. H. & H. R. R. Co., 173 N. Y. 435, rev'g 73 App. Div. 363; 77 N. Y. Supp. 117.

j. **Father.**—The right of a father of an infant, who has been negligently killed, to recover damages for the loss of services is limited to the interval between the injury and the death of the infant, and where death results instantaneously, no damages are recoverable: Ohnmacht v. Mt. Morris El. Light Co., 66 App. Div. 482; 73 N. Y. Supp. 296.

k. A father whose negligence contributed to a railroad collision in which his son was killed, cannot, as administrator of his son, recover therefor when he is sole next of kin: O'Shea v. Lehigh Val-

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ley R. R. Co., 79 App. Div. 254; 79 N. Y. Supp. 890.

a. Where an intestate left him surviving, as his sole next of kin, his father, and the father died before the action came on for trial, the measure of damages recovered by the mother is limited to those which the father suffered down to the time of his death: Pitkin v. N. Y. C. & H. R. R. R. Co., 94 App. Div. 31; 87 N. Y. Supp. 906.

b. **Aliens.**—Under § 1902, an administrator of a decedent may maintain an action against a corporation to recover damages for the decedent's death, although his widow and next of kin are non-resident aliens; there are no words of limitation and no expression of legislative will that the recovery authorized shall be distributed to residents only: Alfson v. Bush Co., 182 N. Y. 393, aff'g 97 App. Div. 632; 89 N. Y. Supp. 1100.

c. An action to recover damages resulting from the death of an alien, who was a resident of the state at the time of his death and also a subject of a foreign country, may be maintained under § 1902, though the next of kin are non-resident aliens; under § 2661 a resident of the state of New York may, although not a citizen of the United States, be appointed administrator of a decedent: Tanas v. Municipal Gas Co., 88 App. Div. 251; 84 N. Y. Supp. 1053.

d. **Connecticut.**—An administrator whose intestate negligently killed in the state of Connecticut, may maintain an action in the state of New York against the person whose negligence caused the intestate's death, as the statutes of the two states are substantially the same: Strauss v. N. Y., N. H. & H. R. R. Co., 91 App. Div. 583; 87 N. Y. Supp. 67.

e. **Statute of Limitations.**—Where the complaint in an action brought in the state of New York, under a statute of the state of New Jersey, to recover damages for the negligent killing of the plaintiff's intestate, discloses the fact that the action was not brought within the time prescribed by the New Jersey statute, and the answer does not set up the statute of limitations as a defense, the court will not reverse an order, made after the case has been brought to trial and the jury have disagreed, permitting the defendant to amend its answer by setting up the statute of limitations: Colell v. Delaware, L. & W. R. R. Co., 80 App. Div. 342.

f. **Complaint.**—A complaint in an action to recover damages resulting from the death of the plaintiff's intestate, which alleges that the decedent left a widow and two brothers, need not further allege the facts constituting the damages as the law implies at least nominal damages: Pizzi v. Reid, 72 App. Div. 162; 76 N. Y. Supp. 306.

g. A complaint in an action brought by the administrator of a male decedent, under § 1902, against a person whose negligence is alleged to have caused the decedent's death, is demurrable unless it shows that the latter left him surviving either a wife or next of kin: Pizzi v. Reid, 36 Misc. 123; 72 N. Y. Supp. 1053.

h. **Seduction.**—An action is not maintainable under § 1902 by a father for the seduction and death of his daughter, caused by the defendant, as the decedent could not have maintained such an action if living: Larocque v. Conheim, 42 Misc. 613.

i. **Administrator.**—Where an action has been commenced under § 1902 by an administrator, upon the death of the latter, the action must be continued in the name of the successor of such administrator and the recovery is for the next kin and must be distributed as if it was an unbequeathed asset left in the hands of the administrator after the payment of debts, etc: Hodges v. Webber, 65 App. Div. 170; 32 Civ. Pro. R. 208.

j. **Municipality.**—The words "personal injuries" as used in chap. 572 of 1886, § 1, providing that an action shall not be brought against a city in this state having fifty thousand inhabitants or over, for personal injuries unless the same be commenced within one year applies to an action against a municipality of over fifty thousand inhabitants brought by an administrator, pursuant to § 1902, to recover damages for the death of his intestate, and such one-year limitation supersedes the two-year limitation prescribed by § 1902: Crapo v. City of Syracuse, 98 App. Div. 376; 90 N. Y. Supp. 553, rev'd 183 N. Y. 395.

k. **Posthumous child.**—Where an administrator has compromised a claim for damages for the negligent killing of her intestate and it was approved by the surrogate, the order of approval should not be vacated on the application of the *guardian ad litem* of a posthumous child: Matter of Anderson, 84 App. Div. 550; 82 N. Y. Supp. 763.

l. **Lex loci.**—A right of action existing by force of the *lex loci* may be vindicated in the tribunals of another state, where the action is of a transitory nature, and the liability is enforceable in accordance with the *lex loci*. There is no distinction between the statutory action for death by negligence and any other right of action, existing at common law or by statute, so far as this extra-territorial right is concerned, and a statutory cause of action existing by the laws of one state is enforceable in another, although not within the statutory law of the latter jurisdiction, unless founded upon some penal liability which an action for death negligence is not; complaint insufficient and demurrable unless it alleges that decedent left next of kin; cause of action arose in Tennessee: Boyle v. Southern Railway Co., 36 Misc. 289; 32 Civ. Pro. R. 218.

m. **Limited letters.**—Limited letters of administration do not restrict the person to whom they are granted to the prosecution of any particular person for causing the death of the intestate, though

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the petition undertakes to specify the person through whose negligence it happened, but the administratrix may prosecute her action against any person liable: Matter of Halligan, 50 Misc. 481.

a. **Hospital.**—An action does not lie under this section for the negligence of a hospital which failed to keep watch over the plaintiff's insane wife, who threw herself out of a window and was killed: Duncan v. St. Luke's Hospital, 113 App. Div. 68.

b. **Employers' Liability Act.**—The complaint in an action under § 1902 may be amended so as to set out the fact that the notice required by the Employers' Liability Act was served on the defendant: Miller v. Erie R. R. Co., 109 App. Div. 612.

c. **Contract.**—The administratrix of a person who, in consideration of a free passage, has signed a contract relieving the carrier from liability for injuries caused by its negligence, cannot recover for the death of such person, although caused by the negligence of the carrier: Hodge v. Rutland R. R. Co., 112 App. Div. 142; 97 N. Y. Supp. 1107.

d. **Landlord and tenant.**—No action lies by a tenant to recover damages for the death of a child alleged to have been caused by reason of the landlord's breach of a covenant to heat the premises; such action is unknown to the common law and is not within the statute allowing representatives to sue for the benefit of next of kin: Dancy v. Walz, 112 App. Div. 355.

e. **Concurrent negligence.**—For injuries resulting in death, the personal representatives of the decedent may maintain an action against two or more persons through whose concurrent negligence the injuries happen: Mangan v. Hudson R. Tel. Co., 50 Misc. 388.

§ 1903. Distribution of damages recovered.

The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, the reasonable funeral expenses of the decedent and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper.

Id.

Amended by chap. 515 of 1904.

See § 2732, post, Order of distribution.

f. Where an action has been commenced under § 1902 by an administrator, upon the death of the latter, the action must be continued in the name of the successor of such administrator, and the recovery is for the next of kin, and must be distributed as if it was an unbequeathed asset left in the hands of the administrator after the payment of debts, etc: Hodges v. Webber, 65 App. Div. 170; 32 Civ. Pro. R. 208.

g. Under § 1903, in regard to the distribution of damages recovered by an administrator in an action to recover damages for the death of his intestate, the administrator is entitled to be credited with attorney's fees, disbursements and witnesses' fees and a reasonable compensation for expert witnesses and such other expenses as are incurred in good faith under a reasonable supposition that the success of the law suit will be enhanced by their expenditure: Matter of Snedeker, 95 App. Div. 149; 88 N. Y. Supp. 847.

h. **Evidence.**—Evidence of the age at which the intestate's father died is not admissible upon the subject of the probable duration of the life of the intestate: Hinsdale v. N. Y. C. & H. R. R. R. Co., 81 App. Div. 617; 81 N. Y. Supp. 356.

i. Where, in an action brought to recover damages for the negligent killing of plaintiff's intestate, a married woman, it appeared that at the time of her death she had separated from her husband and was conducting a separate business, and that she died intestate without issue and was survived by her husband and parents, it is improper to exclude evidence to show the earnings of decedent and her expectancy of life; the decedent's husband was, by virtue of his marital right, the sole person interested in any recovery which might be had in the action: Austin v. Metropolitan Street Ry. Co., 108 App. Div. 249.

j. The personal appearance of the plaintiff's intestate is not an element to be considered by the jury in determining damages as the statute limits the compensation to the "pecuniary injuries," and is to be computed on a basis of the mone-

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tary value of the services of the deceased to her husband and children, and the reception in evidence of her photograph is reversible error: Smith v. Lehigh Valley R. R. Co., 177 N. Y. 379 rev'g 86 App. Div. 628; 83 N. Y. Supp. 1117.

a. **Future increase of salary.**—Evidence that the decedent's salary would probably have been increased is too remote and too conjectural, and the capitalization of the decedent's earning power is not the basis of a verdict: Fajardo v. N. Y. C. & H. R. R. R. Co., 84 App. Div. 354; 82 N. Y. Supp. 912.

b. **Measure of damages.**—The cost of an annuity, equal to the annual earnings of a decedent for his life as determined by the life tables, is not a proper measure of damages in an action to recover for his death: Mix v. Hamburg-American Steamship Co., 85 App. Div. 475; 83 N. Y. Supp. 322.

c. **Wages.**—Where, in an action to recover damages for the death of a child, it appears that the plaintiff was employed as a watchman, it is error for the court to refuse to let him state the amount of his wages: Terhune v. Cody Contracting Co., 72 App. Div. 1; 76 N. Y. Supp. 255.

d. **Charge.**—The plaintiff is not entitled to have the jury charged, "If the jury find that the plaintiff is entitled to a verdict, a verdict for more than nominal damages must be given," as the measure of damages is the pecuniary loss sustained by the next of kin and, under the statute, it is for the jury to determine whether or not they sustained any pecuniary loss: Sciurba v. Metropolitan Street R. Co., 73 App. Div. 170; 76 N. Y. Supp. 772.

e. **Excessive.**—The pecuniary loss to the next of kin of a healthy, ordinarily bright and fairly industrious boy, aged twelve years and earning three dollars a week, which he turned over to his mother, resulting from his death caused by the negligence of a corporation, is more than compensated by a verdict against it for $12,000, and the verdict should be reduced to $7,500: McDonald v. Metropolitan Street R. Co., 36 Misc. 703; 74 N. Y. Supp. 367.

f. A verdict of $9,500 for the death of a girl of twenty who had completed two years of a three-year course in a high school, etc., should be reduced to $5,000: Kellogg v. Albany & Hudson R. & P. Co., 72 App. Div. 321; 76 N. Y. Supp. 85.

g. A verdict for $6,000, rendered in an action to recover damages resulting from the death of the plaintiff's intestate, will not be set aside as excessive where it appears that at the time of his death the intestate was about twenty-one years of age, in good health and was engaged in operating a milk wagon, that he was sober and industrious and left a wife and an infant son: Racine v. Erie Railroad Co., 69 App. Div. 437; 74 N. Y. Supp. 977.

h. **Damages.**—Where an intestate left him surviving, as his sole next of kin, his father, and the father died before the action came on for trial, the measure of damages recovered by the mother is limited to those which the father suffered down to the time of his death: Pitkin v. N. Y. C. & H. R. R. Co., 94 App. Div. 31; 87 N. Y. Supp. 906.

i. **Interest.**—Where an action to recover damages resulting from the death of the plaintiff's husband is brought in the state of New York under a statute of the state of Pennsylvania, and the Pennsylvania statute does not contain any express provision relating to interest upon the verdict, and in that state it is discretionary with the jury whether or not to include interest in their verdicts, the clerk of the court has no power to add interest to the amount of the verdict and include it in the judgment in accordance with the practice prescribed by § 1904: Frounfelker v. D., L. & W. R. R. Co., 73 App. Div. 350; 76 N. Y. Supp. 745.

j. A complaint in an action for slander, which does not allege special damages, in which a married woman alleged that her father-in-law falsely uttered words charging her with having communicated to his son, her husband, a loathsome disease, will not be held demurrable as failing to state facts sufficient to constitute a cause of action, and it is a question for the jury to show whether the words impute unchastity: Woodruff v. Woodruff, 36 Misc. 15.

k. **Funeral expenses.**—The provision of § 1903 that the plaintiff may deduct from the damages recovered the reasonable funeral expenses of the deceased is imperative; and one who has recovered a judgment against the administrator for such funeral expenses shall have leave to issue execution to the amount of the fund arising from such source in the administrator's hands: Matter of McDermott, 49 Misc. 402.

l. Where the only money or property coming into the hands of an administratrix is that received upon the settlement of an action against the employers of the deceased for negligently causing his death, the surrogate has the sole authority, under § 1903, to determine the sum to be allowed for funeral expenses and to direct their payment; such money is no part of the estate of the deceased, and cannot be used in payment of his debts: Matter of McDonald, 51 Misc. 318.

m. **Settlement.**—A father of a deceased infant, who left no widow or children, is entitled to the whole proceeds of an action for the death of said infant, caused by negligence, and, having settled the action after a dismissal of his complaint upon default, his widow has no standing in the action to open the settlement or default: McGurty v. New Amsterdam Gas Co., 115 App. Div. 668.

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§ 1904. Id.; amount of recovery.

a. Where it appears that the deceased was a dentist, earning from $17,000 to $20,000 a year, and leaving a family of small children, a verdict of $40,000 is not excessive: Morhard v. Richmond Light & R. R. Co., 111 App. Div. 353.

b. Where, in an action brought to recover damages for the negligent killing of plaintiff's intestate, a married woman, it appeared that at the time of her death she had separated from her husband and was conducting a separate business, and that she died intestate without issue and was survived by her husband and parents, it is improper to exclude evidence to show the earnings of decedent and her expectancy of life; the decedent's husband was, by virtue of his marital right, the sole person interested in any recovery which might be had in the action: Austin v. Metropolitan Street Ry. Co., 108 App. Div. 249.

c. A verdict of $15,000 will be reduced to $7,500 where it appears that the intestate was thirty-two years of age and was earning twelve dollars a week: Walsh v. Riesenberg, 110 App. Div. 883.

§ 1905. Next of kin defined.

See § 1870, ante, Next of kin defined.

See § 2514, subd. 12, post, Next of kin defined.

§ 1906. Action for slander of a woman.

See § 384, ante, Statute of limitations, action for slander.

See § 450, ante, When married woman is a party.

See § 484, subd. 2, ante, Joinder of actions.

See § 535, ante, Pleadings in slander.

§ 1907. When action for libel cannot be maintained.

See § 384, ante, Statute of limitations, action for libel.

See § 484, subd. 2, ante, Joinder of actions.

See § 535, ante, Pleadings in libel.

d. Under the common law and §§ 1907 and 1908, the privilege of the press extends to all public judicial proceedings and applications to magistrates, judges or courts for judicial action *ex parte* or on notice: Stuart v. Press Publishing Co., 83 App. Div. 467.

e. Mere investigations of a detective character conducted by members of the coroner's office and the municipal police are not judicial and official proceedings within the meaning of § 1907, and a demurrer to an answer which claims a privilege for the report thereof should be sustained: Nunnally v. Press Pub. Co., 110 App. Div. 10.

§ 1908. The last section qualified.

f. Under the common law and §§ 1907 and 1908, the privilege of the press extends to all public judicial proceedings and applications to magistrates, judges or courts for judicial action *ex parte* or on notice: Stuart v. Press Publishing Co., 83 App. Div. 467.

§ 1909. When transferee of claim or demand may sue. Rights of defendant, etc.

See § 502, ante, Allowance of counterclaims.

g. § 1917 does not apply to an action brought against a security company, where a person who lost a certificate by which the company promised to pay her a sum of money and who seeks to compel the issuance of a new certificate, as the certificate is not a negotiable instrument within § 20 of chap. 612, of 1897, known as the Negotiable Instrument Laws; § 1909 would protect the company in paying her the money even if she had assigned the certificate provided the company had no notice of such an assignment: Zander v. New York Security & Trust Co., 39 Misc. 98; 78 N. Y. Supp. 900.

h. Where the validity of an assignment of an Illinois judgment is not questioned, in an action brought thereon in the state of New York by the assignee thereof, he is the real party in interest and expressly authorized by § 1909 to bring the action in his own name, and the presumption, in the absence of proof to the contrary, that the law of a foreign state is like our own does not extend to positive statutory law: Waters v. Spencer, 44 Misc. 15.

i. **Judgment.**—An assignment of a cause of action based on an entry of judgment by default in violation of an agree-

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ment carries the right to sue thereon, irrespective of the consideration for such assignment: Rosenthal v. Rudnick, 65 App. Div. 519; 72 N. Y. Supp. 804.

a. An assignment of a claim against a decedent's estate and of a judgment recovered thereon, carries with it all the rights and benefits under a decree entered upon the judicial settlement of the accounts of the administratrix whether the assignment was made before or after its entry: Bamberger v. Am. Surety Co., 48 Misc. 221; 96 N. Y. Supp. 665.

b. An ordinary assignment of a claim for goods sold, accompanied by a power of attorney to collect the claim from the vendees, confers upon the assignee that right alone, and none to replevin the goods from a sheriff holding them under an execution issued against the vendees by their judgment creditor, nor any, to change the replevin action into one for conversion and maintain it against a substituted surety for the judgment creditor, holding the proceeds of a sale of goods made by the sheriff after the assignee had seized them in replevin: Weaver v. Lawyers' Surety Co., 36 Misc. 635; 74 N. Y. Supp. 462.

c. In an action by an assignee of a receiver of a Pennsylvania corporation to recover a balance due for goods sold and delivered, a reply should be required to a defense of new matter setting up that the claim had been assigned to another than plaintiff: Toplitz v. Garrigues, 71 App. Div. 37; 75 N. Y. Supp. 678.

d. **Electricity.**—A contract to supply electricity is assignable: Hudson River W. P. Co. v. Glens Falls Co., 107 App. Div. 548.

e. **False representations.**—An action based on false representations by the defendant in stating bonds to be a first lien upon property, is assignable: Wickham v. Roberts, 112 App. Div. 742.

f. **Mortgage.**—Under §§ 502 and 1909, the assignment of a mortgage is subject to every counterclaim which might have been set up against the assignor; one of two defendants may set up a counterclaim against plaintiff's assignor: American Guild v. Damon, 186 N. Y. 360.

g. **Reassignment.**—A plaintiff, who has assigned his claim against the defendants, who have had notice of the assignment, cannot maintain an action thereon, as there is no claim then existing in his favor; nor will a reassignment of said claim to plaintiff after the commencement of his action create such cause of action, as the reassignment has no retroactive effect: Walsh v. Woarms, 109 App. Div. 166.

h. **Party.**—The assignor of a claim who has parted with his entire interest cannot be joined with the assignee as a party plaintiff; a cause of action for the conversion of part of the proceeds of a check is assignable: Alexander v. City of Gloversville, 110 App. Div. 791.

i. **Bankrupt.**—An assignee of a claim against a bankrupt may plead such claim as a counterclaim in an action brought on a claim assigned by the bankrupt: Stich v. Berman, 49 Misc. 104.

j. **Offset.**—In an action by the assignee of a draft, the debtor cannot offset a note of the assignor, which, though made and delivered before the assignment, did not mature until after such assignment; such note not yet matured is not a defense or counterclaim "existing" against the transferror at the time of the assignment within the meaning of this section, and the words "before notice of the transfer," as used in this section, do not mean that a claim may be offset if it was acquired after assignment and before notice thereof, unless such claim was due at the time of the assignment: Michigan Sav. B. v. Millar, 110 App. Div. 670; 96 N. Y. Supp. 568, aff'd 186 N. Y. 606.

k. A national banking association cannot offset a debt due from a stockholder against a claim of the stockholder's assignee for liquidation dividends payable upon his assignee's stock: Bridges v. Nat. Bank of Troy, 185 N. Y. 146.

§ 1910. What claims or demands may be transferred.

See § 3343, subd. 9, post, "Personal Injury" includes libel, etc.

l. **Public contracts.**—The requirement of filing contracts and orders for money due thereon applies to public contracts: Brace v. City of Gloversville, 167 N. Y. 452, aff'g 39App. Div. 25; 56 N. Y. Supp. 331, aff'd 167 N. Y. 452.

m. **Construction of § 1910.**—§ 1910 should be given a liberal construction while § 549, subd. 9, and § 3343, being penal, should be strictly construed: Davids v. Brooklyn Heights R. R. Co., 45 Misc. 208; 92 N. Y. Supp. 220, rev'g 104 App. Div. 24.

n. **Public policy.**—An assignment to a county superintendent of the poor of the claims of a contractor with him as such superintendent for providing worthy homes for indigent children of the county is not enforceable by him against the county, as it is void as against public policy since his interest as an assignee and an individual conflicts with his official duty: People ex rel. Spaulding v. Bd. Suprs., 34 Misc. 740; 70 N. Y. Supp. 1048.

o. **Deceit.**—An action for deceit is assignable; it is only actions for personal injuries that are not assignable under the provisions of the Code of Civil Procedure, and the assignability of a cause of action is not made to depend upon the survival

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of the action on the death of a party: Keeler v. Dunham, 114 App. Div. 94.

a. A contract to supply electricity is assignable: Hudson River W. P. Co. v. Glens Falls Co., 107 App. Div. 548.

b. The assignor of a claim who has parted with his entire interest cannot be joined with the assignee as a party plaintiff; a cause of action for the conversion of part of the proceeds of a check is assignable: Alexander v. City of Gloversville, 110 App. Div. 791.

c. An assignment of a claim against a decedent's estate and of a judgment recovered thereon carries with it all the rights and benefits under a decree entered upon the judicial settlement of the accounts of the administratrix whether the assignment was before or after its entry: Bamberger v. Am. Surety Co., 48 Misc. 221; 96 N. Y. Supp. 665.

§ 1913. Action upon judgment regulated.

See § 1251, ante, Judgment exists as a lien for ten years.

See § 2863, post, No jurisdiction in certain cases.

See § 3154, post, Action on judgment of justice.

d. Without any special provision of statute, a plaintiff may sue upon a final order in a special proceeding establishing an indebtedness to him, and nothing in § 1913 suggests that a party so suing must find his rights within the terms of said section, which is restrictive merely upon the common-law right to sue upon a judgment obtained within the jurisdiction: Fenlon v. Paillard, 46 Misc. 151.

e. A final judgment for divorce and the payment of alimony by installments is a judgment for a sum of money within § 1913, which provides that an action cannot be maintained upon a judgment for a sum of money unless ten years have elapsed since it was docketed or unless some of the other circumstances mentioned in the section exist: Shepherd v. Shepherd, 51 Misc. 418.

f. Where, upon the trial of an action on a judgment, by the tacit consent of the parties the action is resolved into one to establish the liability of a defendant not summoned in the former action, a defense that the judgment was not properly docketed and that leave of the court had not been obtained becomes immaterial and irrelevant: Hofferberth v. Nash, 50 Misc. 328.

g. Retroactive.—Chap. 568 of 1896, which adds to this section a provision that an action for a sum of money can be maintained when ten years elapsed since the docketing of such judgment, is retroactive: Peace v. Wilson, 186 N. Y. 403; 188 N. Y. Supp. 557.

h. **Counterclaim.**—A judgment previously obtained by defendants against the plaintiff is not a counterclaim as that term is used in § 636; there is nothing in § 1913 to prevent the owner of such a judgment from asserting his cause of action by way of counterclaim: Brown v. English, 115 App. Div. 884.

§ 1914. Ancillary action for discovery abolished.

See § 803 et seq., ante, Discovery of books and papers.

See § 655, ante, Sheriff may maintain action to discover property of attachment creditor.

See § 2707, post, Proceedings to discover property of decedent.

§ 1915. Action upon a penal bond.

See § 1880 et seq., ante, Actions by private persons upon official bonds.

i. **Counsel fees.**—A counsel fee allowed an attorney pending an action for separation cannot be collected from the husband's executors after his death: Kellogg v. Stoddard, 89 App. Div. 137; 84 N. Y. Supp. 1015.

j. **Bond.**—In an action on a bond for the performance of an act, and not the payment of money, the recovery is limited to the amount of the penalty, and the interest only commences to run from the date of entry of judgment: Sachs v. American Surety Co., 72 App. Div. 60; 33 Civ. Pro. R. 41; 76 N. Y. Supp. 335.

§ 1917. Action upon lost negotiable paper.

k. **Certificate.**—§ 1917 does not apply to an action brought against a security company where a person who lost a certificate by which the company promised to pay her a sum of money and who seeks to compel the issuance of a new certificate as the certificate is not a negotiable instrument within § 20 of chap. 612 of 1897, known as the Negotiable Instrument Laws; § 1909 would protect the company in paying her the money even if she had assigned the certificate, provided the company had no notice of such an assignment: Zander v. New York Security & Trust Co., 39 Misc. 98; 78 N. Y. Supp. 900.

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a. **Indemnity.**—The right to recover upon a lost instrument upon the giving of indemnity does not rest upon the statute, but the power to permit such recovery has always existed in a court of equity: Matter of Cook, 86 App. Div. 586; 83 N. Y. Supp. 1009.

§ 1919. Actions, etc., by or against associations of seven or more persons.

b. The action against the president or treasurer of a joint stock association consisting of more than seven persons, authorized by § 1919, is in effect an action against the association, and where it has gone out of existence the action cannot be maintained against the officer, the defendant may properly take the objection by answer; the remedy of the plaintiff is against the individual association: Peckner v. Webb, 35 Misc. 291.

c. **Liability of individuals.**—A person employed by a member of the board of trustees of an unincorporated association cannot maintain an action to recover the value of his services against the treasurer of such association under the provisions of § 1919, as it could not be said that it was within the contemplation of the members of the association that they should be individually liable for debts contracted by the association: Lightbourn v. Walsh, 97 App. Div. 187; 89 N. Y. Supp. 856.

d. **Amendment.**—A complaint will not be dismissed as failing to state facts sufficient to constitute a cause of action merely because the plaintiff has sued a foreign joint-stock association as a partnership, the objection being taken in the first instance upon the trial, and the court, in the interests of justice and in the absence of proof of the foreign law, will treat the proceeding as a mistrial, will assume that the proper officer of the association was served, that his official designation was omitted by the plaintiff in the title of the action, and will permit the latter to amend, on terms so as to bring the matter within § 1919, permitting an action against the president or treasurer of a joint-stock association: Messler v. Schwarzkopf & Dorer, 35 Misc. 72.

e. **Mandamus.**—Though § 1919 authorizes the maintenance of actions against unincorporated corporations, yet it seems it does not authorize the maintenance of special proceedings such as a mandamus proceeding to compel the New York Stock Exchange, a voluntary unincorporated association, to compel it to reinstate a member: Matter of Weidenfeld v. Keppler, 84 App. Div. 235; 82 N. Y. Supp. 634.

f. **Proof.**—In an action by an officer of an unincorporated association consisting of seven or more persons, it is necessary for such officer to allege and prove that he is such officer of the association: Tanner v. Ranken, 44 Misc. 488; 89 N. Y. Supp. 770.

g. **Tort.**—An action based upon a tort committed by all the members of an unincorporated association, acting through the association, may, under § 1919, be maintained against the president or treasurer of the association: Rourke v. Elk Drug Co., 75 App. Div. 145; 77 N. Y. Supp. 373.

h. **Defense.**—A. member of a subordinate lodge of a society which manages sick benefit funds may, under the provisions of § 1919, maintain an action against the parent lodge to recover sick benefits although the parent lodge is incorporated under the laws of this state; in such a case the subordinate lodge must be deemed to be an unconstitutional association within the meaning of § 1919, and the fact that there are not seven or more members of such subordinate lodge is a matter of defense: Boyd v. Gernant, 82 App. Div. 456.

§ 1925. Action by a taxpayer against a public officer.

See chap. 301 of 1892, Taxpayer's action to restrain illegal acts and to compel restitution.

See chap. 370 of 1899, Taxpayer's action to restrain salaries improperly paid under Civil Service Law.

i. Section 1925 provides a remedy distinct from that afforded by chap. 531 of 1881, as amended by chap. 301 of 1892: Wey v. O'Hara, 48 Misc. 83.

j. **Injunction.**—A preliminary injunction will not issue in a taxpayer's action to annul a city contract unless the plaintiff shows clearly that upon the law and facts the official action complained of is illegal: Stockton v. City of Buffalo, 108 App. Div. 170.

k. In an action brought by a taxpayer to restrain the municipal authorities from paying a claim for compensation to such person for performing said duties, where the complaint alleges an intention so to do, an injunction *pendente lite* should be granted: Beresford v. Donaldson, 54 Misc. 138.

l. **Park.**—A taxpayer's action may be maintained to restrain the use for advertising purposes of a fence surround-

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ing a portion of one of the public parks of a city, although it is not shown that there has been any waste of the city's money or actual injury to its property: Tompkins v. Pallas, 47 Misc. 309.

a. **Contract.**—Where the complaint in a taxpayer's action to annul, as illegal, under certain sections of the Greater New York charter, a contract for the operation of street cars over the Williamsburgh bridge and to restrain the performance of such contract, fails to allege fraud, collusion or bad faith on the part of the municipal officer in so contracting, the sole question is whether he had power to make the contract: Schinzel v. Best, 48 Misc. 224.

b. **Parties.**—In a taxpayer's action to set aside audits made by a board of supervisors, the owners of the claims are necessary parties defendant, and when the defendant board has demurred to the complaint by reason of such defect of parties it is error to refuse an application to amend the complaint to bring in additional parties: Armstrong v. Fitch, 113 App. Div. 317.

c. Aldermen of a city are proper parties in an action by a taxpayer: Koster v. Coyne, 110 App. Div. 742; 97 N. Y. Supp. 433, aff'd 184 N. Y. 494.

d. A taxpayer, although an officer of an unsuccessful bidder for a municipal contract, may maintain a taxpayer's action to restrain the municipality from carrying out such contract when it is fraudulent and illegal and involves a waste of public funds: Gage v. City of New York, 110 App. Div. 403; 97 N. Y. Supp. 157.

e. In an action to restrain the illegal act of a municipal officer, under chap. 301 of 1892, the proper parties defendant are the comptroller, the lessees and their successors in interest, and the city of New York: Wenk v. City of New York, 171 N. Y. 607, rev'g 69 App. Div. 621; 75 N. Y. Supp. 1135.

f. Payment of claims illegally audited by a town board may be enjoined at the suit of taxpayers of the town, and the members of the town board properly should be made parties: Rockefeller v. Taylor, 69 App. Div. 176; 74 N. Y. Supp. 812.

g. In a taxpayer's action, the court will not restrain the performance of a contract for a public work because the contract is ill-advised or the result of gross errors of judgment, nor upon general averments of bad faith where the opposing papers explicitly deny the fraudulent intent: Matter of McClellan, 48 Misc. 215; 96 N. Y. Supp. 479, aff'g 113 App. Div. 295.

h. **Salary.**—A taxpayer's action will not lie to restrain payment of salaries of public officers upon the ground that the appointments are valid in form but invalid in fact, and where the question is not collateral *quo warranto* is the proper remedy: People ex rel. Met. St. Ry. Co. v. Tax Comrs., 174 N. Y. 432, rev'g 79 App. Div. 184.

i. A taxpayer's action cannot be maintained to restrain the payment of a salary to a public officer holding a presumptively valid appointment: Greene v. Knox, 175 N. Y. 432, aff'g 76 App. Div. 405; 78 N. Y. Supp. 779.

j. **Waste and injury.**—Where the supervisors have established and settled the boundary line between two towns by reference to ancient maps, such action cannot, in the absence of fraud, be attacked by a taxpayer's action, under § 1925, since the words "waste" and "injury" include only illegal, wrongful or dishonest illegal action: Govers v. Bd. Suprs. Westchester Co., 171 N. Y. 403, aff'g 55 App. Div. 40; 67 N. Y. Supp. 27.

k. A taxpayer's action will not lie, under § 1925, on the ground that a police board made false returns to the civil service commissioners as to certain sergeants, promoted to the position of captain in the police force, where the complaint does not allege that such promotions will result in "waste" of the funds of the city; the plaintiff has a complete and adequate remedy, under the provisions of § 1948, by an action in the nature of *quo warranto:* Greene v. Knox, 76 App. Div. 405; 78 N. Y. Supp. 779; 33 Civ. Pro. R. 205.

l. A taxpayer's action, authorized by § 1925 and § 59 of the Greater New York charter, cannot be maintained without proof of fraud, collusion, corruption, bad faith or illegality; the statute was not intended to protect against bad judgment or acts within an officer's jurisdiction; "waste" and "injury," as used in § 1925 of the Code of Civil Procedure, and § 59 of the Greater New York charter, are identical in meaning: Hearst v. McClellan, 102 App. Div. 336; 92 N. Y. Supp. 484.

m. § 1925, authorizing a taxpayer to sue to prevent illegal official acts or official wastes of the funds of a municipality, authorizes actions against the offending officials only, and if not brought against them it cannot be maintained: Wenk v. City of New York, 36 Misc. 498.

n. **Tax.**—The fact that a village tax is invalid for want of notice and hearing does not entitle a taxpayer of the village to maintain a taxpayer's action under this section: Trumbull v. Palmer, 104 App. Div. 51.

o. In a taxpayer's action, the plaintiff has a right to urge any illegality or omission in the official acts of the defendant which he might urge in defense of his property in an action for ejectment under a tax title: Queens County Water Co. v. Monroe, 83 App. Div. 105.

p. General allegations in a taxpayer's action to annul a contract made by commissioners of the East river bridge, in the city of New York, held in-

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sufficient to support charge of fraud: Knowles v. City of New York, 176 N. Y. 430, aff'g 74 App. Div. 632; 77 N. Y. Supp. 1180.

a. Where the officials of a city let a contract, contrary to the provisions of the charter, a temporary injunction, obtained in a taxpayer's action, to restrain the city officials from carrying out the contract, should be continued: Happel v. Blessing, 37 Misc. 47; 74 N. Y. Supp. 801.

b. An action may be maintained by a taxpayer to annul an agreement made by a city, through its commissioner of parks, giving an individual the exclusive privilege of placing and renting chairs in a public park: Kurtz v. Clausen, 38 Misc. 105.

c. **Discretion.**—A railroad company cannot maintain a taxpayer's action, under § 1925, to restrain the grade crossing commissioners from proceeding with work, as the statute authorizing such an action was not entitled to apply to a case where public officers have unwisely, though fairly, exercised a discretion conferred on them, or where they have been guilty of a breach of an executory contract: Erie R. R. Co. v. City of Buffalo, 96 App. Div. 458; 89 N. Y. Supp. 122.

d. **Fraud.**—A taxpayer's action brought under chap. 531 of 1881, as amended in 1892, to restrain official acts, by public officers, is only authorized where the acts are without power and where corruption, fraud, or bad faith amounting to fraud is charged; where the complaint in such an action does not allege fraud and acts of bad faith, the complaint will be dismissed at the trial, but without costs: Craft v. Lent, 53 Misc. 484.

e. Taxpayer's action are brought to allow the illegal acts of public officials to be controlled by courts and to protect the corporation. They are not allowed for the purpose of enabling corporations or individuals to require the award of a public contract on bids in excess of those made by other competent and responsible bidders: Nathan v. O' Brien, 117 App. Div. 664.

§ 1928. The last two sections qualified.

See § 925, ante, Proof of presentment, etc., of foreign bills.

§ 1930. Successor may be substituted.

See § 766, ante, An action does not abate on account of death of public officer.

f. **Mandamus.**—Where mandamus proceedings have been instituted against the commissioners of a department of a municipal government to secure the reinstatement of the relator and the respondent ceases to be the commissioner of such department, the proceedings are abated; the relator is not entitled, under §§ 723, 755, 756, 1930 or 1997, to have the respondent's successor substituted as respondent, but his remedy is to make a demand for reinstatement upon the successor and to institute a new mandamus proceeding if such successor refuses to reinstate him: People ex rel. Hatch v. Lantry, 88 App. Div. 583; 85 N. Y. Supp. 193.

§ 1932. Judgment against defendants jointly indebted, when all are not served.

See § 758, ante, Proceedings when one of several joint debtors dies.

See § 819, ante, Consolidation of actions against joint debtor defendants.

See § 1278, ante, Confession of judgment by one of several joint debtors.

See § 2461, post, Supplementary proceedings where the judgment is against joint debtors.

See §§ 3020, 3021, post, Judgment against joint debtors in justice's court.

§ 1395 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

g. Although a complaint sets out an action to recover for work, labor and services against joint defendants, a judgment against one of said defendants only is authorized by § 1205: Lawton v. Partridge, 111 App. Div. 8.

§ 1933. Effect of such judgment.

See § 1278, ante, Confession by one of several joint debtors.

§ 1395 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

h. **Defenses.**—This section does not preclude the setting up of other defenses: Bath Gas Light Co. v. Rowland, 84 App. Div. 563; 82 N. Y. Supp. 841, aff'g 178 N. Y. 631.

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§ 1934. Execution; indorsement thereupon.

§ 1395 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1935. How collected.

§ 1395 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 1936. Judgment, how docketed; effect of docketing.

§ 1396 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. The clerk's omission to write the words "not summoned" upon the docket, as directed by this section, does not impair the judgment creditor's right to proceed against a defendant not summoned: Hofferberth v. Nash, 50 Misc. 328.

§ 1937. Action to charge defendants not personally summoned.

§ 1396 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. Where a lessor, a corporation, brings an action against one of the two joint sureties upon the lease, and recovers judgment against him, the fact that in such action a defendant surety set up the defense of *ultra vires* and was defeated thereon, will not preclude the other surety, when sued by the lessor, under the provisions of § 1937, from setting up that defense: Bath Gas Light Co. v. Rowland, 84 App. Div. 563; 82 N. Y. Supp. 841.

c. **Amendment.**—In an action under § 1937 to charge a joint debtor not personally served in a prior action, a motion to amend the complaint at trial to show that the defendant was not served in the prior action should be granted when it is manifest that the plaintiff attempted to state a cause of action under the section. But a failure of the court to grant such proper amendment does not entitle the defendant to a reversal of judgment for the plaintiff: Hofferberth v. Nash, 117 App. Div. 284.

d. The entry upon the docket prescribed by § 1936 is a condition precedent to the action authorized by this section: Hofferberth v. Nash, 50 Misc. 328, rev'd 117 App. Div. 284.

§ 1939. Answer.

e. In an action against two joint sureties on a lease, although a judgment had been obtained against one surety, yet the other might set up any defense which he might have made in the original action, if the summons had been served on him at the same time as on his fellow-surety: Bath Gas Light Co. v. Rowland, 84 App. Div. 563; 82 N. Y. Supp. 841, aff'g 178 N. Y. 631.

§ 1942. Joint debtors may compound separately. Mode and effect.

f. **Partnership.**—Under § 1942 a member of a partnership cannot be discharged until the partnership has been dissolved, and a compliance with this section does not impair the creditor's right of action against any other joint debtor; it is a well-settled rule that a release to one of several obligors, whether they are bound jointly or jointly and severally, discharges the others, and may be pleaded in bar: Finch v. Simon, 61 App. Div. 139; 32 Civ. Pro. R. 56..

g. Under the provisions of § 1942, the mere payment by one partner of his part of the liability upon notes of the firm does not discharge the other partner of his share of the indebtedness: Kaplan v. Shapiro, 53 Misc. 609.

h. A release executed by a person who had recovered a judgment against all of the members of a firm upon a partnership transaction, to one of the judgment debtors, applies to the interest in the firm assets as well as to the individual property of such judgment debtor, and after the execution of such release an assignee of the judgment, taking the same with knowledge, is not entitled to have a receiver appointed of the firm property: Hunter v. Hunter, 67 App. Div. 470.

i. **Discharge of one.**—The discharge of one joint debtor does not impair the right of action against another unless such an intent "appears affirmatively:" Booth Brothers v. Baird, 83 App. Div. 495, at 502; 82 N. Y. Supp. 432.

j. **Parties.**—In an action by a creditor to enforce the statutory liability of directors, each defendant is entitled to have all the directors who were liable made parties to the action: Bauer v. Parker, 82 App. Div. 289; 81 N. Y. Supp. 995.

k. **Surety.**—The relation of principal and surety exists between an owner of real property, personally liable on a bond

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secured by mortgage upon the property, and his grantee, who assumes payment of the mortgage, and consequently where the assignee of a deficiency judgment, recovered upon the foreclosure of the mortgage, is paid the amount of that judgment by such a grantee and satisfies it, the assignee cannot again recover its amount of the grantor, since deceased, and a judgment debtor in the same judgment, provided the said assignee had notice of the existence of the relation of principal and surety, and such a satisfaction is not a compromise of a joint obligation within §§ 1942-1944, as the obligation is not joint: Matter of Browne, 35 Misc. 362; 71 N. Y. Supp. 1034.

a. **Compromise.**—In an action against two joint debtors the plaintiff may compromise with one without releasing the other from the residue of the demand or without precluding a continuance of the action against him; a judgment against one does not preclude the plaintiffs from compromising: Siefke v. Minden, 40 Misc. 631.

§ 1944. Rights of the debtors not released.

b. A corporation through its directors cannot release one director from liability for the waste of the funds of the corporation: Gilbert v. Finch, 173 N. Y. 455, aff'g 72 App. Div. 38; 76 N. Y. Supp. 143.

§ 1945. Action against persons engaged in transportation.

c. A corporation through its directors cannot release one director from liability for the waste of the funds of the corporation: Gilbert v. Finch, 173 N. Y. 455, aff'g 72 App. Div. 38; 76 N. Y. Supp. 143.

§ 1946. When partner not sued remains liable.

See § 1278, ante, Confession of judgment by one of several joint debtors.

d. **Note.**—Where the holder of a firm note has sued upon it one of the two partners who made it, and that judgment remains unsatisfied, he may sue the omitted partner for the balance remaining unpaid, and a complaint, setting forth the cause of action and alleging why one partner was omitted from the first action and the other from the present action is sufficient and a demurrer thereto is frivolous: Kirkbride v. Wilgus, 37 Misc. 519.

e. **Partnership.**—Allegations as to membership of copartnership and the succession in interest to the business of a former firm and as to their ownership of judgments in action under § 1946; *Held* to be allegations of fact and not conclusions of law are not demurrable: McKee v. Jessup, 62 App. Div. 143.

f. § 1946 applies only to an action on the liability of a partnership and does not authorize the taking of a judgment against a defendant where the complaint alleges that he was the individual purchaser of the goods: New York Fastener Co. v. Wilatus, 65 App. Div. 467; 73 N. Y. Supp. 67.

g. **Compromise.**—In an action against two joint debtors the plaintiff may compromise with one without releasing the other from the residue of the demand or without precluding a continuance of the action against him, a judgment against one does not preclude the plaintiffs from compromising: Siefke v. Minden, 40 Misc. 631.

§ 1947. Continuance of partnership business during action for accounting, etc.

h. § 1947 does not abridge the power of the court to appoint a receiver where a trial has been had: Bernheimer v. Schmidt, 36 Misc. 456, at 462; 73 N. Y. Supp. 767.

i. A receiver should not be appointed where the affidavits in support of the application do not disclose such condition of the business as to require the appointment of a receiver; in lieu thereof an order should be made authorizing the business to be continued under the provisions of § 1947: Kirkwood v. Smith, 64 App. Div. 615; 72 N. Y. Supp. 291.

§ 1948. Attorney-general may maintain action.

See § 1983, post, Writ of *quo warranto* has been abolished.

j. **Title to office.**—An action in the nature of a *quo warranto*, and not a writ of mandamus, is the proper remedy by which to try the title of an office held by another person under a claim of title where the question of the eligibility of the person seeking the office turns upon the construction of the statutory provisions: People ex rel. Thomson v. Hinsdale, 43 Misc. 182; 88 N. Y. Supp. 206.

k. A court of equity will not entertain jurisdiction over contests to public office; an action brought by the incumbent of an office restraining the commissioner

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from removing him cannot be successfully maintained as a determination to the title to public office belongs exclusively to courts of law to be exercised by mandamus, prohibition or *quo warranto* as the circumstances of the case require: People ex rel. Corscadden v. Howe, 177 N. Y. 499, aff'g 88 App. Div. 617; 84 N. Y. Supp. 604.

a. **Taxpayer's action.**—A taxpayer's action will not lie under § 1925 on the ground that a police board made false returns to the civil service commissioners as to certain sergeants promoted to the position of captain in the police force, where the complaint does not allege that such promotions will result in "waste" of the funds of the city; the plaintiff has a complete and adequate remedy under the provisions of § 1948 by an action in the nature of *quo warranto*: Greene v. Knox, 76 App. Div. 405; 78 N. Y. Supp. 779.

b. **Injunction.**—An action to obtain an injunction to restrain members of an unincorporated association from violating an agreement of the organization, is not one to determine the title to office, and, therefore, not within §§ 1948 and 1984: Boston B. B. Assn. v. Brooklyn B. B. Club, 37 Misc. 521; 75 N. Y. Supp. 1076.

c. **Parties.**—An action in the nature of *quo warranto* may be brought by the attorney-general on his own information, under § 1948, against persons alleged to have usurped and entered into the office of city magistrates in the city of New York, and, under § 1954, the persons who claim to have been elected to said office, and rightly entitled thereto, should also be made defendants: People v. Dooley, 171 N. Y. Supp. 74; 33 Civ. Pro. R. 77.

d. **Police.**—When a police officer of the city of New York, one of four promoted to fill vacancies in the number of inspectors of police, is subsequently returned to his former rank because the prior incumbents of two of the vacancies have been reinstated by the court, which fact made the number of inspectors exceed the statutory limit, his remedy, if any, to compel his recognition as an inspector is by *quo warranto*, not by mandamus, as there is another incumbent in the office claimed: People ex rel. Baldwin v. McAdoo, 110 App. Div. 432.

e. **Public officer.**—The bringing of an action of *quo warranto* against a person who usurps or unlawfully holds a public office is in the discretion of the attorney-general. A decision by a prior incumbent of the office that the action should not be brought is not *res adjudicata* or binding upon his successor; when the attorney-general has served a summons and complaint in an action of *quo warranto* the questions as to whether the action was barred by the decision of his predecessor and whether service should be set aside should be raised by motion and not by answer or plea in bar: People v. McClellan, 118 App. Div. 177; 103 N. Y. Supp. 146, aff'd 188 N. Y. 618.

f. In an action brought by an attorney-general, pursuant to § 1948, against a person, who, it is alleged, usurps, intrudes or unlawfully holds or exercises within the state a public office, an allegation of the name of the person entitled to the office and the facts showing his right thereto, inserted into the complaint in pursuance of § 1949 does not make the person aleged to be entitled to the office a necessary party to the action: People v. McClellan, 54 Misc. 130.

§ 1952. Proceedings to obtain books and papers.

See Penal Code, § 57, Refusal to deliver books and papers to a successor in office is a misdemeanor.

See § 2471a, post, Delivery of books and papers, how enforced.

§ 1954. One action against several persons.

g. An action in the nature of a *quo warranto*, and not a writ of mandamus, is the proper remedy by which to try the title of an office held by another person under a claim of title where the question of the eligibility of the person seeking the office turns upon the construction of the statutory provisions: People ex rel. Thomson v. Hinsdale, 43 Misc. 182; 88 N. Y. Supp. 206.

h. **Parties.**—In an action brought under § 1948 against certain persons alleged to have usurped and entered into office of city magistrate of the city of New York, the persons who claim to have been elected to said offices and those holding said offices should all be made party defendants: People v. Dooley, 171 N. Y. 78.

§ 1958. Action triable by jury.

See § 1950, ante, Action triable by jury.

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§ 1962. Action for forfeiture, etc.

See § 549, ante, Right of arrest in an action to recover a penalty.

See § 1893, ante, Action by person specially aggrieved.

See § 1897, ante, Indorsement on summons in an action to recover a penalty.

§ 1969. Action in court of the state for public funds illegally obtained, converted, etc.

See § 549, ante, Order of arrest in action for peculation.

See § 637, ante, Warrant in action against public officer, for peculation.

See § 789, ante, Preference of certain actions by the people.

See § 1925, ante, Action by a taxpayer against a public officer.

See § 1973, post, Statute of limitations.

§ 1973. Limitation of action.

See § 362, ante, When the people will not sue.

See § 398 et seq., ante, When action deemed to be commenced.

§ 1976. Attorney-general must bring action.

See § 789, ante, Preference of certain actions by the people.

§ 1983. Scire facias, quo warranto, etc., abolished.

See § 1948, ante, Action against the usurper of an office or franchise.

a. The successor of a supervisor, chosen by the town board, may compel the delivery of the books and papers of the office and is not obliged to bring *quo warranto* proceedings against his predecessor: Matter of Smith, 116 App. Div. 665; 101 N. Y. Supp. 992, aff'd 188 N. Y. 549.

§ 1984. Actions to be brought in the name of the people.

b. Under § 603 the supreme court has jurisdiction of an action brought by certain base ball clubs, members of a voluntary unincorporated association to prevent one of the members from violating an agreement under which the association was formed, to avoid an alleged election by them of another as the treasurer of said association and to restrain the latter from taking possession of the funds of the association; the action is not one to determine the title to an office, and, therefore, is not within §§ 1948 and 1984 providing that such actions be brought by the people, nor do the provisions of those sections apply to an unincorporated association: Boston B. B. Assn. v. Brooklyn B. B. Club, 37 Misc. 521; 75 N. Y. Supp. 1076.

§ 1985. Judgment for costs may be taken against the people.

See § 3241, post, How costs against the state are paid.

See § 3242, post, Costs when action is brought on relation of private person.

§ 1986. Relator; when to be joined as plaintiff; compensation of attorney-general.

See § 1808, ante, When attorney-general must bring action.

See § 3242, post, Costs when action brought by people in relation of private person.

c. **Rival parties.**—The sections of the Code of Civil Procedure relating to the action of *quo warranto* require that rival claimants to an office should be made parties to the action; if a defect of parties should appear upon the face of the complaint, it may be brought to the attention of the court by demurrer: People v. McClellan, 54 Misc. 416.

d. **Quo warranto.**—The attorney-general may commence an action of *quo warranto* upon his own motion and upon knowledge or information possessed by himself without waiting for a complaint by any person; when *quo warranto* is brought by the attorney-general upon a complaint or information made by a claimant to office, the claimant must be joined as relator and must indemnify the state against costs as required by § 1986, and when the attorney-general sues of his own motion, without naming a relator, it is presumed that there is no adverse claimant to the office: People v. McClellan, 119 App. Div. 416.

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§ 1990. When people, municipal corporation, etc., not required to give security.

See § 1314, ante, No security necessary on appeal by a domestic municipal corporation.

§ 1991. State writs enumerated.

a. The writ of certiorari to review the conviction in a criminal case should not be confounded with the writ provided for in § 1991 as the latter cannot be used to review a determination made in any criminal matter, except a criminal contempt of court as provided by § 2148: People ex rel. Manning v. Hagan, 34 Misc. 24; 69 N. Y. Supp. 451.

b. Neither the writ of *habeas corpus* nor the writ of certiorari provided for in art. 3, title 2, chap. 16 of the Code of Civil Procedure is in any sense a writ to review, and their sole function is to inquire into the cause of detention: People ex rel. Fleischman v. Fox, 34 Misc. 82; 69 N. Y. Supp. 545.

§ 1993. State writ at the instance of the people.

c. A writ of mandamus on behalf of the people in their sovereign capacity can be awarded only upon the application of the attorney-general, or some district attorney, and the indorsement upon the writ must show that it was issued upon such application; in such a case the name of no person need appear as relator: People ex rel. Lehmaier v. Interurban Street Ry. Co., 85 App. Div. 407; 83 N. Y. Supp. 622.

§ 1994. Relator, when joined with people; parties, how styled.

d. § 1994 does not limit the right conferred by § 2127: Matter of Belmont, 40 Misc. 133; 81 N. Y. Supp. 280.

e. In view of the provisions of § 1994, that a state writ awarded upon the application of a private person must show that it was issued upon the relation of that person, the defect, in the motion papers of the company, that they are entitled only in the name of "The People" and do not name the company as relator or in any manner, is a mere irregularity which does not diminish the right to the writ, upon a proper case made, and cannot in such case preclude its subsequent issue in the form required by the Code: Peo. ex rel. Monticello Tel. Co. v. Trustees, 35 Misc. 675.

§ 1997. Final order; certain proceedings same as in actions.

f. Where mandamus proceedings have been instituted against the commissioners of a department of a municipal government to secure the reinstatement of the relator and the respondent ceases to be the commissioner of such department, the proceedings are abated; the relator is not entitled under §§ 723, 755, 756, 1930 or 1997 to have the respondent's successor substituted as respondent, but his remedy is to make a demand for reinstatement upon the successor and to institute a new mandamus proceeding if such successor refuses to reinstate him: People ex rel. Hatch v. Lantry, 88 App. Div. 583; 85 N. Y. Supp. 193.

§ 2000. Habeas corpus, how served; fees and undertaking, when required.

See § 3307, subd. 16, post, Sheriff's fees; habeas corpus.

See § 3207, subd. 16, post, Service of complaint with summons; proceedings thereupon.

§ 2001. Fees to persons not officers.

See § 3307, subd. 16, post, Sheriff's fees; habeas corpus.

See § 3207, subd. 16, post, Service of complaint with summons; proceedings thereupon.

§ 2015. Who entitled to prosecute the writs. Habeas corpus may issue on Sunday.

g. **Bail.**—A person, arrested upon a criminal charge and admitted to bail is not entitled to a writ of certiorari or of *habeas corpus* under § 2015, for the reason that the imprisonment referred to in the section is an actual physical restraint by which the liberty of the individual is in some way interfered with: People ex rel. Albert v. Pool, 77 App. Div. 148.

h. **Appeal.**—An appeal from an order dismissing a writ of *habeas corpus* will not be dismissed by the appellate division upon the ground that the relator has no interest in the proceeding and was practi-

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cally a stranger, where it appears that the special term, with full knowledge of all the facts on which the motion to dismiss the appeal was based, entertained the *habeas corpus* proceeding and proceeded to a determination thereof on the merits: People ex rel. Bebro v. Bond, 104 App. Div. 47.

a. **Examination.**—One arrested under a warrant issued by a magistrate charging him with crime is not obliged to await an examination, but may at once resort for his protection to a writ of *habeas corpus.* The court upon such a proceeding will look back of the warrant and see if the facts stated in the deposition of the prosecutor and his witness confer jurisdiction upon the magistrate to issue it: People ex rel. Perkins v. Moss, 187 N. Y. 410, aff'g 113 App. Div. 329; 99 N. Y. Supp. 138.

b. **Debtor.**—A judgment debtor in custody under an execution against the person, in an action in which there was no authority to issue an execution, may obtain his discharge through *habeas corpus;* it would be better practice to move to set aside the execution against the person: People ex rel. Harris v. Gill, 85 App. Div. 192; 83 N. Y. Supp. 135.

c. **Common law.**—The purpose of the writ under § 2015 is the same as the common law writ of *habeas corpus* which was used to try the rights of parents and guardians to the custody of infant children: People ex rel. Watson v. Buffett, 75 App. Div. 365; 78 N. Y. Supp. 175.

d. **Extradition.**—The action of the governor of the state in issuing a warrant for the extradition of an alleged fugitive from justice can be reviewed by writ of *habeas corpus:* People ex rel. Corkran v. Hyatt, 172 N. Y. 176.

§ 2016. When neither writ shall be allowed.

e. Where, on the return to a writ of *habeas corpus* to inquire into the cause of detention of the petitioner's infant son, it is undisputed that the respondent's custody of the child is by virtue of a commitment made by a magistrate, the court should remand the child into the respondent's custody: People ex rel. Sampson v. N. Y. C. Protectory, 93 App. Div. 196; 87 N. Y. Supp. 557.

§ 2017. How and to whom application for habeas corpus or certiorari made.

f. The petition for writ of *habeas corpus* to obtain the discharge of an inebriate may be made by the incompetent's private attorney: Matter of Larner, 68 App. Div. 320; 74 N. Y. Supp. 70.

§ 2019. Contents of petition.

See § 523, ante, Verification.

See § 1994, ante, When relator is joined with people.

g. **Evidence.**—Facts, not traversed or denied, alleged in a petition for a writ of *habeas corpus* instituted to procure the relator's discharge from imprisonment under an order adjudging her in contempt, even if not admitted, constitute evidence upon the hearing of the writ, and if they show that she was not guilty of contempt she is entitled to be discharged: Matter of Depue, 185 N. Y. 60.

h. **Examination.**—One arrested under a warrant issued by a magistrate charging him with a crime is not obliged to await an examination, but may at once resort for his protection to a writ of *habeas corpus.* The court upon such a proceeding will look back of the warrant and see if the facts stated in the deposition of the prosecutor and his witness confer jurisdiction upon the magistrate to issue it: People ex rel. Perkins v. Moss, 187 N. Y. 410, aff'g 113 App. Div. 329; 99 N. Y. Supp. 138.

§ 2020. When writ must be granted; penalty for refusing.

i. Upon proper facts shown, it is a mandatory duty of a justice of the supreme court, under a penalty of $1,000, to issue a writ of *habeas corpus:* People ex rel. Farley v. Crane, 94 App. Div. 397; 88 N. Y. Supp. 343.

§ 2022. Form of writ of certiorari.

j. The form of a writ of certiorari to inquire into the cause of detention is prescribed by § 2022: People ex rel. Farley v. Crane, 94 App. Div. 397; 88 N. Y. Supp. 343.

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§ 2026. Return; its contents.

a. Where the return to a writ of *habeas corpus*, consisting merely of a commitment regular in form, directing that relator be held to answer to the court of special sessions in the city and county of New York for a violation of the Liquor Tax Law, shows upon its face that the magistrate had jurisdiction to commit, the writ must be dismissed: People ex rel. Laughran v. Flynn, 48 Misc. 159.

§ 2031. Proceedings on return of habeas corpus.

b. Writs of *habeas corpus* and certiorari will not review the conviction by a magistrate where he had jurisdiction of the charge and authority to impose the sentence: People ex rel. Eisen v. Flynn, 37 Misc. 90; 74 N. Y. Supp. 740.

c. **Custody of child.**—Where the court of chancery of another state has awarded the custody of a child to its father, the disposition made will not be changed by our courts where the circumstances have not changed, and particularly where the mother, who had procured an illegal foreign divorce, is living in adultery by virtue of a second marriage which our courts have declared to be illegal: People ex rel. Ludden v. Winston, 34 Misc. 21; 69 N. Y. Supp. 452.

d. **Costs.**—A defendant should not be required to pay a bill of costs without an opportunity being afforded him to be heard; when prosecuted, he has a right to be in court and have his day in court; an examination into the facts required by § 2031: People ex rel. Watson v. Buffett, 75 App. Div. 365; 78 N. Y. Supp. 175.

§ 2032. When prisoner to be remanded.

See § 2016, ante, When neither writ shall be allowed.

e. If it is made to appear to the supreme court, upon the return to the writ, that the relator was held under a valid commitment, it had the force of a final judgment by a competent tribunal and it is the duty of the court to remand the relator: People ex rel. Clark v. Keeper, etc., 176 N. Y. 465.

f. The applicant for a writ must show affirmatively in his petition that he is not detained under any process specified in § 2032, and should it appear upon the hearing that he is, then he must be remanded: People ex rel. Corkran v. Hyatt, 172 N. Y. 176.

g. **Competent testimony.**—Where the return to a writ of *habeas corpus* shows that the relator was duly committed upon competent testimony, the relator must, on demurrer to a traverse of the return, be remanded under § 2032, declaring that the prisoner must be remanded if it appears that she is detained "by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction:" People ex rel. Edwards v. The Warden, 37 Misc. 635.

h. **Order.**—The fact that the petitioner is detained by virtue of a final order of a competent tribunal of civil jurisdiction made in a special proceeding, does not necessarily prevent her discharge under § 2032, if it appears that the time for which she might be legally detained under such final order had expired: Matter of Larner, 79 App. Div 134; 79 N. Y. Supp. 1039.

i. **Return.**—Where the return to a writ of *habeas corpus*, consisting merely of a commitment regular in form, directing that the relator be held to answer to the court of special sessions in the city and county of New York for a violation of the Liquor Tax Law, shows upon its face that the magistrate had jurisdiction to commit, the writ must be dismissed: People ex rel. Laughran v. Flynn, 48 Misc. 159.

§ 2033. When to be discharged in civil cases.

j. The applicant for a writ must show affirmatively in his petition that he is not detained under any process specified in § 2032, and should it appear upon the hearing that he is, then he must be remanded: People ex rel. Corkran v. Hyatt, 172 N. Y. 176.

k. **Debtor.**—It seems that a judgment debtor in custody under an execution against the person, issued in an action in which such an execution was wholly unauthorized, may obtain his discharge through the medium of a writ of *habeas corpus:* People ex rel. Harris v. Gill, 85 App. Div. 192, aff'g 176 N. Y. 606; 83 N. Y. Supp. 135.

l. **Parent.**—A writ of *habeas corpus* depriving a parent of the custody of his daughter should be dismissed where the daughter makes affidavit denying the allegations of the moving papers: People ex rel. Bishop v. Bishop, 117 App. Div. 445.

m. A discharge on *habeas corpus* is not an adjudication as to the unlawfulness of the imprisonment: Losaw v. Smith, 109 App. Div. 754.

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§ 2035. Proceedings on irregular commitment.

See Code Crim. Pro., § 550 et seq., Bail in criminal actions.

a. **Discharge.**—Where it appears by the return that a prisoner is guilty of a criminal offense, he is not entitled, upon *habeas corpus*, to an absolute discharge, but under § 2035 to be discharged upon giving bail: Matter of Jerns, 51 Misc. 395.

§ 2038. Notice to person interested in detention.

b. Under § 2038, relating to writs of *habeas corpus*, the omission to give the notice provided for by the section deprives the justice of jurisdiction to direct the discharge of the prisoner: People ex rel. Asmus v. Melody, 91 App. Div. 569; 86 N. Y. Supp. 837.

c. **Jurisdiction.**—The jurisdiction of the supreme court is always presumed; and its order, discharging on *habeas corpus* a judgment debtor in supplementary proceedings committed as for contempt, regular and apparently valid on its face, is a protection and defense to the sheriff executing the order of discharge, even though in fact said order was void for want of jurisdiction, because made without notice to the judgment creditor, as required by § 2038: Levy v. Melody, 50 Misc. 509.

§ 2039. Prisoner may controvert return; proofs thereupon.

d. Facts, not traversed or denied, alleged in a petition for a writ of *habeas corpus* instituted to procure the relator's discharge from imprisonment under an order adjudging her in contempt, even if not admitted, constitute evidence upon the hearing of the writ, and if they show that she was not guilty of contempt she is entitled to be discharged: Matter of Depue, 185 N. Y. 60.

e. **Extradition.**—A warrant issued by a governor of a state for the extradition of an alleged offender does not conclusively establish the facts recited therein, but they are to be taken as presumptively true although the relator may deny any material allegation of the return, showing that his detention was illegal: People ex rel. Corkran v. Hyatt, 172 N. Y. 176, rev'g 72 App. Div. 629; 76 N. Y. Supp. 1021.

§ 2041. When certiorari to issue on application for habeas corpus.

f. The writ of certiorari to inquire into the cause of detention is in no sense a writ of review, it is not supplemental to the writ of *habeas corpus*, but merely an alternative therefor, to be issued when it is not desirable that the body of the prisoner be produced: People ex rel. Manning v. Hagan, 34 Misc. 24; 69 N. Y. Supp. 451.

§ 2048. Order substituted for writ of discharge; service and effect thereof.

See § 610, ante, How service of order to be made.

See § 2049, post, Enforcing order for discharge.

§ 2049. Enforcing order for discharge; penalty, etc.

See § 1356 et seq., ante, Appeal from a determination in a special proceeding.

§ 2050. When prisoner discharged not to be reimprisoned; when he may be.

See Penal Code, § 379, A person reconfining a person discharged upon a writ of habeas corpus, is guilty of a misdemeanor.

§ 2052. Id.; for concealing prisoner, etc., to avoid writ.

See § 2004, ante, A person served with writ of habeas corpus is to obey it.

See Penal Code, § 380, Concealing a person entitled to deliverance under a writ of habeas corpus is a misdemeanor.

§ 2058. When appeal may be taken in cases under this article.

g. **Order.**—An order in a *habeas corpus* proceeding, which does not determine or end the proceeding but continues it in force, leaving it to be ended by an order to be subsequently made, is not appealable under § 2508 since it is not a final order, and an order of the appellate division reversing it and dismiss-

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ing the proceeding is, therefore, without jurisdiction. The latter order, however, is final, because it dismissed the proceding, and is, therefore, reviewable by the court of appeals: People ex rel. Duryee v. Duryee, 188 N. Y. 440, rev'g 109 App. Div. 533.

§ 2067. Kinds of writ; how alternative writ granted.

a. In order to entitle the relator to a mandamus, he is required to show himself legally and equitably entitled to some right, properly the subject of the writ, that is legally demandable from the person to whom the writ is directed and also that such person has power to perform the duties required: People ex rel. Donoher v. Greene, 95 App. Div. 397; 88 N. Y. Supp. 601.

b. **Province.**—It is not the province of a writ of mandamus to adjust controverted questions of law and fact: Matter of McNeile, 107 App. Div. 338.

c. **Transfers.**—Mandamus will not lie to compel a street railway company to carry the public for a single fare from all its connecting lines: People ex rel. Lehmaier v. Interurban R. Co., 85 App. Div. 407, appeal dismissed 177 N. Y. 296.

d. **Mandamus.**—No issue is raised by allegations on information and belief in denial of positive allegations in support of a motion for writ of mandamus: People ex rel. Frost v. N. Y. C. & H. R. R. Co., 168 N. Y. 187, rev'g 61 App. Div. 494; 70 N. Y. Supp. 684.

e. The issuance of a writ of mandamus, whether it be peremptory or alternative, should only be granted upon affidavits or other proofs showing the proper cause thereof: People ex rel. Collins v. Ahearn, 120 App. Div. 95.

f. A relator, on a writ of mandamus to compel his reinstatement to service on a municipal police force, has a right to discontinue the proceedings, but the order of discontinuance should not contain the recital "without prejudice to a new proceeding:" People ex rel. Morgan v. Bingham, 115 App. Div. 474.

g. A defect in substance in the writ of mandamus may be taken advantage of at any time before the peremptory writ is awarded, and even after the trial of the issue on the alternative writ: People ex rel. Fogarty v. Cassidy, 118 App. Div. 693.

h. **Adequate remedy.**—The writ of mandamus is issued only when there is a clear legal right to be enforced and when there is no other adequate or legal remedy to obtain the relief sought: People ex rel. Lehmaier v. Interurban Ry. Co., 177 N. Y. 296, dismissing appeal, 85 App. Div. 407; 83 N. Y. Supp. 622.

i. **Remedy by action.**—While there is no inflexible rule that the mere existence of a remedy by action will defeat an application for a writ of mandamus, yet where such a remedy exists the application for a mandamus is addressed to the sound discretion of the court: People ex rel. Murray v. Lindenthal, 77 App. Div. 515; 78 N. Y. Supp. 997.

j. **New York city.**—*It seems*, that, under the language of § 383 of the Greater New York charter, authorizing the president of a borough to appoint such subordinates "as he may deem necessary," the appointment of a superintendent of incumbrances is discretionary: People ex rel. Kay v. Swanstrom, 79 App. Div. 94; 79 N. Y. Supp. 934.

k. **Judgment.**—A justice of the municipal court of New York city cannot be required by mandamus to insert in a judgment that the defendant is subject to arrest and imprisonment: Matter of Kling, 60 App. Div. 512; 69 N. Y. Supp. 962.

l. **City magistrate.**—An elector of the city of New York is entitled to a writ of mandamus compelling the mayor to appoint a city magistrate, whose term of office was unconstitutionally extended for an additional term: Matter of Kelly v. Van Wyck, 35 Misc. 210; 71 N. Y. Supp. 814.

m. **Verdict.**—Where both parties to the trial of issues presented by an alternative writ of mandamus request the direction of a verdict, a verdict directed for the relator has the same effect as one found in his favor by a jury after a submission of a case, and where the judgment had been affirmed by the appellate division, the facts are deemed settled in favor of the relator: People ex rel. Gleason v. Scannell, 172 N. Y. 316, aff'g 69 App. Div. 400; 75 N. Y. Supp. 122, aff'd 172 N. Y. 316.

n. **Laches.**—A peremptory writ of mandamus to restore to active duty a member of the fire department of the city of New York, who has been unlawfully retired upon a pension, should be denied on the ground of laches, where it appears that the relator, without excuse therefor, waited a year and five months before commencing the proceeding, and that during this time he continued to draw his pension and another person filled his place: People ex rel. Miller v. Sturgis, 82 App. Div. 580; 81 N. Y. Supp. 816.

o. A writ of mandamus should be denied where a person removed from a position in the classified civil service, waits sixteen months without excusing his delay before seeking reinstatement: People ex rel. Connolly v. Board of Education, 114 App. Div. 1; 99 N. Y. Supp. 737, aff'd 187 N. Y. 535.

p. **Board of supervisors.**—A judgment requiring a board of supervisors to levy a tax and pay the proceeds to the

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county treasurer to be invested for a town may be enforced by the town by mandamus directing the board of supervisors to again levy and collect the same and pay it over to the county treasurer: People ex rel. Town of Walton v. Bd. Suprs., 173 N. Y. 297, rev'g 75 App. Div. 184; 77 N. Y. Supp. 670.

a. Where the appellate division has directed that a peremptory writ of mandamus should be granted directing a board of supervisors to allow claims for services "at such sums as are proper," an order entered thereon requiring the allowance at a specified amount, is erroneous, and upon appeal, the order will be conformed to the direction of the appellate division: People ex rel. Spaulding v. Supervisors, 170 N. Y. 93, mod'y 66 App. Div. 117; 72 N. Y. Supp. 782.

b. The rejection of a claim by a board of supervisors of a county, on the ground that the county is not liable therefor, may be reviewed by mandamus as well as certiorari: People ex rel. Smart v. Bd. Supervisors, 66 App. Div. 66; 72 N. Y. Supp. 568.

c. **Title to public office.**—The title to a public office cannot be tried in a mandamus proceeding even when there is no serious question as to relator's title: People ex rel. McLaughlin v. Police Comrs., 174 N. Y. 450, rev'g 79 App. Div. 82; 79 N. Y. Supp. 710; 80 N. Y. Supp. 1146.

d. **Civil service.**—Mandamus will not lie to compel the state civil service commissioners to place in the competitive class certain employees of the sheriff and register of King's county as the action of the commissioners is quasi-judicial: People ex rel. Sims v. Collier, 175 N. Y. 196, rev'g 79 App. Div. 636.

e. While mandamus is the proper remedy to compel a municipal civil service commission to correct an illegal classification of positions in the public service, it will not lie when the determination of the commission does not constitute an abuse of discretion and it cannot be said, therefore, to be illegal: Matter of Dill, 185 N. Y. 106.

f. The determination of a municipal civil service commission in classifying positions in the public service is not reviewable by certiorari, the remedy is by mandamus: People ex rel. Schau v. McWilliams, 185 N. Y. 92.

g. An action for damages, under § 20 of the Civil Service Law, does not lie until the veteran has first resorted to the mandamus authorized by said section to compel the restoration of his salary: Hilton v. Cram, 112 App. Div. 35; 97 N. Y. Supp. 1123.

h. In changing the civil service rules by transferring a particular position from the competitive class to the non-competitive class, the state civil service commission acts in a judicial capacity and such action cannot be reversed or set aside in mandamus proceedings: People ex rel. O'Toole v. Hamilton, 44 Misc. 577; 90 N. Y. Supp. 97.

i. Although § 21 of the Civil Service Law authorizes the writ of mandamus to every person whose rights are prejudiced contrary to the provisions of the section, the statute means only that the remedy is available in cases where it is appropriate. Moreover, the issuance of the writ of mandamus is in the discretion of the court, and even under said statute does not issue as of strict right: People ex rel. Hoefle v. Cahill, 116 App. Div. 885; 102 N. Y. Supp. 325.

j. The determination of a civil service commission in deciding whether the duties of a new are the same as those of an abolished position cannot be reviewed by writ of mandamus: People ex rel. Donovan v. Cantor, 89 App. Div. 50; 85 N. Y. Supp. 406.

k. A person unlawfully removed from a position in the civil service who fails to institute proceedings until after the officer removing him dies, has no standing to enforce his right to reinstatement by writ of mandamus directed to the deceased officer's successor unless he made a demand upon such successor for restoration to his former position: People ex rel. Taylor v. Welde, 61 App. Div. 580; 70 N. Y. Supp. 869.

l. A police captain of the city of New York duly appointed and carried on the rolls of the department for fifteen months may compel the civil service commission and the city police commissioner by mandamus to certify him on the monthly pay rolls of the department: Matter of Toole v. Ogden, 39 Misc. 581; 80 N. Y. Supp. 584.

m. **Town board.**—Mandamus will not lie to review an audit of a town board; certiorari is the proper remedy: People ex rel. McCabe v. Matthies, 179 N. Y. 242, aff'g 92 App. Div. 16; 87 N. Y. Supp. 196.

n. **Town auditors.**—The hearing by a board of town auditors of a claim against the town and an examination of the questions involved and the rejection of such claim, constitute an audit reviewable by certiorari, and mandamus will not lie to compel board to re-examine claim: People ex rel. McCabe v. Matthies, 179 N. Y. 242, aff'g 92 App. Div. 16; 87 N. Y. Supp. 196.

o. A writ of mandamus will be granted to compel the board of auditors of a town to meet and receive an account and to audit and pass upon the same: People ex rel. Canton B. Co. v. Auditors, 42 Misc. 116; 85 N. Y. Supp. 1093.

p. A town board of auditors established by virtue of § 172 et seq. of the Town Law has authority to employ counsel, and when such board of auditors has employed counsel and allowed his claim for services, a supervisor to

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whom the money has been paid for the settlement of the claim will be ordered by mandamus to pay over the same to the claimant, although his employment was not authorized by the regular town board: Matter of Comesky v. Blackledge, 114 App. Div. 834.

a. **Police commissioner.**—Will not be granted to review action of police commissioner in revoking pension of widow of former policeman: People ex rel. Waddy v. Partridge, 172 N. Y. 305, rev'g 74 App. Div. 620; 77 N. Y. Supp. 1137.

b. Granted in proceeding by a detective sergeant summarily reduced to patrolman requiring police commissioner to reinstate him: Matter of Sugden v. Partridge, 174 N. Y. 87, rev'g 78 App. Div. 644; 80 N. Y. Supp. 1149.

c. The police commissioners of the city of New York cannot be compelled by mandamus to pay moneys to a person who claims to be entitled to compensation as a police sergeant under the provisions of § 3 of chap. 569 of 1895, where no appropriation has been made for such payment: People ex rel. Daly v. York, 66 App. Div. 453; 73 N. Y. Supp. 331.

d. **Veteran.**—A veteran deprived of any right to preference in appointment or promotion has a remedy by mandamus, and it is not a sufficient answer to show that the position in question has been filled by the appointment of another incumbent; it is necessary in such cases, however, to make the incumbent, if his appointment was permanent, a party to the mandamus proceeding: People ex rel. Mesick v. Scannell, 63 App. Div. 243; 71 N. Y. Supp. 380.

e. The preference accorded to veterans, for a refusal to allow which the remedy of mandamus is given, is to an appointment where the veteran's name appears upon the eligible list; it does not entitle him to a preference in being placed upon such list: Matter of Allaire v. Knox, 62 App. Div. 29; 70 N. Y. Supp. 845.

f. **Board of canvassers.**—Where, after a board of canvassers has been directed to count a ballot, an opposing candidate obtains an alternative writ of mandamus directing that it reject the ballot, the board is not entitled to appeal from the order setting aside such alternative writ: People ex rel. Courtney v. Unger, 85 App. Div. 251; 83 N. Y. Supp. 84.

g. **Commissioner of highways.**—An application for a peremptory writ of mandamus commanding the commissioner of highways of the city of New York to remove a stand for the sale of newspapers and periodicals is a proceeding to enforce a right in which the general public is interested and may be maintained by a citizen and resident of the city: People ex rel. Pumpyansky v. Keating, 168 N. Y. 390.

h. Where obstructions have been placed across a highway, mandamus is the proper remedy by which to compel the commissioner to remove them: People ex rel. De Groat v. Marlett, 41 Misc. 151; 83 N. Y. Supp. 962.

i. **Board of aldermen.**—Will not be granted, directing board of aldermen to elect veteran as sergeant-at-arms: Matter of Shaughnessy v. Fornes, 172 N. Y. 323, aff'g 73 App. Div. 462; 77 N. Y. Supp. 223.

j. **City.**—Will be granted to compel city to pay bill for printing legal notices in official papers after same was audited by a board which was subsequently abolished: People ex rel. Smith v. Clarke, 174 N. Y. 259, rev'g 79 App. Div. 78; 79 N. Y. Supp. 1111.

k. An unliquidated and disputed claim against the city cannot be enforced by a peremptory writ of mandamus: People ex rel. Dady v. Coler, 171 N. Y. 373, dismissing appeal, 69 App. Div. 409; 75 N. Y. Supp. 37.

l. **Assessment.**—Mandamus is not the proper method of obtaining relief from an assessment for the purpose of taxation, which is void on account of lack of jurisdiction on the part of the assessing body; certiorari is the proper remedy: People ex rel. Bliss v. Feitner, 72 App. Div. 45; 76 N. Y. Supp. 219.

m. When a judgment has been entered canceling an assessment for street opening, the plaintiff, by mandamus, may compel the municipal authorities to make a formal cancellation on the books: People ex rel. Jardine v. Brush, 115 App. Div. 688; 101 N. Y. Supp. 312, aff'd 188 N. Y. 544.

n. **Remedy.**—Although § 537 of the Greater New York charter provides that in the event of the removal of any member of the clerical, etc., force, he shall have the right to sue out a writ of certiorari or other appropriate remedy for the purpose of reviewing the action of the commissioner, yet, such section does not entitle a member to sue a writ of mandamus, as mandamus is not an appropriate remedy: People ex rel. Holden v. Woodbury, 88 App. Div. 593; 85 N. Y. Supp. 161.

o. **Discretion.**—Where the law requires a public officer to do a specified act in a specified way upon a conceded state of facts, without regard to his own judgment as to the propriety of the act and no power to exercise discretion, the duty is ministerial in character and performance may be compelled by mandamus if there is no other remedy: Matter of Troy Press Co., 94 App. Div. 514; 88 N. Y. Supp. 115.

p. If the court denies a peremptory writ of mandamus, but finds the relator entitled to an alternative writ to try his right to reinstatement to office, it has no power to annex as a condition to the granting of the alternative writ that the relator waives all claims to back salary: People ex rel. Collins v. Ahearn, 115 App. Div. 171.

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a. **Labor Law.**—Where the comptroller of the city of New York, on a motion for a peremptory writ of mandamus requiring him to draw a warrant, submits an affidavit that the relator failed to comply with the Labor Law in allowing his employees to work more than eight hours a day, etc., the motion is properly denied: People ex rel. Lentilhon v. Coler, 61 App. Div. 223; 70 N. Y. Supp. 482.

b. **Appeal.**—Where, upon a motion for a writ of mandamus, an interested party appears specially and raises the point that he was not, and should be, a party to the proceeding, and the court, upon its own motion, enters an order making him a party, and such person raises no objection thereto until after the proceeding has resulted unfavorably to him, an appeal taken by him from the order will be dismissed: People ex rel. Kathan v. Co. Bd. Canvassers, 75 App. Div. 110; 77 N. Y. Supp. 620.

c. **Appeal.**—An alleged wrongful refusal of a justice of the municipal court of the city of New York to order a removal of an action to another district of the court should be reviewed by appeal and writ of mandamus will not lie against the justice: People ex rel. Jaffe v. Bolte, 35 Misc. 53; 71 N. Y. Supp. 74.

d. **Removal of relator.**—When a plaintiff petitioning for mandamus to compel reinstatement to a fraternal society alleges that he was expelled unlawfully and states facts supporting the allegation, the alternative writ should issue, although the opposing affidavits deny the allegations of the petition and justify the expulsion. The writ cannot be denied because the relator was removed "in the method provided for by the constitution and bylaws of the organization," for under the petition and reply there are questions of fact involved: People ex rel. Miodownick v. Order Brith Abraham, 116 App. Div. 364.

e. A proceeding against a municipality for the enforcement of a right of a relator does not abate by the resignation, removal or expiration of term of the officers, but may be enforced against his successor or successors: People ex rel. La Chicotte v. Best, 187 N. Y. 1, rev'g 112 App. Div. 912.

f. **Unliquidated claim.**—Mandamus is not the proper remedy to compel the audit of an unliquidated claim against the city: People ex rel. Dunn v. Metz, 115 App. Div. 269.

g. §§ 814 and 2067 should be read and construed in connection with §§ 1909, 1910 and 449 for the purpose of determining their effect in respect to each other, for they are deemed to have been enacted simultaneously: Bamberger v. Am. Surety Co., 48 Misc. 221; 96 N. Y. Supp. 671.

h. **Tax.**—A peremptory writ of mandamus should be granted where the court had directed a refund of excess tax paid which has never been complied with: People ex rel. R. R. Co. v. Supervisors, 51 Misc. 200.

i. **Village.**—When money is raised and appropriated by a village for a specific purpose, mandamus will lie on behalf of the payee to compel payment by the village treasurer, and it is no answer to say that the money was diverted from its proper purpose by the prior incumbent of the office: People ex rel. Rohr v. Owens, 110 App. Div. 30.

j. **Board of health.**—Mandamus will lie to compel a board of health to issue the necessary permits to carry on the business of selling milk when the relator establishes a clear legal right to carry on such business without interference: People ex rel. Lodes v. Dept. of Health, 51 Misc. 190.

k. **Police.**—When a police officer of the city of New York was one of four promoted to fill vacancies in the number of inspectors of police, and he is subsequently returned to his former rank because the prior incumbents of two of the vacancies have been reinstated by the court, which fact made the number of inspectors exceed the statutory limit, his remedy, if any, to compel his recognition as an inspector is by *quo warranto*, not by mandamus, as there is another incumbent in the office claimed: People ex rel. Baldwin v. McAdoo, 110 App. Div. 432.

l. A police sergeant discharged on a defective certificate and on insufficient findings will be reinstated by mandamus: People ex rel. Metcalf v. McAdoo, 109 App. Div. 892; 96 N. Y. Supp. 868, aff'd 184 N. Y. 268.

m. **Proper remedy.**—If the relator was convicted after a trial upon charges, he cannot in effect review that determination and annul it by mandamus, but he must resort to certiorari: People ex rel. Hanrahan v. McAdoo, 110 App. Div. 894.

n. Certiorari does not lie to recover an assessment not alleged to be void, but merely erroneous as to amount, when the relator has not made application to the tax commissioner for a correction thereof during the period the books were open for that purpose; the proper remedy is mandamus to compel the board to act on the assessment, and, if the decision is erroneous, to review the same on certiorari: People ex rel. Chambers v. Wells, 110 App. Div. 336.

o. **Demurrer.**—When the alternative writ, whereby the relator, the superintendent of sewers, in the bureau of sewers, in the office of the president of the borough of Manhattan, seeks reinstatement on the ground that he was dismissed without a hearing, fails to allege that he was at the head of a bureau created by the charter, or by an official given authority by the charter to create

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bureaus, it is subject to demurrer, as failing to state facts sufficient to show a right to a peremptory writ: People ex rel. Michales v. Ahearn, 111 App. Div. 741; 98 N. Y. Supp. 492.

a. **Elections.**—Mandamus is the proper remedy to compel inspectors to receive the vote of an elector: People ex rel. Borgia v. Doe, 109 App. Div. 670; 96 N. Y. Supp. 389.

b. **Moneys paid into court.**—The chamberlain of the city of New York will be compelled by mandamus to pay over to the treasurer of the state all moneys paid into court and remaining unclaimed for over twenty years, as required by § 9 of chap. 681 of the Laws of 1892: People v. Keenan, 110 App. Div. 537; 97 N. Y. Supp. 77, aff'd 185 N. Y. 600.

c. **Common council.**—The mayor of a city who, *ex officio*, is the presiding officer of the common council, may be compelled by mandamus to put a motion offered at a meeting of that body, when his duty to put such motion does not involve the exercise of any discretion, but is purely ministerial, and when the refusal is not based on a claim that the same was technically out of order, but on the claim that it contemplated an *ultra vires* action by the common council: People ex rel. Hayes v. Brush, 110 App. Div. 720.

d. **Stenographer.**—A writ of mandamus will not lie to compel the board of estimate and apportionment of New York to fix a stenographer's salary: Matter of Hamburger v. Board of Estimate, 109 App. Div. 427; 96 N. Y. Supp. 130, appeal dis. 184 N. Y. 577.

§ 2068. When writ granted at special term.

e. **Proper remedy.**—Mandamus is not the proper remedy for the enforcement of a claim for extra work done under a contract with a city, even though the claimant has a certificate of the work done, which certificate under the contract is conclusive. This because it is not a question of the amount of work done, but whether there can be a recovery therefor under the contract: Matter of Morris & Cumings Dredging Co., 116 App. Div. 257.

f. **Ballots.**—Although mandamus is asked for to compel the inspectors to declare and the clerk to enter the result instead of asking a recounting of the ballots, the latter relief is fairly within the prayer of the petition, and the proceeding should not fail because of such mistake: People ex rel. Sturtevant v. Armstrong, 115 App. Div. 103.

§ 2070. When peremptory mandamus to issue in first instance.

g. A mandamus is only allowed against a ministerial public officer when a person has a legal right which he is entitled to enforce, and the ministerial public officer whose duty it is to enforce the right refuses to perform his duty; it may be stated as a general proposition that the office of the writ of mandamus is to compel the performance an act which the law specifically enjoins, and not to undo an act already done. It should not be granted to expunge from the records in a county clerk's office the registration of a dentist: Matter of Dental Society v. Jacobs, 103 App. Div. 86; 92 N. Y. Supp. 590.

h. **Information and belief.**—Where, in a petition for a peremptory writ of mandamus to compel the authorities of the city of New York to cancel certain tax sales, the material allegations essential to establish the invalidity of the tax sales are set out only upon information and belief, without stating the sources of the information except as to one or two matters, the application for the writ will be refused, even in the absence of an effective denial of the allegations of the petition by the city authorities: People ex rel. Bourke v. Grout, 107 App. Div. 228.

i. **Discretion.**—An order of the supreme court denying an application for a peremptory writ of mandamus is one within the discretion of the court and is not reviewable by the court of appeals unless the order denying the writ shows that the court did not refuse the writ in the exercise of its discretion: People ex rel. Lehmaier v. Interurban Ry. Co., 177 N. Y. 296, dismissing appeal 85 App. Div. 407; 83 N. Y. Supp. 622.

j. The issuing of a writ of mandamus is discretionary and will be denied where an applicant for the installation of a telephone refuses to give a written assurance that he does not intend to use the telephone for illegal purposes: Matter of Cullen v. New York Tel. Co., 106 App. Div. 250.

k. The issuance of the common-law writ of mandamus is not a matter of right, but rest in the discretion of the court; a stockholder of a mutual insurance company has a right to inspect the list of members and mandamus may issue to enforce the same: People ex rel. Venner v. N. Y. Life Ins. Co., 111 App. Div. 183.

l. The issuance of a writ of mandamus, whether it be peremptory or alternative, should only be granted upon affidavits or other proofs showing the proper cause therefor: People ex rel. Collins v. Ahearn, 120 App. Div. 95.

m. **Superintendent of buildings.**—On the application for a writ of mandamus re-

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quiring the superintendent of buildings in the city of New York to approve amended plans, rejected by him, it is improper for the court to grant a peremptory writ of mandamus compelling such approval "without prejudice, etc." Mandamus will not lie to compel action by the building department in advance of the preparation and adoption of proper plans, but only to compel action when plans affording no legitimate grounds of objection have been arbitrarily or unreasonably condemned: Matter of Hartman v. Collins, 106 App. Div. 11.

a. **Transfer.**—Mandamus will not lie to compel a street railway company to carry the public for a single fare over all its connecting lines: People ex rel. Lehmaier v. Interurban R. Co., 85 App. Div. 407; 83 N. Y. Supp. 622.

b. **Alternative writ proper.**—Where an issue of fact is presented, preliminary to the determination of the question as to whether a relator is or is not entitled to a peremptory writ, an alternative should be allowed instead of denying the application: People ex rel. Lazarus v. Coleman, 99 App. Div. 88; 91 N. Y. Supp. 432.

c. Where the answer to a petition on mandamus denies the allegations of said petition, an issue of fact is raised and the relator is entitled only to an alternative writ; the granting of a peremptory writ is improper: People ex rel. Munch Brewery v. Clement, 117 App. Div. 539.

d. **Railroad.**—When it will not be granted in first instance to compel railroad corporation to operate trains in a designated way. The abuse of directors in operating a railway may be remedied by the railroad commission whose determination may be enforced by mandamus and reviewed by certiorari: People ex rel. Linton v. B. H. R. R. Co., 172 N. Y. 91, aff'g 69 App. Div. 549; 75 N. Y. Supp. 202.

e. **Common council.**—The mayor of a city who, *ex officio*, is the presiding officer of the common council, may be compelled by mandamus to put a motion offered at a meeting of that body, when his duty to put such motion does not involve the exercise of any discretion, but is merely ministerial, and when the refusal is not based on a claim that the same was technically out of order, but on the claim that it contemplated an *ultra vires* action by the common council: People ex rel. Hayes v. Brush, 110 App. Div. 720.

f. A resolution of the former council of the city of Brooklyn purporting to confer a right upon a gas lighting corporation to use the streets at a time when said common council has power to confer such right, and which would be meaningless if given any other construction, must be taken as giving the required consent of said common council, and mandamus lies against the president of the present borough of Brooklyn to compel him to issue and deliver permits to such gas company to connect gas mains: People ex rel. Brooklyn Union Gas Co. v. Littleton, 110 App. Div. 728; 96 N. Y. Supp. 444, aff'd 185 N. Y. 605.

g. **Police.**—When a police officer of the city of New York was one of four promoted to fill vacancies in the number of inspectors of police, and he is subsequently returned to his former rank because the prior incumbents of two of the vacancies have been reinstated by the court, which fact made the number of inspectors exceed the statutory limit, his remedy, if any, to compel his recognition as an inspector is by *quo warranto*, not by mandamus, as there is another incumbent in the office claimed: People ex rel. Baldwin v. McAdoo, 110 App. Div. 432.

h. Since certain services to be performed in courts are properly of a police character, the police commissioner may not be compelled by mandamus to remove police officers detailed for service therein: People ex rel. O'Donnell v. McClellan, 52 Misc. 609.

i. **Moneys paid into court.**—The chamberlain of the city of New York will be compelled by mandamus to pay over to the treasurer of the state all moneys paid into court and remaining unclaimed for over twenty years, as required by § 9 of chap. 651 of the Laws of 1892: People v. Keenan, 110 App. Div. 537; 97 N. Y. Supp. 77, aff'd 185 N. Y. 600.

j. **Gas company.**—Answer upon an application for a writ of peremptory mandamus to compel a gas company to supply gas at a reduced rate held merely to state a conclusion of law: Matter of Rebbecchi, 51 Misc. 403.

k. **Fireman.**—A motion for a peremptory mandamus to restore a fireman will be denied where the answering affidavits allege that the position has been abolished: People ex rel. O'Donnell v. Bermel, 51 Misc. 75.

l. **Town board.**—A peremptory writ of mandamus ordering the payment of an audited claim will issue when neither the jurisdiction of the town board nor the legality of its action upon the relator's claim is contested: Matter of Mefford, 113 App. Div. 529.

m. **Answering affidavits.**—A peremptory writ of mandamus should be granted where the answering affidavits only deny on information and belief the material allegations of the petition: Matter of Long Acre El. Light & P. Co., 51 Misc. 407; 101 N. Y. Supp. 460; 117 App. Div. 83.

n. **Proper remedy.**—If the relator was convicted after a trial upon charges, he cannot in effect review that determination and annul it by mandamus, he must resort to certiorari: People ex rel. Hanrahan v. McAdoo, 110 App. Div. 894.

o. **Village.**—Mandamus will lie to compel a village treasurer to pay moneys raised and appropriated by the village for

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a specific purpose, and the fact that the money was diverted from its proper purpose by a prior incumbent of the office is not a defense: People ex rel. Rohr v. Owens, 110 App. Div. 31.

a. When a board of village assessors has jurisdiction and has acted, mandamus will not lie to compel it to act in any particular way. The review of its acts must be had by certiorari: People ex rel. Seelye v. Keefe, 119 App. Div. 713.

b. **Stockholder.**—A stockholder is entitled to mandamus to obtain an examination of the corporate books only when necessary in aid of his stock interests. But where the information is sought, not for the benefit of the stock interest, but to secure information in aid of a suit by a stockholder against directors personally, for deceit and to recover damages sustained by reason of a false report published by them whereby he was induced to become a stockholder, the writ will be refused: Matter of Taylor, 117 App. Div. 348.

c. The court will not grant a writ of mandamus to compel a committee of a private corporation assigned to hear the parties, on application of the member: People ex rel. Huber Co. v. M. & D. P. Assn., 54 Misc. 332.

d. **Civil service.**—One who seeks reinstatement by mandamus to a public office on the ground that he holds a position in the classified civil service, subject to competitive examination, and entitled to an opportunity to be heard before removal, must show by his petition that he held his position lawfully and had passed the examination required to make his appointment legal, for otherwise he is a *de facto* officer only and has no title to the office: Matter of Meehan v. Flaherty, 119 App. Div. 128.

e. The supreme court has no power to order a recanvass of ballots and a writ commanding a recanvass of the votes, and the proclamation of the result is void for want of jurisdiction: People ex rel. March v. Beam, 188 N. Y. 266.

f. If the court denies a peremptory writ of mandamus, but finds the relator entitled to an alternative writ to try his right to reinstatement to office, it has no power to annex as a condition to the granting of the alternative writ that the relator waives all claims to back salary: People ex rel. Collins v. Ahearn, 115 App. Div. 171.

g. **Subway.**—The consent of the commissioner of electricity need not precede the application for space in the subway, and the applicant may mandamus the Subway Company upon its refusal to assign space: Matter of Long Acre El. L. & P. Co., 188 N. Y. 361, aff'g 117 App. Div. 80.

h. **Municipal court.**—The action of a justice of a municipal court transferring an action into another district may be reviewed upon appeal from the final judgment, and a mandamus will not be granted to compel the justice to retain jurisdiction and try the action: People ex rel. McGowan v. Murray, 53 Misc. 364.

§ 2071. Alternative writ; how served.

See § 1999, ante, How a state writ is served generally.

§ 2073. Return or demurrer to first writ.

See § 14, ante, Civil contempts.

See § 2076, post, Demurrer to alternative writ of mandamus.

See § 2266 et seq., post, Proceedings to punish civil contempts.

i. **Waiver.**—An objection that the proceedings were not instituted within the proper time must be taken in the return or by demurrer, or is waived; it cannot be taken by a motion to dismiss: People ex rel. Ryan v. Bingham, 114 App. Div. 170.

j. **Demurrer.**—On mandamus brought to compel a water company to furnish water as required by its franchise and contract with the municipality, an allegation of the return reciting in *haec verba* an isolated clause of the contract which prescribes deductions of rent for neglect to supply water is subject to demurrer as not stating a defense: People ex rel. Pelham Manor v. New Rochelle W. Co., 199 App. Div. 472.

§ 2074. Return, how made.

See § 2072, ante, Alternative writ, how returnable.

See § 2073, ante, Return or demurrer to first writ.

k. The writ of mandamus is not ordinarily granted to adjust controverted questions of law and fact, is not demandable as a matter of right, and whether it should be granted rests in the discretion of the court; the amount of salary of a janitor in a public school should not be determined by mandamus, but by an action: People ex rel. Ajas v. Board of Education, 104 App. Div. 162; 93 N. Y. Supp. 600.

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a. **Laches.**—Where an employee in the tenement house department of the city of New York, five months after her removal by the tenement house commissioner, applies for a writ of certiorari to review the action of the commissioner in removing her, but withdraws the application in consequence of the conflicting decisions as to her remedy, and subsequently and after a decision of the court of appeals settling the question of remedy, and sixteen months after her removal, she applies for a peremptory mandamus for her reinstatement, she will not be held guilty of *laches:* People ex rel. Shuter v. Butler, 54 Misc. 18.

b. **Police.**—Determination and order of removal of a policeman upon charge of insubordination must be reversed: People ex rel. Sesselman v. Bingham, 189 N. Y. 104.

§ 2075. Motion to set aside writ.

c. Where, on a motion to quash a writ of mandamus, the petition on which the writ was granted was not made a part of the record, the court must assume that the writ was properly granted: People ex rel. Segee v. Hayes, 106 App. Div. 563.

§ 2076. Contents of alternative writ; demurrer thereto.

See § 484, ante, Joinder of causes of action.

See § 487 et seq., ante, Demurrer.

d. **Practice.**—The practice to be followed when issues of fact, raised by an alternative writ of mandamus and the return thereto, are sent to a trial term for trial is the same as that observed when issues of fact arising in an equity action are sent to a jury for trial: People ex rel. Bean v. Clausen, 74 App. Div. 217; 77 N. Y. Supp. 521.

e. When the alternative writ, whereby the relator, the superintendent of sewers, in the bureau of sewers, in the office of the president of the borough of Manhattan, seeks reinstatement on the ground that he was dismissed without a hearing, fails to allege that he was at the head of a bureau created by the charter, or by an official given authority by the charter to create bureaus, it is subject to demurrer, as failing to state facts sufficient to show a right to a peremptory writ: People ex rel. Michales v. Ahearn, 111 App. Div. 741; 98 N. Y. Supp. 492.

f. Where an alternative writ of mandamus runs to the members of a board of public officers in their personal names, the peremptory writ, issued after the terms of two members have expired and others have been elected in their places, may be directed to and enforced upon the members constituting such board generally: People ex rel. B. C. A. Soc. v. Hendrickson, 54 Misc. 337.

§ 2077. Form and contents of return.

See § 498, ante, When objection may be taken by answer.

See § 499, ante, Objection, when deemed waived.

See § 500 ante, Answer, what to contain.

See § 507, ante, Defendant may interpose several defenses or counterclaims.

g. **Removal.**—The return to an alternative writ of mandamus to compel a relator's restitution to office must in each defense deny his unlawful removal from office: People ex rel. McEnroe v. Wells, 89 App. Div. 89; 85 N. Y. Supp. 438.

h. **Damages** for a false return to a writ of mandamus should not include the relator's counsel fees nor other disbursements of the trial; although the common-law action for damages for a false return no longer lies and the issue is tried in the proceeding itself, the damages recoverable for the false return are the same as those formerly recoverable in the action: People ex rel. Lally v. N. Y. C. & H. R. R. Co., 116 App. Div. 849.

i. **Denials.**—The allegations of a petition on mandamus are not put in issue by denials made upon information and belief: Matter of Elder v. Bingham, 118 App. Div. 25; 103 N. Y. Supp. 617, aff'd 189 N. Y.

§ 2079. Issue of fact; when it arises.

See § 964, ante, When issues of law arise; when issues of fact arise.

j. **Alternative writ.**—On the trial of issues on an alternative writ where both parties request the direction of a verdict, a verdict for the relator has the same effect as if found by a jury, and when the judgment is affirmed by the appellate division the facts are deemed found in favor of such relator: People ex rel. Gleason v. Scannell, 172 N. Y. 316, aff'g 69 App. Div. 400; 75 N. Y. Supp. 122.

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§ 2080. Application of certain provisions of chapter sixth.

See § 518 et seq., ante, Provisions generally applicable to pleadings.

a. **Amendment of writ.**—Amendment of an alternative writ of mandamus after the case has been taken to the court of appeals, without success, should be granted only on condition of the payment of all the defendant's costs and disbursements: People ex rel. McDonald v. Clausen, 61 App. Div. 184; 70 N. Y. Supp. 417.

§ 2082. Subsequent proceedings the same as in an action.

b. Under §§ 2080, 2083 and 2084, where the return to an alternative writ of mandamus raises questions of fact which are tried at the trial term without a jury, the decision of the trial judge should embrace only findings of fact and the parties should then apply to the special term for such final order as the law applied to the facts warrants; *it seems* that a proper stipulation might be made in a case under which the trial judge might resolve both classes of questions and that in that event the entering of the final order at special term would follow as a matter of course: People ex rel. Birmingham v. Grout, 45 Misc. 181.

c. **Practice.**—The practice pursued upon the trial of the issues of fact raised by an alternative writ of mandamus and the return thereto considered, and held to amount to a mistrial: People ex rel. Berlinger v. Wells, 178 N. Y. 411, rev'g 85 App. Div. 378; 83 N. Y. Supp. 376.

d. **New trial.**—Where issues of fact, raised by the return to an alternative writ of mandamus, are tried before a jury, the trial judge may properly entertain a motion for a new trial made upon the minutes, pursuant to § 999 of the Code of Civil Procedure, and it is not necessary that the motion be made at special term upon a case or exception or a case containing exceptions: People ex rel. Wieland v. Knox, 78 App. Div. 344; 79 N. Y. Supp. 989.

§ 2083. Issue of fact; how triable.

e. Under §§ 968 and 2083 the relator is entitled, as a matter of right, to have the jury render a verdict upon such issues. The presiding judge may, in a proper case, direct a verdict upon the issues or submit them to the jury for their determination, but he has no power to nonsuit the relator: People ex rel. Bean v. Clausen, 74 App. Div. 217; 77 N. Y. Supp. 521; 33 Civ. Pro. R. 141.

f. **Short decision.**—Where an issue of fact, joined upon an alternative writ of mandamus, is tried before a judge without a jury, the parties having waived a jury trial, it is the duty of the trial judge to make and file findings or a short decision: People ex rel. Havron v. Dalton, 77 App. Div. 499; 78 N. Y. Supp. 1051.

§ 2086. Costs.

g. Although § 2086 provides that where an application for a peremptory writ of mandamus is granted or denied without a previous alternative mandamus, costs not exceeding fifty dollars and disbursements may be awarded to either party as upon a motion, yet this provision does not contemplate the allowance of costs to an unsuccessful party: People ex rel. Lantz v. Common Council, 95 App. Div. 75.

§ 2087. Appeals.

h. **Calendar.**—When, on an appeal from a final order in mandamus in the first department there is a case and exceptions bringing up questions of law and practice, the appeal should be placed upon the enumerated calendar; but where the record presents merely questions of law, and there is no case and exceptions on appeal from an order denying a motion to set aside the verdict, the appeal should be placed upon the non-enumerated calendar: People ex rel. Connolly v. Bd. of Education, 113 App. Div. 315.

§ 2089. Stay of proceedings; enlargement of time.

i. An appeal by the fire commissioner of the city of New York from an order granting a peremptory writ of mandamus compelling him to reinstate the relator is to be considered as an appeal taken by the municipality within § 1314, and the service of the notice of appeal stays the proceedings without giving an undertaking, and there is no warrant for applying to § 2089 the characteristics of a special provision which should prevail over the provisions of § 1314, for the latter is likewise special in its nature and may be read in harmony with the former: Matter of Croker v. Sturgis, 38 Misc. 596.

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§ 2090. Fine in certain cases.

See § 350, ante, Remission of fines and penalties.

See § 1117, ante, Enforcement of uncollected fines in New York city.

See § 2293 et seq., post, Proceedings to collect a fine.

§ 2091. Kinds of writ; how granted.

a. **Bias.**—The supreme court will not issue a writ of prohibition to prohibit a justice of the court of special sessions from proceeding with the consideration of a criminal complaint where the application is put upon the ground that the said judge is biased: People ex rel. Devery v. Jerome, 36 Misc. 256; 73 N. Y. Supp. 706.

b. **Witness.**—A witness, whose examination in a proceeding before a magistrate has been concluded and who is under no requirement to attend further, cannot, by an alternative writ of prohibition, restrain the proceeding, still pending, upon the ground that the information which is its basis designates no crime: People ex rel. Fleming v. Mayer, 41 Misc. 289; 84 N. Y. Supp. 71.

c. **Office of writ.**—The office of a writ of prohibition is to prevent a tribunal, having judicial power, from taking cognizance of matters not within its jurisdiction or from exceeding its jurisdiction in regard to such matters, and the question of jurisdiction is the only question which can properly be considered upon an application for the writ: People ex rel. Jones v. Sherman, 66 App. Div. 231, aff'd 171 N. Y. 684; 72 N. Y. Supp. 718.

d. **Will.**—A writ of prohibition will not be issued to prevent a surrogate from admitting a first will to probate where witnesses to a second will refuse to testify: People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339; 76 N. Y. Supp. 865.

e. **Writ of prohibition.**—A writ of prohibition lies only where the grievance cannot be redressed by ordinary proceedings at law or in equity or by appeal: People ex rel. Hummel v. Trial Term, 184 N. Y. 30, aff'g 105 App. Div. 598; 94 N. Y. Supp. 1037.

f. **New York city.**—A writ of prohibition may be issued to restrain the court of general sessions of the city of New York from granting a new trial, although the record shows that the statute of limitations had run on the crime of which the defendant was convicted: People ex rel. Jerome v. Court of General Sessions, 112 App. Div. 424; 98 N. Y. Supp. 557, aff'd 185 N. Y. 504.

g. The court of general sessions of the peace in and for the county of New York has no power to entertain a motion for a new trial after judgment in a criminal case unless the motion is made under the provision of subd. 7 of § 465 of the Code of Criminal Procedure; a writ of prohibition is the appropriate remedy to restrain such court from entertaining a motion on grounds not permitted by such section: People ex rel. Jerome v. General Sessions, 185 N. Y. 504.

h. A writ of prohibition will not issue to the court of general sessions of the city of New York commanding it to stay further proceedings upon a motion for a new trial, made after judgment by one who has been convicted of a misdemeanor: People ex rel. Jerome v. Goff, 49 Misc. 72; 98 N. Y. Supp. 66, 185 N. Y. 504, rev'g 112 App. Div. 424.

i. **Public officials.**—A writ of prohibition will not lie to restrain investigation by commission of charges against public officials: People ex rel. Bender v. Milliken, 185 N. Y. 35; 97 N. Y. Supp. 1117.

j. **Anticipated injury.**—The extraordinary writ of prohibition which issues to stay proceedings in excess of jurisdiction may not be invoked to prevent an anticipated injury or injustice on the theory that the court may erroneously decide that an invalid subpoena is valid or that an information is sufficient to give jurisdiction when it is not sufficient: People ex rel. Livingston v. Wyatt, 113 App. Div. 111; 99 N. Y. Supp. 114, aff'd 186 N. Y. 383.

k. A writ of prohibition will not be allowed to guard against a future apprehended error by an inferior tribunal when, as a matter of fact, such tribunal upon due objection may not admit such error and when, if he does commit it, the aggrieved party may be fully and adequately protected by ordinary process of appeal from or review of its action: People ex rel. Ballin v. Smith, 184 N. Y. 96, rev'g 106 App. Div. 613; 95 N. Y. Supp. 1152.

l. **Conclusive.**—Where, on the return to an alternative writ of prohibition to restrain the further proceedings of a magistrate before whom an information is laid, the relator neither traverses the return nor moves for a new one, but moves for an absolute writ without a trial of the issues, the return is conclusive as to all matters denied by the respondent and as to any new matter alleged therein not denied by the relator, including the substance of the information: People ex rel. Livingston v. Wyatt, 186 N. Y. 383.

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§ 2092. When writ granted at special term.

a. An objection to the sufficiency of the papers upon which an alternative writ of prohibition has been granted may be taken by motion to dismiss the writ: People ex rel. W. S. T. Co. v. Bauer, 54 Misc. 28.

§ 2093. Id.; by the appellate division of the supreme court.

See § 793, ante, When an order is necessary.

§ 2094. Alternative writ must issue first; its contents.

b. Where an employee has a remedy by certiorari to review the proceedings in case they result in his removal or attempted removal, a writ of prohibition will not be granted to prevent the officers having jurisdiction from trying the charges: People ex rel. Crowley v. Butler, 53 Misc. 366.

§ 2097. Legal objections, how taken; motion to quash or set aside writ.

c. **Witness.**—A witness, whose examination in a proceeding before a magistrate has been concluded and who is under no requirement to attend further, cannot, by an alternative writ of prohibition, restrain the proceeding still pending, upon the ground that the information which is its basis designates no crime: People ex rel. Fleming v. Mayer, 41 Misc. 289; 84 N. Y. Supp. 71.

§ 2099. Proceedings after return; trial by jury.

d. **When refused.**—A writ of prohibition should be refused where the lower court had jurisdiction: People ex rel. Aldhouse v. McCarthy, 41 Misc. 429; 84 N. Y. Supp. 1062.

§ 2100. Final order; costs.

See § 3236, post, Costs of a motion.
See § 3240, post, Costs in a special proceeding.
See § 3251, post, Amount of costs generally.

e. The court below granted an alternative writ, but, upon a return being filed, it refused to grant an absolute writ. An order refusing an absolute writ is a final order under § 2100, which provides that "where a final order is made against the relator it must authorize the court or judge and the adverse party to proceed in the action, special proceeding or matter as if the alternative writ had not been issued," and neither the Code nor the practice authorizes the special term, when a final order refusing an absolute writ is entered, to prohibit a court from proceeding by order, either pending an appeal from the order refusing the absolute writ or for any other period of time: People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339; 33 Civ. Pro. R. 128; 76 N. Y. Supp. 865.

f. **Release.**—Under § 2100 the supreme court has power to grant a writ of prohibition restraining a justice of the peace from issuing any compulsory process of subpoena after the release of a defendant by a writ of *habeas corpus*, on the ground that the original information was insufficient: People ex rel. Sandman v. Tuthill, 79 App. Div. 24; 79 N. Y. Supp. 905.

§ 2101. Appeal.

See § 2087, ante, Appeals.

§ 2102. Stay of proceedings; enlargement of time.

g. **Conclusive.**—Where, on the return to an alternative writ of prohibition to restrain the further proceedings of a magistrate before whom an information is laid, the relator neither traverses the return nor moves for a new one, but moves for an absolute writ without a trial of the issues, the return is conclusive as to all matters denied by the respondent and as to any new matter alleged therein not denied by the relator, including the substance of the information: People ex rel. Livingston v. Wyatt, 186 N. Y. 383.

§ 2106. Writ; to whom directed.

See § 1070, ante, Copy of order for foreign jury to be delivered to sheriff.
See § 1071, ante, Mode of obtaining a foreign jury.

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§ 2114. Order on confirming inquisition.

See § 2116, post, Governor to pay damages into court.

§ 2120. Cases where writ may issue.

See § 1992, ante, Writ to be under seal.
See § 1995, ante, Parties may appear by attorney.
See § 2121, post, Cases where it cannot issue.
See § 2122, post, The same.

a. Certiorari, where no remedy is provided by the statute, can only run to persons or tribunals that have acted judicially in making the determination sought to be reviewed: People ex rel. Rochester Tel. Co. v. Priest, 95 App. Div. 44; 88 N. Y. Supp. 11.

b. The writ of certiorari to inquire into the cause of detention is in no sense a writ of review, it is not supplemental to a writ of *habeas corpus* but merely an alternative therefor, to be issued when it is not desirable that the body of the prisoner be produced: People ex rel. Manning v. Hagan, 34 Misc. 24; 69 N. Y. Supp. 451.

c. **Kinds of writ.**—There are three writs of certiorari, the common law writ, the statutory writ under the Code and a special statutory proceeding to review questions of taxation which may be designated as a writ of review *de novo;* the three writs considered and discussed: People ex rel. Citizens' L. Co. v. Feitner, 81 App. Div. 118; 81 N. Y. Supp. 73.

d. **Change of grade.**—A writ of certiorari to review an unauthorized act may properly be directed to the commissioners who heard a claim for damages because of the change of the grade of a street, although they have resigned and other commissioners have been appointed in their places, where it appears that all the papers, etc., are still in the custody of the former commissioners: People ex rel. Grout v. Stillings, 75 App. Div. 569; 78 N. Y. Supp. 333.

e. **Court of equity.**—A court of equity has inherent power in a proper case to restrain collection of the taxes imposed on grounds not provided for by the statute and for which no relief can be had by certiorari: Mercantile Nat. Bank v. Mayor, 172 N. Y. 35, aff'g 50 App. Div. 628; 63 N. Y. Supp. 1111.

f. **Police officer.**—On a writ of certiorari to review the removal of a police officer in the city of New York, evidence held insufficient: People ex rel. Stephenson v. Greene, 92 App. Div. 243; 87 N. Y. Supp. 172.

g. Certiorari will not lie to reverse the dismissal of a police officer in the city of New York where the statute providing for the dismissal is mandatory: People ex rel. Padian v. McAdoo, 114 App. Div. 100.

h. **Bail.**—A person who has been arrested upon a criminal charge and has been admitted to bail is not entitled to a writ of certiorari or of *habeas corpus* under § 2015: People ex rel. Albert v. Pool, 77 App. Div. 148; 78 N. Y. Supp. 1026.

i. **Elmira fire department.**—The removal of a member of the Elmira fire department is reviewable by certiorari: People ex rel. Ellett v. Flood, 64 App. Div. 209; 71 N. Y. Supp. 1067.

j. **Audit of claim.**—The writ of certiorari to review audit of claims for work on a town highway dismissed for want of interest and because a taxpayer's remedy was by suit and also because the audited bills had been delivered to the clerk of the board of supervisors: People ex rel. Cole v. Cross, 87 App. Div. 56; 83 N. Y. Supp. 1083.

k. **School board.**—The fact that the janitor of a public school in New York city was given a hearing upon charges before a committee of the school board, does not make the action of the school board in adopting the report of the committee dismissing the janitor a judicial determination which can be reviewed by certiorari: People ex rel. Purcell v. Simonson, 66 App. Div. 18; 72 N. Y. Supp. 957.

l. **Directors.**—Directors' abuse of discretion in operating railroad may be remedied by board of railroad commissioners, whose determination is reviewable by certiorari: People ex rel. Linton v. B. H. R. R. Co., 172 N. Y. 90, aff'g 69 App. Div. 549; 75 N. Y. Supp. 202.

m. **Commissioner of buildings.**—A writ of certiorari will not issue to review the action of a commissioner of buildings of the borough of Brooklyn in removing, after a hearing on charges preferred, an inspector of buildings who, by the express terms of the Greater New York charter, held his office during the pleasure of the commissioner: People ex rel. Scheel v. Guilfoyle, 65 App. Div. 498; 72 N. Y. Supp. 891.

n. **Civil service.**—§ 10 of the Civil Service Law, chap. 370 of 1899, which provides that the mayor of each city shall appoint suitable persons to prescribe and enforce rules for the classification of the offices in the classified service of the city, imposes upon the municipal civil service commissioners duties which are administrative rather than judicial, and consequently their action is not reviewable by certiorari: People ex rel. Mack v. Burt, 65 App. Div. 157; 82 N. Y. Supp. 567.

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a. **Police commissioner.**—The refusal of the police commissioner of the city of New York in refusing to grant a theater license is discretionary and is not reviewable by certiorari: Matter of Armstrong v. Murphy, 65 App. Div. 126; 72 N. Y. Supp. 475.

b. **Teacher.**—The refusal of the board of education of New York city to issue a license to a teacher in a higher grade is not reviewable by certiorari: Matter of Walker v. Maxwell, 68 App. Div. 196; 74 N. Y. Supp. 94.

c. **Fire department.**—The removal of the engineer of the fire department of Long Island City is not reviewable by certiorari where the statute under which he was removed prescribes no condition or form preliminary to removal and does not authorize the issuance of a writ: People ex rel. Payntar v. Gleason, 63 App. Div. 435; 71 N. Y. Supp. 700.

d. **Proper remedy.**—If the relator was convicted after a trial upon charges, he cannot, in effect, review that determination and annul it by mandamus, but he must resort to certiorari: People ex rel. Hanrahan v. McAdoo, 110 App. Div. 894.

e. The determination of a municipal civil service commission in classifying positions in the public service is not reviewable by certiorari, the remedy is by mandamus: People ex rel. Schau v. McWilliams, 185 N. Y. 92.

f. **Town board.**—The audit by a town board of the salary of a health officer is in itself a recognition that he holds such office, and when the salary of such officer has, by statutory authority, been fixed at $100, and the town board has audited the same at twenty-five dollars, such audit will be annulled on certiorari and the claim remitted to the board, with instructions to audit the same at $100: People ex rel. Leitner v. Sipple, 109 App. Div. 788; 96 N. Y. Supp. 897.

g. **Presumption.**—On certiorari to review the discharge of an assistant foreman of a city fire department under a charge of perjury, the charge being criminal, the relator is entitled to the same presumption in favor of his innocence that would exist if the charge were made in a criminal court; on the review of such trial the question is whether, on the same evidence, a verdict of a jury against the relator, if rendered in a criminal trial for perjury, should be set aside as not warranted by the evidence: People ex rel. Madigan v. Sturgis, 110 App. Div. 1.

h. **Poor.**—The acts of supervisors in distinguishing between town and county poor, pursuant to § 134 of the Poor Law, and in assessing a town for the support of its poor, pursuant to §§ 9 and 10 of chap. 225 of the Laws of 1896, are legislative and not judicial, and cannot be reviewed by certiorari: People ex rel. Allen v. Supervisors, 113 App. Div. 773.

i. **Excise.**—Certiorari does not lie to review the action of a special deputy commissioner of excise and the superintendent of buildings of the city of New York in revoking a liquor tax certificate on the ground that the premises of the holder of the certificate did not comply with the local laws in relation to hotels; such determination is not a judicial act: Matter of Leverant, 110 App. Div. 371.

j. **Department of health.**—The action of the department of health of the city of New York, in preventing one from carrying on the business of selling milk in said city, although it may involve the exercise of judgment and discretion, is not a judicial determination, and, in the absence of statutory authority, is not reviewable by certiorari: People ex rel. Lodes v. Dept. of Health, 51 Misc. 190.

k. **Assessment.**—Where the right to assail an assessment for personal taxes is founded upon the taxing officer's lack of jurisdiction, because of the non-residence of the relator, the latter's appearance before the taxing officer, for the purpose of presenting proof of the invalidity of the assessment, is not necessary to entitle him to relief by certiorari: People ex rel. Strong v. O'Donnel, 47 Misc. 226.

l. Where an assessment is not deemed wholly erroneous, but merely as to an increase is illegal and void, such illegal excess may be cancelled in a proceeding by certiorari: People ex rel. Littman v. Wells, 91 App. Div. 172; 86 N. Y. Supp. 309.

m. The proceedings of a public improvement commission in awarding a contract for curbing and paving are neither judicial nor quasi-judicial, and hence not subject to review by certiorari before the assessment of a tax: People ex rel. North v. Featherstonhaugh, 172 N. Y. 112, dismissing appeal, 67 App. Div. 625; 73 N. Y. Supp. 1144.

n. Certiorari does not lie to recover an assessment not alleged to be void, but merely erroneous as to amount, when the relator has not made application to the tax commissioner for a correction thereof during the period the books were open for that purpose; the proper remedy is mandamus to compel the board to act on the assessment, and, if the decision is erroneous, to review the same on certiorari: People ex rel. Chambers v. Wells, 110 App. Div. 336.

o. The court, in reviewing an assessment by common-law certiorari, will ascertain from the whole record whether the relator's property was fairly and justly assessed in comparison with other property, and if not so assessed, will annul an assessment: People ex rel.

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Connelly v. Reis, 109 App. Div. 748; 96 N. Y. Supp. 597.

a. The right of a taxpayer to review an assessment by certiorari is absolute and not a matter of discretion, and he may show that the assessment is invalid for any reason; it is no answer to the writ for the assessors to allege that the facts alleged in the petition show that the whole roll was void. It is immaterial that in destroying an assessment against himself the relator destroys it also against others and even as against all persons assessed, and assessors will not be heard to say that they acted so illegally that there was not enough of their acts to justify a review: People ex rel. Friendly v. Davenport, 119 App. Div. 790.

b. When a board of village assessors has jurisdiction and has acted, mandamus will not lie to compel it to act in any particular way. The review of its acts must be had by certiorari: People ex rel. Seelye v. Keefe, 119 App. Div. 713.

c. **Writ of prohibition.**—Where an employee has a remedy by certiorari to review the proceedings in case they result in his removal or attempted removal, a writ of prohibition will not be granted to prevent the officers having jurisdiction from trying the charges: People ex rel. Crowley v. Butler, 53 Misc. 366.

§ 2121. Cases where it cannot issue.

See § 2, ante, Court of record, enumerated.

See § 1356 et seq., ante, Appeal from an order in a special proceeding.

d. **Railroad.**—When it will not be granted in first instance to compel railroad corporation to operate trains in a designated way. The abuse of directors in operating a railway may be remedied by railroad commission, whose determination may be enforced by mandamus and reviewed by certiorari: People ex rel. Linton v. B. H. R. R. Co., 172 N. Y. 91, aff'g 69 App. Div. 549; 75 N. Y. Supp. 202.

§ 2122. The same.

e. **Grant of land.**—A grant of land under water does not determine the rights of the state or of an adverse claimant of such land and the adverse claimant is not an aggrieved party within the meaning of § 2127, and cannot, under § 2122, obtain a writ of certiorari "to review the determination," as there is no final determination to review: People ex rel. Oyster Bay v. Woodruff, 64 App. Div. 239.

f. **Principal of a school.**—As a principal of a public school in a city has a right of appeal to the commissioner of education from the action of the commissioners of education of the city in removing him from office, his remedy is adequate, and certiorari to review his dismissal will not lie by reason of the prohibition contained in this section: People ex rel. Walrath v. O'Brien, 112 App. Div. 97.

g. **Liquor tax.**—Certiorari does not lie to review the action of a special deputy commissioner of excise and the superintendent of buildings of the city of New York in revoking a liquor tax certificate on the ground that the premises of the holder of the certificate did not comply with the local laws in relation to hotels; such determination is not a judicial act: Matter of Leverant, 110 App. Div. 371.

h. **Board of health.**—The common-law writ of certiorari lies only to review acts of a judicial character, and in the absence of a statute expressly authorizing it, the writ will not issue to review the action of the board of health of the city of New York in preventing the relator from carrying on the business of selling milk: People ex rel. Lodes v. Department of Health, 116 App. Div. 890.

§ 2124. When from another court.

i. Where an appeal is taken to the appellate division by virtue of § 62 of the Railroad Law from the determination of the common council of a city to lay out a new street across the right of way of a railroad and the parties to such a proceeding are unable to agree on a record for such appeal, the proper practice is by a writ of certiorari under § 2124, directed to such common council and requiring them to return all papers and proceedings upon which it acted in reaching the determination from which the appeal was taken. What return should contain, discussed and determined: Matter of Delavan Avenue, 62 App. Div. 492.

§ 2125. Limitation of time for review.

j. This section is not solely a statute of limitations, but, by implication, it grants the relator four months in which to procure the writ in cases in which, although the determining body has finally adjourned after disposition made of the matter, it or its successors at its next authorized meeting can obey the order made by the court: People ex rel. Leitner v. Sipple, 109 App. Div. 788; 96 N. Y. Supp. 897.

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a. § 2125 is not solely a statute of limitations, as by implication it grants the relator four months within which to procure the writ of certiorari in a case where, although the determining body has finally adjourned after making a disposition of the matter in question, it or its successors, at the next authorized meeting, can obey any order made by the court: People ex rel. Cole v. Cross, 87 App. Div. 56; 83 N. Y. Supp. 1083.

b. **Assessment.**—Limit of time to review by certiorari an assessment in the city of New York: People ex rel. Taber, Prang Art Co. v. Wells, 39 Misc. 602; 80 N. Y. Supp. 610.

c. **Statute of limitations.**—The four-month's statute of limitations in § 2125 for the issurance of a writ to review the order of the highway commissioners, closing a portion of the highway, does not begin to run until the order is recovered as provided by § 80 of the Highway Law: People ex rel. Dinsmore v. Vandewater, 83 App. Div. 60; 82 N. Y. Supp. 626.

d. **Town auditors.**—*Quaere*, if, after the dismissal of the writ of certiorari, the claimant sues out another writ to review the reaudit, whether the board of town auditors may avail itself of the statute of limitations contained in § 2125: Matter of Weeks, 106 App. Div. 45.

e. **Commissioner.**—Where a commissioner in the street cleaning department was on sick leave and was not notified of the determination dismissing him from the service until his return from such leave, a writ of certiorari to review the determination should not be quashed on the ground that it was not granted and served within four months after the determination to be reviewed became final, as provided by § 2125: People ex rel. Lahey v. Woodbury, 102 App. Div. 333.

f. In a proceeding to review the action of a municipal civil service commission to place a certain position in the competitive list, the proceeding had to be commenced under § 2125 within four months from the date of the adoption of the rule putting such position in such competitive list: People ex rel. Schau v. Whittet, 100 App. Div. 176; 91 N. Y. Supp. 675; rev'd 185 N. Y. 92.

§ 2127. Application for writ; where and how made.

See rule 44 (Sup. Ct.), When motions in the appellate division are to be heard.
See § 769, ante, Where motions in the supreme court are to be heard.

g. An application for a writ of certiorari may, in the first judicial district, be made to a justice of the supreme court at his chambers; the granting of such application is, nevertheless, the act of the court, and should be entered in the minutes of the clerk, but a failure to make such entry will not invalidate the writ: People ex rel. Grout v. Stillings, 76 App. Div. 143; 78 N. Y. Supp. 942.

h. **Adverse claimant.**—A grant of land under water does not determine the rights of the state or of an adverse claimant of such land, and the adverse claimant is not an aggrieved party within the meaning of § 2127, and cannot, under § 2122, obtain a writ of certiorari "to review the determination," as there is no final determination to review: People ex rel. Oyster Bay v. Woodruff, 64 App. Div. 239.

i. **Highway commissioner.**—A highway commissioner who is a taxpayer is a person aggrieved within the meaning of § 2127: People ex rel. Cole v. Cross, 87 App. Div. 56; 83 N. Y. Supp. 1083.

j. **Attorney.**—A petition for a writ of certiorari to review a determination by which a person is aggrieved may be verified by an attorney, and where the determination has been made by a board appointed in a city under a special statute, the city is not a necessary party, and the mere fact that the city may be brought in under the provisions of § 2137 does not make it a necessary party: Matter of Belmont, 40 Misc. 133; 81 N. Y. Supp. 280.

k. **Petition.**—The object of a petition in certiorari is to obtain the writ, and if the petition be insufficient the respondent's remedy is by motion to quash the writ before making return thereto. If issue be joined by making a return, the insufficiency of the petition is waived: Matter of City of New York v. Sloat, 116 App. Div. 815.

l. **Return.**—Although the return to the writ of certiorari is conclusive and must be accepted as true, yet when supervisors return that the relator's claim against the county for legal services was not a legal charge against it, the statement is a mere conclusion, and the court may inquire into the validity thereof: People ex rel. Slosson v. Board of Supervisors, 116 App. Div. 844.

§ 2128. When notice necessary; service thereof.

See rule 37 (Sup. Ct.), Notice for argument and for motion.
See § 780, ante, Notice of motion to be eight days generally.

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§ 2129. To whom writ directed.

a. A petition for a writ of certiorari to review a determination by which a person is aggrieved, may be verified by an attorney, and where the determination has been made by a board appointed in a city under a special statute, the city is not a necessary party, and the mere fact that the city may be brought in under the provisions of § 2137 does not make it a necessary party: Matter of Belmont, 40 Misc. 133; 81 N. Y. Supp. 280.

b. **Change of grade.**—A writ of certiorari to review an unauthorized act may properly be directed to the commissioners who heard a claim for damages because of the change of the grade of a street, although they have resigned and other commissioners have been appointed in their places, where it appears that all the papers, etc., are still in the custody of the former commissioners: People ex rel. Grout v. Stillings, 75 App. Div. 569; 78 N. Y. Supp. 333.

§ 2130. Mode of service.

See § 2071, ante, Alternative writ; how served.

§ 2131. Stay of proceedings.

See § 2132, post, When and where writ returnable.

See § 2138, post, Hearing upon return.

c. In a proceeding by a writ of certiorari to review a determination of a fire commissioner of the city of New York, dismissing the chief, a stay cannot be supported upon the ground of alleged erroneous rulings of the commissioner as this question is one under § 2140 for the appellate divisions; § 2131 limited the right to have a stay in common-law writ of certiorari and changing the rule provided that the writ did not act as a stay except where specifically authorized by the court: People ex rel. Croker v. Sturgis, 39 Misc. 448; 81 N. Y. Supp. 94.

§ 2132. When and where writ returnable.

See § 2138, post, Where hearing to be had.

See Tax Law, chap. 908 of 1896, § 250 et seq., ante, In regard to review of assessment by certiorari.

d. Under the Tax Law, a petition for the writ of certiorari to review certain franchise assessment upon property in New York state may be made to and the writ allowed by the supreme court in the first judicial district, but under this section the writ should be returnable in the third judicial district at the office of the clerk of the county of Albany, where the assessment is made, and if made returnable in the first district it should not be quashed but should be amended and made returnable in the third district: People ex rel. N. Y. C. & H. R. R. Co. v. Priest, 169 N. Y. 432; 32 Civ. Pro. R. 341, mod'y 63 App. Div. 128; 71 N. Y. Supp. 390.

e. **Motion to dismiss.**—A motion to dismiss a writ of certiorari, issued to review the action of the commissioner of public safety of a city of the second class, in removing a member of the police force on the ground that the decision was not reviewable, may be made and determined before any return is made to the writ: People ex rel. Miller v. Peck, 73 App. Div. 89; 76 N. Y. Supp. 328.

§ 2134. Return; when and how made.

f. Where an issue of fact is raised by the petition for, and the return to a writ of certiorari, obtained by a corporation to review the action of the commissioners in refusing to reduce the amount of an assessment, it is the duty of the court to take the testimony upon such issue or send it to a referee: People ex rel. Bhumgara v. Wells, 93 App. Div. 212; 87 N. Y. Supp. 543.

g. **Further return.**—The allegations contained in the return to a writ of certiorari must, for the purposes of the proceeding, be deemed true; the relator's remedy is for a further return if they are untrue: People ex rel. Rochester L. Co. v. Feitner, 65 App. Div. 224; 72 N. Y. Supp. 641.

h. **Town board.**—A return to a writ of certiorari to review a determination of a town board made by a majority of such board is conclusive upon the appellate division and a separate return made by a single member of such board cannot be considered: People ex rel. Lester v. Eno, 176 N. Y. 513, rev'g 84 App. Div. 55; 82 N. Y. Supp. 520.

i. **Assessment.**—Facts alleged in a petition to review an assessment for a sewer must be deemed to be admitted by the return when the return is silent as to material facts contained in the peti-

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tion: People ex rel. Keim v. Desmond, 186 N. Y. 232.

a. When on certiorari to review an assessment on real estate the petition alleges facts showing that the percentage of increase of assessment on adjoining property was not as great as on the relator's property and that no improvements had been made on his property, a return denying that the assessed valuations complained of were illegal, excessive and erroneous by reason of inequality, raises a question of fact and it is error to render judgment for the relator on the pleading; although such return does not deny facts alleged by the petition, but merely conclusions that the relator drew from the facts, an issue of fact is raised which must be determined, not upon the petition and return, but by taking evidence: People ex rel. Bishop v. Feitner, 116 App. Div. 452.

b. The right of a taxpayer to review an assessment by certiorari is absolute and not a matter of discretion, and he may show that the assessment is invalid for any reason; it is no answer to the writ for the assessors to allege that the facts alleged in the petition show that the whole roll was void. It is immaterial that in destroying an assessment against himself the relator destroys it also against others and even as against all persons assessed, and assessors will not be heard to say that they acted so illegally that there was not enough of their acts to justify a review: People ex rel. Friendly v. Davenport, 119 App. Div. 790.

c. **Police.**—When further return to a writ of certiorari to review the discharge of a police officer will not be ordered: People ex rel. Moynihan v. McAdoo, 112 App. Div. 32.

d. **Conclusive.**—The return of the state civil service commission on certiorari is conclusive, even though the counsel for the respondent admits that it is not in accordance with the facts; the remedy to correct such an error is by a further return under § 2135: People ex rel. Melody v. Pound, 111 App. Div. 395.

§ 2135. Id.; how compelled; fees for making.

See § 2005, ante, Persons served to make return upon payment of fees.

e. Where the relator does not apply for a further return, the court will accept the allegations of fact in the return as final: People ex rel. Palmieri v. Marean, 86 App. Div. 278; 83 N. Y. Supp. 843.

f. A further return is only allowed where the return is defective, namely, where it does not comply with the writ: People ex rel. Meehan v. Greene, 103 App. Div. 393; 92 N. Y. Supp. 1112.

g. The return of the state civil service commission on certiorari is conclusive, even though the counsel for the respondent admits that it is not in accord with the facts; the remedy to correct such an error is by a further return under § 2135: People ex rel. Melody v. Pound, 111 App. Div. 395.

§ 2136. Id.; after term of office expired.

h. The police commissioners of the police department of the city of New York should not, after they have gone out of office, be permitted to show that, in dismissing a patrolman from the force after a trial upon charges, they considered his record upon the question of his guilt, which would invalidate their proceedings, when the fact is not disclosed by their official proceedings, recorded pursuant to the mandate of the statute: People ex rel. Regan v. York, 78 App. Div. 432; 80 N. Y. Supp. 300.

i. **Change of grade.**—A writ of certiorari to review an unauthorized act may properly be directed to the commissioners who heard a claim for damages because of the change of the grade of a street, although they have resigned and other commissioners have been appointed in their places, where it appears that all the papers, etc., are still in the custody of the former commissioners: People ex rel. Grout v. Stillings, 75 App. Div. 569; 78 N. Y. Supp. 333.

§ 2137. When third person may be brought in.

See § 820, ante, The court may make an order of interpleader in certain cases.

j. **Party.**—A petition for a writ of certiorari to review a determination by which a person is aggrieved may be verified by the attorney and where the determination has been made by a board appointed in a city under a special statute, the city is not a necessary party and the mere fact that the city may be brought in under the provisions of § 2137 does not make it a necessary party: Matter of Belmont, 40 Misc. 133; 81 N. Y. Supp. 280.

§ 2138. Hearing upon return.

k. Under § 2138, providing that a certiorari shall be heard "upon the writ and return, and the papers upon which the writ was granted," while the statements in the return to a writ of certiorari import verity, yet when it is silent

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as to the material allegations of fact contained in the petition, the presumption is that the officers making the return intended to admit such allegations: People ex rel. McGuire v. Monroe, 97 App. Div. 283; 89 N. Y. Supp. 920.

a. Under § 2138, the court cannot look beyond the return and consider the facts stated in the petition and accompanying papers, unless the return is an admission of those facts or the equivalent of an admission: People ex rel. Lester v. Eno, 176 N. Y. 513, rev'g 84 App. Div. 55; 82 N. Y. Supp. 520.

b. On certiorari to review the discharge of an assistant foreman of a city fire department under a charge of perjury, the charge being criminal, the relator is entitled to the same presumption in favor of his innocence that would exist if the same charge were made in a criminal court: People ex rel. Madigan v. Sturgis, 110 App. Div. 1.

§ 2139. Id.; upon affidavits.

c. § 2139, allowing "either party to produce affidavits or other written proofs, relating to any alleged error of fact or any other question of fact which is essential to the jurisdiction of the body or officer to make the determination to be reviewed," applies only where the court is satisfied that the facts cannot be made to appear by an order for a further return: People ex rel. Campbell v. Partridge, 99 App. Div. 410; 91 N. Y. Supp. 258.

§ 2140. Questions to be determined.

d. A determination that property had not been injured by a change of public grade may be reviewed by a writ of certiorari: People ex rel. Myer v. Adam, 74 App. Div. 604; 77 N. Y. Supp. 754.

e. **Evidence insufficient.**—Evidence held insufficient to establish that a police captain permitted disorderly houses to exist or that he failed to report suspicious places: People ex rel. Stephenson v. Greene, 92 App. Div. 243; 87 N. Y. Supp. 172.

f. Evidence held insufficient to justify the removal of a member of the New York police force: People ex rel. Reardon v. Partridge, 86 App. Div. 310; 83 N. Y. Supp. 705.

g. **Insufficient writ.**—Where it appears on the face of a writ of certiorari that it is insufficient in law, and that certiorari does not lie to review the acts complained of, the special term to quash the writ upon a motion made on the writ alone and before a return has been made thereto: People ex rel. Haggerty v. McClellan, 107 App. Div. 272.

h. **Fire commissioner.**—In a proceeding by a writ of certiorari to review a determination of a fire commissioner of the city of New York dismissing the chief, a stay cannot be supported upon the ground of alleged erroneous rulings of the commissioner, as this question is one under § 2140 for the appellate division; § 2131 limits the right to have a stay in a common law writ of certiorari and changes the rule providing that the writ does not act as a stay except where specifically authorized by the court: People ex rel. Croker v. Sturgis, 39 Misc. 448; 81 N. Y. Supp. 94.

i. On certiorari to review the discharge of an assistant foreman of a city fire department under a charge of perjury, the charge being criminal, the relator is entitled to the same presumption in favor of his innocence that would exist if the charge were made in a criminal court; on the review of such trial the question is whether, on the same evidence, a verdict of a jury against the relator, if rendered in a criminal trial for perjury, should be set aside as not warranted by the evidence: People ex rel. Madigan v. Sturgis, 110 App. Div. 1.

j. **Police commissioner.**—The nature and extent of the punishment which should be inflicted upon a member of the police force of the city of New York who has been found guilty, after a trial before the police commissioner upon charges preferred against him, is a matter for the police commissioner, not the court, to determine: People ex rel. Downes v. Greene, 96 App. Div. 1; 88 N. Y. Supp. 1060.

k. Evidence held insufficient to show misconduct of police officer and to warrant his removal: People ex rel. Maguire v. Bingham, 117 App. Div. 192.

l. Facts held insufficient to warrant removal of police officer: People ex rel. Gannon v. McAdoo, 117 App. Div. 438.

m. **Assessment.**—The appellate division will not reverse the determination of the state board of tax commissioners in a proceeding to review the equalization of tax assessments unless, upon all the evidence, an error in the conclusion of that board clearly appears: People ex rel. Hunt v. Priest, 90 App. Div. 520; 85 N. Y. Supp. 481.

n. The court, in reviewing an assessment by common-law certiorari, will ascertain from the whole record whether the relator's property was fairly and justly assessed in comparison with other property, and if not so assessed, will annul an assessment: People ex rel. Connelly v. Reis, 109 App. Div. 748; 96 N. Y. Supp. 597.

o. Where the right to assail an assessment for personal taxes is founded upon the taxing officer's lack of jurisdiction, because of the non-residence of the relator, the latter's appearance be-

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fore the taxing officer, for the purpose of presenting proof of the invalidity of the assessment, is not necessary to entitle him to relief by certiorari: People ex rel. Strong v. O'Donnell, 47 Misc. 226.

a. **Jurisdiction.**—Under § 2140 the court is authorized on the hearing upon the return to a writ of certiorari, to inquire whether the body had jurisdiction of the subject matter and whether there was competent proof of all the facts necessary to be proved in order to authorize the making of the determination: People ex rel. Underhill v. Skinner, 74 App. Div. 58; 77 N. Y. Supp. 36.

§ 2142. Restitution may be awarded.

See § 1292, ante, Restitution; when directed.

§ 2143. Costs.

See § 2007, ante, Punishment for non-payment of costs.

See § 2086, ante, Costs.

See § 2100, ante, Final order; costs.

b. **Discretion.**—Costs on a writ of certiorari are granted in the discretion of the appellate division upon the writ itself; although the court of appeals has reversed a dismissal of the writ by the appellate division, and also the determination of a police commissioner dismissing a police officer, "with costs to abide the event," nevertheless, the appellate division may deny costs to the successful relator in its discretion; hence, in the absence of such an award of costs by the appellate division the relator cannot tax costs on a judgment entered on the remittitur of the court of appeals: People ex rel. Shiels v. Greene, 114 App. Div. 168.

c. Where the return to a writ of certiorari to review an assessment for taxation raises no issue of fact, but admits the illegality of the assessment, a notice of trial is neither necessary nor proper; and no more than twenty-five dollars costs should be awarded to the relator: People ex rel. Phœnix Co. v. O'Donnel, 52 Misc. 311.

§ 2144. Entry and enrollment of final order.

See § 1237, ante, Judgment-roll to be filed; of what it consists.

See § 1345, ante, Judgment or order; where entered.

See § 1354, ante, Entry of judgment or order; judgment-roll.

§ 2145. Effect thereof.

See § 1345, ante, Judgment or order; where entered.

§ 2148. Id.; to civil cases only.

d. The writ of certiorari to review the conviction in a criminal case should not be confounded with the writ provided for in § 1991, as the latter cannot be used to review a determination made in any criminal matter except a criminal contempt of court, as provided by § 2148: People ex rel. Manning v. Hagan, 34 Misc. 24; 69 N. Y. Supp. 451.

§ 2156. Effect of consent where petitioner is a joint debtor.

See § 1942, ante, Joint debtors may compound separately; mode and effect.

See § 1944, ante, Right of the debtors not released.

§ 2160. Affidavit of consenting creditor.

See § 2157, ante, Consent of purchaser of debt.

§ 2161. When non-resident creditor to annex account, etc.

See § 842, ante, Before whom oaths and affidavits may be taken.

§ 2162. Petitioner's schedule.

See § 2190, post, Petitioner's schedule.

§ 2163. His affidavit.

See § 2175, post, Contents of assignment and to whom made.

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§ 2166. Hearing.

See § 434, ante, Proof of service of summons, how made.

§ 2168. Opposing creditor to file specifications, and may demand jury trial.

See § 1163 et seq., ante, Mode of trial by jury.

See § 1190, ante, Trials by jury; proceedings.

§ 2185. Insolvent to be released from imprisonment.

a. Under § 2185, where an imprisoned debtor is discharged under the State Insolvent Law, the sheriff must discharge him upon being furnished a certified copy of the discharge, and it would seem that a similar practice in case of a discharge in bankruptcy is both reasonable and proper: Walker v. Harder, 39 Misc. 749; 80 N. Y. Supp. 948.

§ 2187. Invalidity may be proved on motion to vacate order of arrest, etc.

See § 586, ante, When deposit to be paid to a third person.

§ 2188. Who may be exempted, and by what court.

See § 145 et seq., ante, Jail liberties.

See § 111, ante, Length of imprisonment under an execution.

See § 2200, post, Who may be discharged.

§ 2189. Contents of petition.

See § 2151, ante, Contents of petition.

§ 2195. When discharge to be granted; effect thereof.

See § 2177, ante, Effect of assignment.

See § 2288, post, Proceedings when accused does not appear.

§ 2197. Petitioner to be released from imprisonment.

See § 3347, subd. 11, post, Application of certain portion thereof, regulated and qualified.

§ 2198. Debts not affected.

See § 3347, subd. 11, post, Application of certain portions thereof, regulated and qualified.

§ 2199. Discharge, when void.

See § 2184, ante, Effect of discharge as to debts, etc., to the United States and the state.

See § 2186, ante, Discharge; when void.

See § 3347, subd. 11, post, Application of certain portions thereof, regulated and qualified.

§ 2200. Who may be discharged.

See § 111, ante, Length of imprisonment under an execution.

See § 145 et seq., ante, Jail liberties.

See § 1372, ante, Requisites of execution against a person.

See § 1487 et seq., ante, General provisions relating to executions against the person.

See § 3033, post, Discharge of judgment debtor in justice's court.

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§ 2205. Notice to creditors.

a. Where a person is imprisoned under a body execution and, pursuant to § 2205, makes application to be discharged, the court has no power to dispense with the fourteen days' notice, as the proceeding for the discharge of an imprisoned debtor is not commenced until the petition, schedules and affidavit as prescribed in § 2205 are presented to the court: Matter of Quick, 92 App. Div. 131; 87 N. Y. Supp. 316.

§ 2211. Assignment; effect thereof.

See § 2177, ante, Effect of assignment by debtor.

§ 2212. Discharge; when to be granted.

See § 2200, ante, Who may be discharged from imprisonment.

§ 2217. Effect of failure so to apply.

See § 1494, ante, New execution may issue when creditor discharges debtor after thirty days.

§ 2218. Debtors to United States, etc., not to be discharged.

See § 2184, ante, Effect of discharge as to debts due the United States as the state.

§ 2226. Effect of order appointing trustee.

See § 2177, ante, Effect of assignment by debtor.

§ 2231. When tenant may be removed.

See § 1504 et seq., ante, Action of ejectment for non-payment of rent.

b. The owner of premises can maintain summary proceedings to dispossess only in a case where the relation of landlord and tenant exist between the parties and that relation is not created by an arrangement under which the tenants are permitted to make the premises their home provided they board the owner and make repairs: Schreiber v. Goldsmith, 35 Misc. 45; 70 N. Y. Supp. 236.

c. Where the term granted by a lease is in terms made liable to curtailment upon the giving of a five days' notice in writing by the landlord for any breach by the tenant, all claim and right of the latter under the lease expires upon the notice being given, and thereupon the landlord is entitled to maintain summary proceedings under § 2231, subd. 1, for dispossession for holding over: Martin v. Crossley, 46 Misc. 254; 91 N. Y. Supp. 712.

d. **Construed.**—The statute conferring the remedy by summary proceedings, being in derogation of the common-law rights of the tenant, must be strictly construed against the landlord but not as regards the tenant: Matter of Flewwellin v. Lent, 91 App. Div. 430; 86 N. Y. Supp. 919.

e. **Re-enter.**—The word "re-enter" means only the re-entry in its technical sense as known to the common law by ejectment, and does not include the removal of the lessee by statutory summary proceedings: Michaels v. Fishel, 169 N. Y. 381, aff'g 51 App. Div. 274; 64 N. Y. Supp. 1007.

f. **Notice.**—A notice served in summary proceedings by a landlord stating the amount due and that the relation of landlord and tenant has ceased, is unauthorized, as under § 2731, subd. 2, a notice should demand either the payment of the rent or the possession of the premises: McMahon v. Howe, 40 Misc. 546; 82 N. Y. Supp. 984.

g. **Under-tenant.**—Where premises are sublet to an under-tenant, the owner cannot maintain summary proceedings to dispossess the under-tenant while the lease to the original tenant is in existence: Schlaich v. Blum, 42 Misc. 225; 85 N. Y. Supp. 335.

h. **Municipal court.**—The jurisdiction of the municipal court of the city of New York to make a final order and issue a warrant in summary proceedings is not to be presumed; the record must show jurisdictional facts: Engel, Heller Co. v. Elias Brew. Co., 37 Misc. 480; 75 N. Y. Supp. 1080.

i. Jurisdiction of the municipal court of New York in summary proceedings: Cohen v. Melle, 43 Misc. 79; 86 N. Y. Supp. 514.

j. **Supreme court.**—The supreme court has not jurisdiction of a summary proceeding to remove a tenant for non-payment of rent: Jones v. Reilly, 68 App. Div. 116; 74 N. Y. Supp. 243.

k. **Jurisdiction.**—Service of process, in summary proceedings to dispossess tenants, made upon one member of a firm, consisting of two persons, is sufficient to confer jurisdiction upon the court to entertain the proceedings and issue the war-

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rant of dispossession: Maneely v. Mayers, 43 Misc. 380; 87 N. Y. Supp. 471.

a. A lessee of premises, who sublets them during her entire term, reserving, however, a right of re-entry in case of breach of certain covenants, may maintain summary proceedings against her sub-tenant: Shumer v. Hurwitz, 49 Misc. 121.

b. When the treasurer of the defendant corporation has testified on trial that the three days' notice and demand was served upon him, it is sufficient as an admission that the service was properly and duly made, even though the process server was not called to testify, especially so when no motion to dismiss on that ground was made at trial: Peabody v. Long Acre Square Building Co., 112 App. Div. 114; 98 N. Y. Supp. 242, rev'd 188 N. Y. 103.

c. The conviction of a sub-tenant for the selling of liquor upon the premises without a license constitutes sufficient ground for the removal of the tenant under the fifth subdivision of this section, where it appears that, notwithstanding his conviction, he was permitted to remain until the trial of the proceeding instituted against the tenant, instituted six months after such conviction: Comforti v. Romano, 50 Misc. 148.

§ 2232. Person holding over land sold, etc., may be removed.

d. The fact that the question of title is raised collaterally, in a proceeding instituted in the municipal court under § 2232, subd. 4, for the summary removal of a squatter from land claimed to be owned by the petitioner does not serve to oust the municipal court of jurisdiction; where the issue involved in the proceeding as to the right to the possession of the premises and the provisions of the Code requiring the removal of an action brought in a justice's or municipal court where the determination of title to real estate is involved, have no application to such a proceeding: Van Deventer v. Foster, 87 App. Div. 62.

e. A lessee of premises, who sublets them during her entire term, reserving, however, a right of re-entry in case of breach of certain covenants, may maintain summary proceedings against her sub-tenant: Shumer v. Hurwitz, 49 Misc. 121.

f. **Squatters.**—When in summary proceedings to remove squatters from land, brought in the municipal court of the city of New York, it appears that the question of title to the property is in issue, the court has no jurisdiction and should dismiss the proceeding: Bowen v. Ludvik, 119 App. Div. 11.

§ 2233. Id.; in case of forcible entry or detainer.

See § 1669, ante, Person put out by forcible entry or detainer may recover treble damages.

g. The forcible removal by employees of a city of a refreshment stand of an individual, maintained under a written agreement between him and the city, does not constitute a forcible entry and detainer under § 2233 et seq., for the reason that the agreement does not specify any part of the land to be set apart for the occupation of the stand of the individual, and the statute contemplates that the entry shall be made into "real property:" Becher v. City of New York, 102 App. Div. 269.

h. **Res adjudicata.**—A determination in a proceeding for forcible entry and detainer in favor of the petitioner is *res adjudicata* and bars a subsequent proceeding of the same nature by the defendant for an alleged forcible entry and detainer of a building upon the same premises by the former petitioner: Jacob v. Town of Oyster Bay, No. 2, 109 App. Div. 630.

i. Summary proceedings to remove one making a forcible entry and detainer of lands are to preserve the peace and prevent parties from asserting their right to lands by force, even though their title and right to possession be superior: Town of Oyster Bay v. Jacob, 109 App. Div. 613; 96 N. Y. Supp. 620.

§ 2234. Application; to whom made.

See § 1211, ante, Judgment to bear interest.

§ 1357 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2235. Petition by person entitled to possession.

j. The interest of the petitioner in the premises affected is a jurisdictional fact, which must appear from the facts and not by inference: Engel, Heller Co. v. Elias Brewing Co., 37 Misc. 480; 75 N. Y. Supp. 1080.

k. **Petition.**—Petition held insufficient in action by executor and trustee of a decedent to dispossess tenant: Rowland v. Dillingham, 83 App. Div. 156; 82 N. Y. Supp. 470.

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a. In summary proceedings an allegation that the petitioners are the landlords of the premises is insufficient, and a final order made thereon will be reversed: Bell v. Karsch Brewing Co., 52 Misc. 159.

b. **Domestic corporation.**—An agent of a domestic corporation may, and an officer thereof need not, verify its petition to initiate summary proceedings to dispossess its tenant: Matter of Stuyvesant Real Estate Co., 40 Misc. 205; 81 N. Y. Supp. 642.

c. **Squatter.**—A petition in a proceeding taken to dispossess a squatter sufficiently states the interest of the petitioner under § 2235 when it alleges that he is the owner in fee simple of the premises, and an objection to the insufficiency of such an objection is waived where the defendant does not take it until an adjourned day, he having meanwhile interposed an answer: Mauterstock v. Williams, 42 Misc. 402.

d. **Non-payment of rent.**—A petition to dispossess a tenant for non-payment of rent and taxes, which states that the three days' notice requiring payment or possession of the premises was served on the tenant, a corporation, by delivering and leaving with the treasurer of the defendant a true copy of the notice, and having annexed a certificate of the process server stating that the original notice was shown at the time of service, is sufficient to confer jurisdiction on the court: Peabody v. Long Acre Square Building Co., 112 App. Div. 114; 98 N. Y. Supp. 242, rev'd 188 N. Y. 103.

e. **Interest.**—When the petition in summary proceedings merely states that the petitioner is "lessee and landlord" of the premises, it fails to state the interest of the petitioner, as required by § 2235; such defect deprives the municipal court of New York of jurisdiction, and it cannot be cured by amendment, being jurisdictional: Ferber v. Apfel, 113 App. Div. 720.

§ 2238. Precept.

f. A precept complies with the provisions of § 2238 if it is returnable in not less than three nor more than five days after its issue, although it is dated before it was issued: Powers v. De O., 64 App. Div. 373; 72 N. Y. Supp. 1103.

g. **Jurisdiction.**—Where, in proceedings to dispossess tenants, it does not appear that they were co-partners, service of the notice provided by the lease, and service upon the other of the notice without the precept is insufficient to confer jurisdiction where the tenants appear specially and object to the jurisdiction of the court: Adler v. Lowenstein, 52 Misc. 556.

§ 2239. Id.; in New York city.

See § 3205, post, Service of complaint, etc., in district courts of New York.

§ 1358 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2240. Id.; how served.

h. The municipal court of the city of New York does not gain jurisdiction of a proceeding to dispossess a tenant, where the petition fails to state by which of the three methods set forth in § 2240, service was made: Matter of Stuyvesant Real Estate Co., 40 Misc. 205.

§ 2244. Answer.

i. An action by a tenant to restrain temporarily summary proceedings from being continued will be refused where the tenant has an adequate remedy at law: Weber v. Rogers, 41 Misc. 662; 85 N. Y. Supp. 232.

j. **Eviction.**—In an action for the payment of rent the tenant cannot set up as a defense that alterations render his occupation less convenient; there can be no constructive eviction without a surrender: Hall v. Irvin, 38 Misc. 123; 77 N. Y. Supp. 91.

k. The eviction of a tenant from a portion of the demised premises suspends, during the continuance of the eviction, the right of the landlord to maintain summary proceedings against the tenant for non-payment of rent: Sirey v. Braems, 65 App. Div. 472; 72 N. Y. Supp. 1044.

l. **Counterclaim.**—A counterclaim is properly dismissed, where it consists of a violation of a covenant by the landlord, as the tenant is obliged to pay rent while he remains in possession of the premises: Jacob v. Thompson, 73 App. Div. 224; 71 N. Y. Supp. 802.

m. A counterclaim may be interposed by a tenant in summary proceedings instituted against him: Castagnette v. Nicchia, 76 App. Div. 371; 78 N. Y. Supp. 498.

n. A counterclaim, in summary proceedings, of an agreement by the landlord to accept a surrender of the premises and pay a certain sum is insufficient in that it does not allege that the defendant surrendered the premises: Flegenheimer v. Dreyer, 72 App. Div. 589; 76 N. Y. Supp. 573.

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a. **Covenant.**—A tenant cannot defend on the ground that the covenant, on the part of the lessor to make changes or repairs, had not been performed: Jefferson Real Est. Co. v. Hiller & Sons, 39 Misc. 784; 81 N. Y. Supp. 374.

b. **Assignment of lease.**—A defense on the ground that an assignment of the lease to the party instituting summary proceedings was fraudulent as to creditors may be interposed: Woods v. Garcewich, 67 App. Div. 53; 73 N. Y. Supp. 472.

c. **Res adjudicata.**—In a summary proceeding, instituted by a landlord against a tenant in the municipal court of the city of New York, to recover possession of premises for non-payment of rent, the tenant cannot raise the defense of *res adjudicata* by motion, but must do so by answer: Fritztuskie v. Wauroski. 83 App. Div. 150; 82 N. Y. Supp. 543.

d. **Appeal.**—Under § 2244 a justice before whom a summary proceeding is pending has jurisdiction to determine whether any rent is due under a lease and may take an account if an accounting is necessary; if the justice commits error in his determination, the remedy is by appeal and a stay: Natkins v. Wetterer, 76 App. Div. 93; 78 N. Y. Supp. 713.

§ 2245. Issues upon forcible entry or detainer.

See § 2233, ante, Persons holding over land sold, etc., may be removed in case of forcible entry or detainer.

§ 2247. Trial.

See § 2988 et seq., post, Trial in justice's court.

e. Where a summary proceeding is based both upon the non-payment of rent and the non-payment of taxes, non-payment of rent sufficiently proven will sustain a final order of removal of the tenant: Peabody v. Long Acre Square Building Co., 47 Misc. 629; 94 N. Y. Supp. 502.

f. **Appeal.**—Where the return on appeal by a tenant from a final order shows that the parties appeared on a certain day and that, on a subsequent day, a trial was had and that, a week thereafter, a final order was made in the landlord's favor, without any appearance by either party, such order was without jurisdiction and an appeal therefrom will be dismissed: Katz v. Schreckinger, 52 Misc. 160.

§ 2248. Adjournment.

See § 2959 et seq., post, Adjournments in justice's court.

§ 2249. Final order upon trial.

g. **Appeal.**—An order of the county court of Ulster county, reversing an order of the city court of the city of Kingston, in summary proceedings instituted by a landlord to recover possession of demised real estate, is not appealable to the appellate division, as the right to take such appeal is not conferred by §§ 1356 and 1357, relating to appeals, to the appellate division from orders made in special proceedings generally, nor by § 2260, relating to appeals from orders made in summary proceedings to recover possession of real estate; the final order mentioned in § 2260, as defined by § 2249, is the final order made upon the trial: Matter of Soop v. Burhans, 106 App. Div. 341; 94 N. Y. Supp. 463, rev'd 183 N. Y. 227.

h. Where the return on appeal by a tenant from a final order shows that the parties appeared on a certain day and that, on a subsequent day, a trial was had and that, a week thereafter, a final order was made in the landlord's favor, without any appearance by either party, such order was without jurisdiction and an appeal therefrom will be dismissed: Katz v. Schreskinger, 52 Misc. 160.

i. **Default.**—A judgment by default in summary proceedings for the non-payment of rent, until reversed, set aside or vacated, is conclusive in a subsequent action by the landlord against the tenant to recover rent, as to the tenancy, occupation, the non-payment of rent and the holding over after default. While not conclusive as to the amount of rent due, it is conclusive that some rent is due and unpaid: Prince v. Schlesinger, 116 App. Div. 500.

j. As a tenant dispossessed for non-payment of taxes has no right of redemption, a final order of dispossession should issue when the proof shows that the taxes were not paid until the second day of the trial; such order must determine the rights of the landlord as existing at the time of issue joined: Peabody v. Long Acre Square Building Co., 112 App. Div. 114; 98 N. Y. Supp. 242, rev'd 188 N. Y. 103.

k. Where the issue in summary proceedings is whether a new lease to him from a lessee of the landlord covered the premises occupied by the tenant, a final order in his favor in a prior proceeding relating to the same premises by another lessee of the same landlord,

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of which the latter had notice, is conclusive upon the landlord in the present proceeding: Kosower v. Sandler, 49 Misc. 443.

a. In summary proceedings against a tenant for non-payment of rent, an order denying a motion by the mortgagee of the tenant's rights under the lease that the final order in favor of the landlord be vacated and that he be permitted to come in and defend will be affirmed: Rubenstein v. Rosenthal, 50 Misc. 313.

b. A final order awarding possession to the landlord of the demised premises for non-payment of rent is an adjudication of the existence of a valid lease: Meyerhoffer v. Baker, 51 Misc. 598.

§ 2250. Amount of costs; how collected.

See § 3074 et seq., post, Costs in justice's court.

c. A landlord who succeeds in a summary proceeding, not involving a forcible entry or detainer, is entitled, under §§ 2250 and 3076, subd. 2, to ten dollars costs and no more, and is not entitled to an extra allowance under § 3253; § 3240 does not apply to a summary proceeding: Lauria v. Capobianco, 39 Misc. 441.

d. **Costs.**—In the municipal court of the city of New York a tenant is entitled as costs to his actual disbursements to the extent of ten dollars, and in addition the fees of any witnesses attending from outside the county: Cohen v. Melle, 43 Misc. 79; 86 N. Y. Supp. 514.

§ 2251. Warrant to dispossess defendant.

e. When, in an action by a former tenant to recover from his landlord sums alleged to have been paid under an option to purchase, which sums were to be returned or applied on the rent if the tenant elected not to purchase, it is shown that subsequent to the alleged payments the landlord obtained a judgment of dispossession against said tenant in summary proceedings, such judgment is *res adjudicata* against plaintiff's claim: Von der Born v. Schultz, 111 App. Div. 263.

§ 2253. When warrant cancels lease; exception.

f. § 2253 provides that the issuing of a warrant of dispossession shall annul the relation of landlord and tenant, and, therefore, a tenant remaining in possession after such issue, cannot thereafter bear to his landlord the relation of tenant from month to month: Seigel v. Neary, 38 Misc. 297.

g. **Lease.**—A mere demand for the rent due and a notice to quit the premises, provided the rent is not paid, as preliminary to institute summary proceedings, does not cancel the lease: Woodworth v. Harding, 75 App. Div. 54; 77 N. Y. Supp. 969.

h. **Fixtures.**—Assuming that an unexercised right to remove trade fixtures passes to a trustee of the estate of the tenant, appointed in bankruptcy proceedings the day after the issuing of a warrant for the removal of the tenant for non-payment of rent, the trustee loses such right by accepting from the landlord a new lease of the property, "together with the buildings thereon and the appurtenances," not containing any reservation of the right to remove the fixtures: Van Vleck v. White, 66 App. Div. 14; 72 N. Y. Supp. 1026.

i. **Deposit.**—A deposit made for the security of rent alone and to be returned upon the "fulfillment" of the lease, can be retained by the lessors after re-entry by summary proceedings for default in payment of rent, only to the extent necessary to satisfy rent coming due before the precept was issued, and cannot be applied to a deficiency arising on an attempted reletting of the premises by the lessors as the lessee's agents for which the lessee covenanted to be responsible, but which was dependent by the terms of the lease upon an entry by ejectment since the summary proceedings terminated the lease, under § 2253: Michaels v. Fishel, 169 N. Y. 381; 32 Civ. Pro. R. 310, aff'g 51 App. Div. 274; 64 N. Y. Supp. 1007.

j. Under a lease providing that a deposit, made by the lessee for security and applicable primarily to the rent of the last two months of the term, may, upon his failure to perform, be retained by the lessor as liquidated damages for the breach and for her necessity to reenter by due process of law, she is entitled, after dispossessing the lessee, and notwithstanding § 2253, to retain the deposit and as liquidated damages: Lesser v. Stein, 39 Misc. 349.

k. **Security.**—Where a landlord asserts the right of entry, under a warrant of dispossession, he waives claim to any sum deposited as security for the performance of the terms of a lease except such an amount as may be necessary to pay the rent then due: Caesar v. Rubinson, 174 N. Y. 492, rev'g 71 App. Div. 180; 75 N. Y. Supp. 544.

l. **Damages.**—Although the eviction of a tenant by summary proceedings cancels the lease and relieves the tenant from liability for future rent, yet when the lease provides that the tenant shall

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pay damages sustained by the landlord in consequence of a failure of the tenant to pay rent, the landlord may maintain an action for such damage even though the tenant has been evicted by summary proceedings: Slater v. Von Chorus, 120 App. Div. 16.

§ 2254. Warrant; when and how stayed.

See § 2265, post, How proceedings are stayed.

a. Where, upon the return of the precept, issued in a summary proceeding, instituted by a landlord against the tenant to recover possession of the demised premises because of the non-payment of rent, the tenant tenders to the landlord the amount of rent due, together with the costs and disbursements of the proceeding, the court may thereupon, under § 2254, enter an order directing that the proceeding be dismissed, and need not defer such dismissal until after a final order of removal has been made: Matter of Flewwellin v. Lent, 91 App. Div. 430; 86 N. Y. Supp. 919.

b. **Appeal.**—The fact that the final order overstates the amount of rent which was actually due does not entitle the tenant to have the order reversed on appeal, where it does not appear that after the final order was made he made any offer to pay the rent actually due, or to give an undertaking to pay the same: Stelle v. Creamer, 69 App. Div. 296; 74 N. Y. Supp 669.

c. **Stay.**—Equity will, after judgment in summary proceedings, restrain the execution of the warrant of dispossession and validate the lease where, before issue of the warrant, the landlord in bad faith had refused the tenant's tender of all that was due him for rent and for costs of the judgment: Asbyll v. Haims, 38 Misc. 578; 78 N. Y. Supp. 64.

d. Where a summary proceeding as based both upon the non-payment of rent and the non-payment of taxes, non-payment of rent sufficiently proven will sustain a final order of removal of the tenant: Peabody v. Long Acre Square Building Co., 47 Misc. 629; 94 N. Y. Supp. 502.

§ 2256. Redemption by lessee.

e. As a tenant dispossessed for non-payment of taxes has no right of redemption, a final order of dispossession should issue when the proof shows that the taxes were not paid until the second day of the trial: Peabody v. Long Acre Square Building Co., 112 App. Div. 114; 98 N Y. Supp. 242, rev'd 188 N. Y. 103.

f. **Mortgage.**—Where a tenant mortgages his estate and is thereafter dispossessed for non-payment of rent, the unexpired term of his lease exceeding five years when the warrant is issued, and the mortgagee thereupon takes a new lease from the landlord for the whole of the unexpired term, she may nevertheless maintain an action to foreclose her mortgage; for the right of redemption given by § 2256 is outstanding and is not merged in the plaintiff's term: Chumar v. Melvin, 53 Misc. 463.

§ 2260. Appeal.

See § 3044 et seq., post, Appeals from justice's court.
See § 3188 et seq., post, Appeals from city court of New York.

g. Where the justice erroneously determined the amount of rent due, the remedy is by an appeal from a final order awarding possession of the premises to the defendant and to obtain a stay pending the appeal of the warrant issued under such order: Natkins v. Wetterer, 76 App. Div. 93; 78 N. Y. Supp. 713.

h. An order of the county court of Ulster county, reversing an order of the city court of the city of Kingston, in summary proceedings instituted by a landlord to recover possession of demised real estate, is not appealable to the appellate division, as the right to take such appeal is not conferred by §§ 1356 and 1357 relating to appeals to the appellate division from orders made in special proceedings generally, nor by § 2260, relating to appeals from orders made in summary proceedings to recover possession of real estate; the final order mentioned in § 2260, as defined in § 2249, is the final order made upon the trial: Matter of Soop v. Burhans, 106 App. Div. 341; 94 N. Y. Supp. 549, rev'd 183 N. Y. 227.

i. This section confers the same right to appeal from a final order in a summary proceeding instituted in an inferior local court as from a judgment of a justice's court: Matter of Soop v. Burhans, 183 N. Y. 227, rev'g 106 App. Div. 341; 94 N. Y. Supp. 463.

j. When summary proceedings originate in a justice's court and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

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§ 2261. Effect of appeal limited in certain cases.

a. When summary proceedings originate in a justice's court and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

§ 2264. Application of this title; effect of final order.

b. **Justice of peace.**—A justice of the peace has no power to pass judgment upon the title to real estate or adjudicate the rights of parties in partnership property, nor is a final order in summary proceedings a bar to an action of ejectment for the same lands: Willis v. McKinnon, 37 Misc. 386; 75 N. Y. Supp. 770.

§ 2265. How proceedings under this title to be stayed.

See § 602 et seq., ante, Injunctions generally.

c. **Stay.**—Where the justice erroneously determines the amount of rent due, the remedy is by an appeal from a final order awarding possession of the premises to the defendant and to obtain a stay pending the appeal of the warrant issued under such order: Natkins v. Wetterer, 76 App. Div. 93; 78 N. Y. Supp. 713.

d. **Stay.**—An injunction restraining the execution of a warrant for dispossession in summary proceedings until the determination of an action brought by the tenants to reform the instrument will not be granted where in addition to the general allegations of fraud, the only facts stated in the moving affidavit is that the tenant accepted the instrument without reading it: Rubino v. Mariano, 65 App. Div. 314; 73 N. Y. Supp. 713.

e. An action by a tenant to restrain temporarily summary proceedings from being continued will be refused where the tenant has an adequate remedy at law: Weber v. Rogers, 41 Misc. 662; 85 N. Y. Supp. 232.

§ 2266. Cases to which this title applies.

See § 14, ante, Contempts punishable civilly.

See § 545, ante, Attorney's failure to pay certain motion costs is contempt.

See § 776, ante, Subsequent motion after denial of first, by an attorney, is contempt.

See § 808, ante, Disobedience to an order for discovery of books and papers, is contempt.

See § 853, ante, Failure to obey subpoena is punishable as contempt.

See § 863, ante, Arrest of privileged witness is contempt.

See § 1675, ante, Withholding real property from person entitled to possession is contempt in certain cases.

See § 1716, ante, Neglect of sheriff to make return in an action of replevin is punishable as contempt.

See § 1773, ante, Failure to pay alimony is punishable as contempt.

See § 2007, ante, Failure to make return to mandamus is contempt.

See § 2096, ante, Default of return to alternative writ of prohibition is punishable as contempt.

See § 2135, ante, Omission to make return to certiorari is contempt.

See § 2457, post, Disobedience to order in supplementary proceedings is punishable as for contempt.

See § 2481, post, Surrogate has power to punish for contempt.

See § 2870, post, Justice of the peace has power to punish for contempt.

See Penal Code, § 143, Criminal contempt is a misdemeanor.

f. It is not a prerequisite to the punishment of a party for contempt of court that the moving party shall have exhausted all other remedies for making good the damages: Matter of Goslin, 95 App. Div. 407; 88 N. Y. Supp. 670.

g. **Supplementary proceedings.**—It will not be assumed, especially as the basis for the reversal of an order in contempt proceedings, that an injunction order was made in supplementary proceedings: Holmes v. O'Regan, 68 App. Div. 318; 74 N. Y. Supp. 10.

h. The refusal of a judgment creditor to obey an order directing the restitution by him of a sum of money, paid to him by a receiver in supplementary proceedings under an order which has been vacated may be punished by proceedings for contempt under § 14 when construed in connection with §§ 2266 and

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2268 of that Code: Newell v. Hall, 74 App. Div. 278; 77 N. Y. Supp. 610.

a. **Alimony.**—Under chap. 17, title 3, which by § 1773 governs proceedings instituted for contempt for a failure to pay temporary alimony, it is necessary that a personal demand be made upon the defendant for the payment of the alimony, and that the order to show cause why he should not be punished for contempt be served on him personally; the service of such an order to show cause upon his attorney is not sufficient: Goldie v. Goldie, 77 App. Div. 12; 79 N. Y. Supp. 268.

b. **Proof.**—There must be an adjudication upon competent proof, not only of the facts unequivocally stated which constituted the violation of the injunction order, but that such violation "was calculated to, or actually did, defect, impair, impede or prejudice the rights or remedies" of the plaintiff: Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. 532; 77 N. Y. Supp. 287.

c. **Attorney.**—Where an attorney procures sureties, one who is insolvent and the other fictitious, he and the surety are both guilty of contempt: Nucchio v. Porto, 72 App. Div. 88; 76 N. Y. Supp. 96.

d. **Surety.**—A surety on an undertaking on appeal to the court of appeals, who swears falsely as to his property may be confined sufficiently to pay the loss sustained: Buffalo L., T. & S. D. Co. v. Medina G. & E. L. Co., 68 App. Div. 414; 74 N. Y. Supp. 486.

e. **Injunction.**—Where the main object of an action by a suspended member of a voluntary association is to compel his reinstatement as a member in good standing, the court has no power to grant an interlocutory injunction requiring his reinstatement; and in a proceeding to punish as for a civil contempt the violation of such injunction, the lack of authority to grant it is a complete defense: Bachman v. Harrington, 184 N. Y. 459.

f. Parties in no way connected with defendants, who were restrained under § 604, subd. 1, from removing a sidewalk fruit stand, are not guilty of a contempt of court, particularly where they were executing the process of another court in an action by a landlord to dispossess a defaulting tenant: Rigas v. Livingston, 178 N. Y. 20.

g. **Summary proceedings.**—A defendant should not be punished for contempt for a failure to obey an injunction restraining him from instituting summary proceedings against the plaintiff on the ground that prior summary proceedings were determined in plaintiff's favor, where it appears that the defendant discontinued the action prior to the motion to punish him, and such proceedings were instituted by him on the theory that the injunction had expired through failure of the plaintiff to give a bond as required: Jones v. Burgess, 109 App. Div. 888.

h. **Habeas corpus.**—When, by consent of parties on *habeas corpus* to obtain possession of a child, the court has ordered that the child be put in a Roman Catholic institution, there to be educated until its majority, and that the father pay for its support and for the services of the mother's counsel, said father cannot be punished as for a contempt in failing to make such payments, when the child was not, in fact, placed in such Roman Catholic institution, but was placed in some other institution by consent of the parties: People ex rel. Barker v. Stringer, 110 App. Div. 364.

i. **Executor.**—A decree that an executor owes a debt to an estate and directing him to pay the same, is, by virtue of §§ 2714 and 2552, conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under § 2555; if the executor is insolvent, he may be relieved from imprisonment under § 2286: Matter of Strong, 111 App. Div. 281; 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

j. **Receiver.**—When a foreign corporation is dissolved by judicial decree and a permanent receiver is appointed, it ceases to exist and an order obtained subsequent to such dissolution decreeing an executrix to be in contempt for failure to obey a direction to pay over moneys to said corporation should be set aside: Matter of Skelly, 109 App. Div. 58.

§ 2267. When punishment may be summary.

See § 11, ante, Requisites of commitment for contempt.

See § 1018, ante, General powers of a referee to punish for contempt.

k. **Questions.**—The order adjudging the party guilty of contempt should specify the question for failure to answer which he was punished for: Matter of King v. Ashley, 179 N. Y. 281, aff'g 96 App. Div. 143; 89 N. Y. Supp. 482.

§ 2268. When warrant to commit may issue without notice.

l. By the provisions of § 2268 it is, among other things, provided that the court must be satisfied by proof, by affidavit, that a personal demand has been made for payment of the sum directed to be paid in the order. There

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is no affidavit of such fact contained in the present record nor does the recital in the order adjudging the defendant to be in contempt contain such statement, the recital being "it appearing to the satisfaction" of the court, etc. The satisfaction of the court as provided by the Code provision must be had upon an affidavit or other equivalent proof: Flor v. Flor, 73 App. Div. 262; 76 N. Y. Supp. 813.

a. **Supplementary proceedings.**—The refusal of a judgment creditor to obey an order directing the restitution by him of a sum of money, paid to him by a receiver in supplementary proceedings under an order which has been vacated may be punished by proceedings for contempt under § 14 when construed in connection with §§ 2266 and 2268 of that Code: Newell v. Hall, 74 App. Div. 278; 77 N. Y. Supp. 610.

b. **Petition.**—The provisions of this section only regulate the authority and dictate the manner of a court's exercising its right to inquire into the alleged misconduct of an attorney by an order to show cause based on a petition by the client: People ex rel. White v. Feenaughty, 51 Misc. 468.

§ 2269. Order to show cause, or warrant to attach offender.

c. The objection that a proceeding to punish a defendant for contempt was brought before the court by means of a notice of motion, whereas it should have been instituted by an attachment or an order to show cause, under § 2269, must be deemed to have been waived unless the objection was taken at the special term: Maigille v. Leonard, 102 App. Div. 367.

d. **Defective papers.**—The papers are fatally defective where they fail to show any facts from which the court can adjudge that any right or remedy of the plaintiff has been defeated, impaired, impeded or prejudiced: Dunlop v. Mulry, 40 Misc. 131; 81 N. Y. Supp. 260.

e. **Contempt.**—A proceeding to punish a judgment debtor for contempt in refusing to testify in proceedings supplementary to execution must be by order to show cause or by warrant of attachment. A proceeding instituted by notice of motion is void: Lawrence v. Dixey, 119 App. Div. 294.

f. An order to show cause why one should not be punished for contempt must be served personally, the service upon counsel is not sufficient: Matter of Weeks, 111 App. Div. 337.

§ 2272. Id.; when contempt was committed before a referee.

See § 1018, ante, General powers of a referee to punish for contempt.

g. **Witness.**—An order adjudging the witness guilty of contempt for refusal to answer a question propounded to him before a referee is properly made upon the return of an order to show cause: Matter of Husted, 37 Misc. 237; 75 N. Y. Supp. 252.

h. An order punishing a witness for contempt in failing to appear before a referee, in pursuance of an order and testify in supplementary proceedings is void; the attendance of witnesses in such proceedings can be enforced only by the due service of process of subpoena, as upon the trial of an action: Matter of Depue, 185 N. Y. 60.

§ 2273. Effect of order to show cause, and of warrant.

i. Where a judgment debtor obtains a judgment in the first judicial district and institutes supplementary proceedings before the county judge of Rensselaer county, an order to show cause why the judgment debtor should not be punished for contempt for refusing to answer questions cannot be issued by a justice and made returnable at a special term in the first judicial district, as under § 2273 such an order is an appeal in supplementary proceedings and must be made to the county judge of Rensselaer county or to the supreme court, third judicial district: Matter of Backus, 91 App. Div. 266; 86 N. Y. Supp. 638.

j. An order to show cause in proceedings to punish a contempt of court may be served on the attorney for the defendant charged with the offense: Lederer v. Lederer, 47 Misc. 471; 95 N. Y. Supp. 934, rev'd 108 App. Div. 228.

§ 2278. When habeas corpus may issue.

See § 2013, ante, Certain prisoners to be remanded.

k. Facts not traversed or denied, alleged in a petition for a writ of *habeas corpus* instituted to procure the relator's discharge from imprisonment under an order adjudging her in contempt, even if not admitted, constitute evidence upon the hearing of the writ, and if they show that she was not guilty of contempt, she is entitled to be discharged: Matter of Depue, 185 N. Y. 60.

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§ 2280. Interrogatories and proofs.

a. The testimony of a witness in a proceeding to punish a debtor for contempt may be compelled before the court on such proceeding either by subpoena or by an order under the provisions of § 2280, and the judgment debtor is not entitled to an order appointing a referee to take the testimony of such witness: People ex rel. Tuell v. Paine, 92 App. Div. 303.

§ 2281. When and how accused to be punished.

b. **Fine.**—An order cannot be sustained adjudging a person guilty of contempt and directing him to pay a fine where no damages have been shown: Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. 532; 77 N. Y. Supp. 287.

c. **Judgment debtor.**—Evasive and contumacious conduct of a judgment debtor examined in supplementary proceedings should not be held for contempt unless it appears that the judgment creditor's rights or remedies have been impaired: Matter of Ryan, 73 App. Div. 137; 77 N. Y. Supp. 132.

d. **Jurisdiction.**—Upon a writ of *habeas corpus*, only the jurisdiction or the power of the court to make the order or judgment under which the relator is detained can be attacked: People ex rel. White v. Feenaughty, 51 Misc. 468.

e. **Warrant.**—Where a proceeding is instituted against a party charged with contempt by affidavit and attachment and it is adjudged that he is in contempt, a warrant of commitment must issue as prescribed by § 2281, but where the proceeding is begun by an affidavit and order to show cause the offender may be committed by a certified copy of an order so made, as prescribed by § 2283: People ex rel. White v. Feenaughty, 51 Misc. 469.

§ 2283. Id.; upon return of order to show cause.

f. On the return of an order to show cause why an attorney should not be punished for contempt and for such other and further order as may to the court seem just, etc., an order requiring such attorney to deposit money with a trust company is improper, as such relief was not indicated in the motion papers: Matter of Weeks, 111 App. Div. 337.

g. **Warrant.**—Where a proceeding is instituted against a party charged with contempt by affidavit and attachment and it is adjudged that he is in contempt, a warrant of commitment must issue as prescribed by § 2281, but where the proceeding is begun by an affidavit and order to show cause the offender may be committed by a certified copy of an order so made, as prescribed by § 2283: People ex rel. White v. Feenaughty, 51 Misc. 469.

§ 2284. Amount of fine.

See § 853, ante, Penalty for disobedience to subpoena.

See § 855, ante, Penalty for disobeying subpoena, warrant for witness.

See § 2281, ante, When and how accused to be punished.

h. **Fine.**—An order cannot be sustained adjudging a person guilty of contempt and directing him to pay a fine where no damages have been shown: Mutual Milk & Cream Co. v. Tietjen, 73 App. Div. 532; 77 N. Y. Supp. 287.

i. Where a judgment debtor under examination in supplementary proceedings fails to appear on the adjourned day, as he believes the proceedings to have been stayed, he should not be fined $250 and $50 costs for willful contempt, but only $50 and $10 costs: Kreiser v. Kitaoka, 36 Misc. 174; 73 N. Y. Supp. 164.

j. The court has power, under § 2284 to punish a person for contempt for disobeying an order requiring him to appear for examination by a fine of $250: New Jersey Foundry & M. Co. v. Siebert, 45 Misc. 357.

k. The provisions of § 2284 that, in the absence of proof of actual loss and injury, "a fine must be imposed, not exceeding the amount of the complainant's costs and expenses, and two hundred and fifty dollars in addition thereto," mean that the party may be fined the costs and expenses of the motion for contempt only, and that clause, together with the subsequent clause as to the $250, is a limitation of the fine: Matter of Husted, 37 Misc. 237.

l. **Surety.**—A surety on an undertaking on appeal to the court of appeals, who swears falsely as to his property may be confined sufficiently to pay the loss sustained by the plaintiff: Buffalo, L., T. & S. D. Co. v. Medina G. & E. L. Co., 68 App. Div. 414; 74 N. Y. Supp. 486.

m. Where, in a proceeding instituted by the judgment creditor to punish the surety for contempt, it appears that, pursuant to the writ of replevin, the property in question was taken from

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the custody of the officer who made the levy and was removed beyond the jurisdiction of the court, the damages caused by the surety's contempt is presumptively the amount of the judgment and the surety may properly be fined such amount and the costs and expenses of the contempt proceedings: Matter of Goslin, 95 App. Div. 407; 88 N. Y. Supp. 670.

a. **Purchaser.**—Where a purchaser fails to pay the amount bid at a mortgage foreclosure sale, he is entitled to have the amount which he is chargeable with determined before contempt proceedings are commenced: Rowley v. Feldman, 66 App. Div. 463; 73 N. Y. Supp. 385.

b. **Mandamus.**—A member of the council of New York city refusing to obey a peremptory writ of mandamus, directing the council to issue corporate stock to pay relator's claim is guilty of willful contempt and will be fined under § 2284 the costs, disbursements and council fees paid by the relator and committed to jail for ten days: People ex rel. Pierce v. Brice, 34 Misc. 491; 70 N. Y. Supp. 346.

c. **Injunction.**—A violation of an injunction order in supplementary proceedings may be punishable as a contempt by imposing the costs of such supplementary proceedings as an additional fine, and the order directing such payment need not require the payment of such costs within a specified time; the order is governed by § 2284 and not by § 2455 which relates to the costs awarded in supplementary proceedings: Fitzsimmons v. Ryan, 64 App. Div. 404.

d. A municipal corporation violating an injunction may be punished by a proper fine under this section: Marson v. City of Rochester, 112 App. Div. 51; 97 N. Y. Supp. 881, aff'd 185 N. Y. 74.

e. **Contempt.**—An order adjudging a person guilty of contempt for failing to obey an order to appear and testify before a referee in supplementary proceedings, imposing as a fine the amount of the judgment sought to be recovered and directing that it be paid to the creditor, is without power where the creditor may maintain an action for damages for failure to obey any process issued with jurisdiction: Matter of Depue, 185 N. Y. 60.

§ 2285. Length of imprisonment.

f. Where a writ of mandamus, directing a member of the common council of a city to perform an act is obeyed on the same day on which he was served with an order to show cause why he should not be punished for contempt in failing to obey such writ, the court has no power under § 2285 to direct that he be confined in jail in addition to fining him for such contempt: People ex rel. Pierce v. Brice, 62 App. Div. 593.

§ 2286. When court may release offender.

g. A person imprisoned for a civil contempt, in having failed to comply with a surrogate's decree directing him to pay a sum of money representing his *devastavit* of an estate of which he had been an administrator, should not be discharged, under § 2286 upon his uncorroborated statement that he is unable to pay the sum where it appears that the surrogate's decision also found him guilty of fraud and perjury: Matter of Collins, 39 Misc. 753.

h. **Executor.**—A decree that an executor owes a debt to an estate and directing him to pay the same, is, by virtue of §§ 2714 and 2552, conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under § 2555; if the executor is insolvent he may be relieved from imprisonment under § 2286: Matter of Strong, 111 App. Div. 281; 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

§ 2320. Jurisdiction; concurrent jurisdiction.

See § 340, ante, Jurisdiction of county court in regard to incompetents.

i. **Supreme court.**—The supreme court has inherent power to protect the interests of incompetents, in addition to the power expressly conferred upon it by the Code of Civil Procedure for that purpose; if the provisions of the Code of Civil Procedure prescribe the way in which the power shall be exercised, such provisions must be followed; but if the Code of Civil Procedure does not regulate the manner in which the power shall be exercised, then it becomes the duty of the court to determine the mode and manner in which the power can be best exercised to effect the end desired: Am. Mortgage Co. v. Dewey, 106 App. Div. 389; 94 N. Y. Supp. 808.

j. **Committee.**—In the selection of a committee of the person of an incompetent, the court should exercise the greatest care so that the rights of all the parties may be subserved and should also consider the welfare and happiness of the incompetent though the wishes and interests of the relatives of the incompetent should not be ignored, particularly if they coincide with the incompetent's welfare: Matter of Cooper, 105 App. Div. 449.

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a. **Removal.**—§ 2320 contemplates that a proceeding to remove the committee of an incompetent shall be a continuance of the original proceeding, and not an independent proceeding, and that all the parties heard on the original proceeding shall be made parties thereto: Matter of Osborn, 74 App. Div. 113; 77 N. Y. Supp. 423.

b. **Jury.**—A finding held to be equivalent to one that the incompetent had become imbecile through loss of memory or understanding and thus bringing the case within the jurisdiction given by § 2320; the jury is not confined in its findings to the sole question as to whether the incompetent is competent at the time of the inquiry, in view of the fact that § 2325 provides that the jury shall make findings relating to the incompetent's property; opinions of neighbors as to the incompetent's sanity are entitled to little weight as against undisputed facts: Matter of Preston, 46 Misc. 46.

c. **Insanity.**—When a resident of this state, who is sane, has been decoyed into another state and there adjudged to be insane, and a committee of her person and property appointed, it is not a valid adjudication as to insanity, nor does it establish her residence in such state, and the validity of the proceedings can be attacked collaterally in this state: Matter of Bergmann, 110 App. Div. 588.

§ 2322. Committee may be appointed.

d. The legal title to the lunatic's property remains in the incompetent person, notwithstanding the appointment of the committee; such committee is merely the custodian or bailiff of the property and has no interest therein or independent power to dispose of the same in any manner whatever; it is his duty to preserve the property and not to dispose of it, except by order of the court: Scribner v. Young, 111 App. Div. 814.

§ 2323. Application for committee; by whom made.

e. The fact that a petition for the appointment of a committee of an alleged incompetent is not presented in the judicial district in which the alleged incompetent resides, as required by § 2323, is an irregularity which renders the proceedings invalid; *it seems* that under § 2325 such a petition is defective if the matters alleged therein, relating to the mental condition of the alleged incompetent, are alleged upon information and belief without stating the source of the information: Matter of Bischoff, 80 App. Div. 326; 80 N. Y. Supp. 917.

§ 2323-a. Application when incompetent person is in a state institution; petition, by whom made; contents and proceedings upon presentation thereof.

Where an incompetent person has been committed to a state institution in any manner provided by law, and is an inmate thereof, the petition may be presented on behalf of the state by a state officer having special jurisdiction over the institution where the incompetent person is confined or the superintendent or acting superintendent of said institution; the petition must be in writing and verified by the affidavit of the petitioner or his attorney, to the effect that the matters therein stated are true to the best of his information or belief; it must show that the person for whose person or property, or both, a committee is asked has been legally committed to a state institution over which the petitioner has special jurisdiction, or of which he is superintendent or acting superintendent, and is at the time an inmate thereof; it must also state the institution in which he is an inmate, the date of his admission, his last known place of residence, the name and residence of the husband or wife, if any, of such person, and if there be none, the name and residence of the next of kin of such person living in this state so far as known to the petitioner; the nature, extent and income of his property, so far as the same is known to the

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petitioner, or can with reasonable diligence be ascertained by him. The petition may be presented to the supreme court at any special term thereof, held either in the judicial district in which such incompetent person last resided, or in the district in which the state institution in which he is committed is situated, or to a justice of the supreme court at chambers within such judicial district, or to the county court of the county in which the incompetent person resided at the time of such commitment, or of the county in which said institution is situated. Notice of the presentation of such petition shall be personally given to such person, and also to the husband or wife, if any, or if none to the next of kin named in the petition and to the officer in charge of the institution in which such person is an inmate. Upon the presentation of such petition, and proof of the service of such notice, the court or justice may, if satisfied of the truth of the facts required to be stated in such petition, immediately appoint a committee of the person or property, or both, of such incompetent person or may require any further proof which it or he may deem necessary before making such appointment.

Added by chap. 824 of 1895.

Amended by chap. 149 of 1897, and chap. 509 of 1904.

a. This section is not unconstitutional: Sporza v. German Savings Bank, 119 App. Div. 172.

b. An application for the appointment of a committee of the person and estate of an alleged incompetent under § 2323a, which was served on the alleged incompetent and the superintendent of a hospital where he was confined, satisfies the requirements of § 2323a, and it is not necessary to serve an order to show cause, subsequently granted, on such incompetent where it was served on his attorney who had previously appeared in the proceeding: Matter of Maginn, 100 App. Div. 230.

c. This section providing for the appointment of the committee of a person committed to a state institution, though passed subsequent to chap. 401 of 1889, is not inconsistent therewith nor a repeal thereof: Trust Co. of America v. State Safe D. Co., 109 App. Div. 665; 96 N. Y. Supp. 585, aff'd 187 N. Y. 178.

d. A committee of an alleged incompetent who is a resident of this state can be appointed only after the issuing of a commission and the determination of a jury as provided by § 2327; the only exception to this rule is when the application is made in behalf of the state authorities and the incompetent person is in a state institution: Matter of Bergman, 110 App. Div. 588.

e. **Demurrer.**—Objections that the petition for the appointment of the committee failed to state the age of the petitioner or of other parties, or whether they or any of them were incompetent, cannot be raised by demurrer in an action by the committee to recover the convict's estate, the proceedings having been in a court of general jurisdiction and thereafter are not open to a collateral attack in such action: Trust Co. of America v. State Deposit Co., 187 N. Y. 178, aff'g 109 App. Div. 665.

§ 2325. Contents, etc., of petition, proceedings upon presentation thereof.

f. The fact that a petition for the appointment of a committee of an alleged incompetent is not presented in the judicial district in which the alleged incompetent resides, as required by § 2323, is an irregularity which renders the proceedings invalid; *it seems* that under § 2325, such a petition is defective, if the matters alleged therein, relating to the mental condition of the alleged incompetent, are alleged upon information and belief without stating the source of the information: Matter of Bischoff, 80 App. Div. 326; 80 N. Y. Supp. 917.

g. A finding held to be equivalent to one that the incompetent had become imbecile through loss of memory or understanding, and thus bringing the case within the jurisdiction given by § 2320; the jury is not confined in its findings to the sole question as to whether the incompetent is competent at the time of the inquiry, in view of

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the fact that § 2325 provides that the jury shall make findings relating to the incompetent's property; opinions of neighbors as to the incompetent's sanity are entitled to little weight as against undisputed facts: Matter of Preston, 46 Misc. 46.

§ 2326. When foreign committee may be appointed.

a. A non-resident committee or guardian of a non-resident incompetent may be appointed by our courts as committee of the property of the incompetent within the state of New York, but it is discretionary with the court whether it will take such action or appoint a resident: Matter of Bartelme, 34 Misc. 131; 69 N. Y. Supp. 468.

b. When a resident of this state, who is sane, has been decoyed into another state and there adjudged to be insane, and a committee of her person and property appointed, it is not a valid adjudication as to insanity, and a petition in this state setting forth such facts does not authorize the appointment of a committee in this state under this section: Matter of Bergmann, 110 App. Div. 588.

§ 2327. When foreign committee may be appointed.

c. The appointment of a committee of a resident of this state, except upon the application of the state authorities, can only be had after the issuing of a commission or the determination of a jury, as required by this section: Matter of Bergman, 110 App. Div. 588.

d. When the county court directs an inquisition by a jury to inquire into the condition of the alleged incompetent, their findings must be so far within the terms of the statute as to leave no doubt that the person has been found either a lunatic or of so unsound mind as to be classified as such: Matter of Clark, 175 N. Y. 139, rev'g 77 App. Div. 633; 79 N. Y. Supp. 1129.

e. **Committee.**—Where it appears from the allegations of the petition, and accompanying affidavits, presented upon an application for the appointment of a committee of the property of a person upon the ground of her incompetency to manage her affairs, that the court has jurisdiction of the person and of the subject matter and that the allegations, if true, would presumably require the appointment of a committee, the court should not hear the merits on the affidavits but must send the matter to a commissioner or a jury: Matter of Milchsack, 43 Misc. 586; 89 N. Y. Supp. 524.

f. **Notice.**—Where there is a dispute as to the habits and condition of the alleged drunkard, it is decidedly the safer course that notice of institution of proceedings be served on him in order that he may have an opportunity to be heard at every step: Matter of Coffin, 41 Misc. 131; 34 Civ. Pro. R. 8.

§ 2333. Expenses of commission.

See rule 71 (Sup. Ct.), Fee of commissioner for executing a commission of lunacy.

See § 3313, post, Fees of trial jurors.

g. *It seems* that §§ 2333, 2334 and 2335, do not authorize the granting of costs against the defendant in a proceeding before a commission to inquire into the mental capacity which results in an adjudication that the defendant is competent to manage her affairs: Sander v. Larner, 101 App. Div. 167.

§ 2335. Subject of inquiry in cases of lunacy.

h. **Lunacy.**—The word "lunacy," as used in § 2335, includes imbecility arising from old age and loss of memory or understanding; the personal physician of a testator is incompetent to testify to his lack of testamentary capacity against the objection of the proponents of the will; the burden of proving a testator was *non compos mentis* rests on the party alleging it during the entire proceeding: Matter of Preston, 113 App. Div. 732.

i. A finding of a person's incompetency in an inquisition under § 2335, and the final order of confirmation, made and filed more than a year after the conveyance to another, have no retroactive effect and are not presumptive evidence that the first person was incompetent when he conveyed the property or that the latter used undue influence: Swanstrom v. Day, 46 Misc. 311; 93 N. Y. Supp. 192, aff'd 101 App. Div. 609.

§ 2336. Proceedings upon verdict, or return of commission.

j. Where a person who has been adjudged incompetent dies during the pendency of a proceeding to determine the compensation to be paid, out of the funds in the hands of the committee, to the petitioner for his necessary dis-

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bursements and for costs and counsel fees, the court has power to direct that the incompetent's executor be brought into the proceeding, and that such proceeding be prosecuted to a conclusion: Matter of Ferris, 86 App. Div. 559; 83 N. Y. Supp. 1106.

a. Assuming, without deciding, that § 2336 is mandatory, and that where a committee of the property is appointed in a lunacy proceeding, the court must direct the payment by him out of the funds in his hands of the necessary disbursements of the petitioner, there is no doubt that the petitioner, through his or her attorney, can consent that the court direct that a part of the disbursements be paid, not out of the funds in the hands of the committee, but out of other moneys belonging to the incompetent person: Matter of Ashley, 67 App. Div. 138.

§ 2337. Security to be given by committee.

See § 810 et seq., ante, General provisions relating to bonds and undertakings.

See § 2829, post, Inquiry as to the value of the property.

See § 2831, post, Qualification of guardian of person.

§ 2338. Compensation of committee.

See § 2730, post, Compensation allowed an executor.

b. The committee of the property of an incompetent person is to be compensated for receiving and holding property which it does not become his duty to convert into cash, and such compensation is not to be made upon the theory that these are *extra* services in addition to those which would be required to be performed by an executor or administrator and for which the court may make a special allowance, but upon the theory that they correspond, within the fair intent and meaning of § 2338 of the Code, with the services of an executor or administrator in converting property into cash: Matter of Notman, 103 App. Div. 520; 93 N. Y. Supp. 82.

§ 2339. Committee under control of court; limitation of powers.

c. The court may require a committee to render an intermediate account whenever good cause is shown although the provisions of § 2342 allow the committee of an incompetent to render an account with the consent of the court: Matter of Arnold, 76 App. Div. 126; 78 N. Y. Supp. 772.

d. All the parties heard on the original proceeding shall be made parties to the proceeding for the removal of the committee: Matter of Osborn, 74 App. Div. 113; 77 N. Y. Supp. 423.

e. Persons who have cut timber on the lands of a lunatic under an unauthorized contract with her husband and son, and with the permission of the committee, are liable therefor to the successor of said committee, although they have paid therefor in good faith to the husband and son; as the committee has no power to authorize the cutting of the timber, so he has no power to authorize the purchasers to pay the value thereof to third persons: Scribner v. Young, 111 App. Div. 814.

§ 2340. Committee of property may maintain actions, etc.

See § 426, subd. 2, ante, Personal service of summons on infant.

See § 429, ante, Service of summons on committee only, and not on lunatic.

See § 1755, ante, How next friend of lunatic, etc., allowed to sue.

See § 3271, post, The court may require security for costs to be given in an action by or against a committee.

§ 2341. Committee of property; to file inventory and account.

The provisions of article two of title seven of chapter eighteen of this act, requiring the general guardian of an infant's property, appointed by a surrogate's court, to file in the month of January in each year an inventory, account and affidavit, and prescribing the form of the papers so to be filed, apply to a committee of the property appointed, as prescribed in this title. For the purpose of making that application the committee is deemed a general guardian of the property; the person with respect to whom he is appointed is deemed a ward and the papers must be filed in the office of the clerk of the court by which the committee was appointed,

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or if he was appointed by the supreme court, in the clerk's office where the order appointing him is entered, and, if the incompetent person for whom such committee is appointed has been committed to a state institution, and is an inmate thereof, a duplicate of such inventory, account, and affidavit, shall be filed also by said committee with the superintendent or officer having special jurisdiction over the institution where the incompetent person is confined. In every case where a committee has used or employed the services of an incompetent person, with respect to whom he has been appointed a committee, or where moneys have been earned by or received on behalf of such incompetent person, the committee must account for any moneys so earned or derived from such services, the same as for other property or assets of the incompetent person.*

2 R. S. 53, §§ 8, 9.

Amended by chap. 51 of 1894 and chap. 181 of 1906.

See § 2842, post, Filing by a guardian of annual inventory and account.

a. The fact that the special guardian of an incompetent has been allowed and has been paid costs out of the estate on an accounting by the committee of said incompetent, does not constitute a waiver of the right of such special guardian to appeal from a decree of the surrogate settling the account; the incompetent is not prejudiced because the special guardian has merely received just compensation for his services, and the committee is not prejudiced because the sum was paid out of the estate: Matter of Edwards, 110 App. Div. 623.

§ 2342. Annual examination of accounts and inventories of committee.

b. Since the constitution of 1894, the duty under § 2342 of examining the accounts of committees of incompetents in New York county devolved on the presiding justice, appellate division. first department; the amendments of § 2342, in 1895 and 1899 did not divest the court of its power under § 2339 to require an intermediate accounting wherever good cause was shown; the annual axamination under § 2342 is not a bar to a proceeding to remove the committee, nor does that section prescribe the only method by which the removal of such committee may be accomplished; where the application for the removal of the committee is made on a ground which will involve the examination of his accounts, the application should be accompanied with one for an intermediate accounting: Matter of Arnold, 76 App. Div. 126; 78 N. Y. Supp. 772.

c. Upon the settlement of the account of the committee of the estate of a lunatic, they should be allowed for moneys borrowed by him, and expended for the lunatic's support and maintenance after the personal estate was exhausted: Matter of Roberts, 52 Misc. 630.

d. **Waiver.**—The fact that the special guardian of an incompetent has been allowed and has been paid costs out of the estate on an accounting by the committee of said incompetent, does not constitute a waiver of the right of such special guardian to appeal from a decree of the surrogate settling the account; the incompetent is not prejudiced because the special guardian has merely received just compensation for his services, and the committee is not prejudiced because the sum was paid out of the estate: Matter of Edwards, 110 App. Div. 623.

§ 2343. Property, when to be restored.

e. An adjudication that an habitual drunkard was not cured of her habit of overindulgence made in proceedings under § 2343 for a *supersedeas* of her committee, is not conclusive in a *habeas corpus* proceeding instituted by the drunkard to procure her release on the ground that recent occurrences demonstrated her restoration to competency: Matter of Larner, 79 App. Div. 134; 79 N. Y. Supp. 1039.

f. The supreme court will not reexamine, under § 2343 the question of the competency of a person, theretofore duly found incompetent to manage himself or his affairs, because of an incurable progressive form of insanity, unless a case is made out showing a probabil-

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ity that he has been restored to competency: Matter of Bischoff, 37 Misc. 734; 76 N. Y. Supp. 467.

a. Notice.—Notice of an application that the incompetent has become capable of managing himself should be required to be given to the committee of the person at some stage of the proceedings: Matter of Larner, 68 App. Div. 320; 74 N. Y. Supp. 70.

§ 2344. Id.; disposition in case of death.

b. The expenses incurred in the proceeding are not ordinary debts of the decedent, which the petitioner is required to present to the decedent's executor for payment in the ordinary course of administration, but are a charge on the estate in the hands of the committee: Matter of Ferris, 86 App. Div. 559; 83 N. Y. Supp. 1106.

§ 2345. Action to compel conveyance.

c. Where an action has been brought to compel the specific performance of an agreement to renew a lease, the court has ample power under § 2345 to carry out the provisions of a contract to renew a lease made by a person who alleges in his answer that he is incompetent and unable to execute any paper: Wurster v. Armfield, 175 N. Y. 256, rev'g 67 App. Div. 158; 73 N. Y. Supp. 609.

§ 2348. Application to dispose of real property or an interest therein.

In either of the following cases real property or a term, estate or other interest in real property of an infant in being or the contingent interest therein of an infant not in being or of a person incompetent to manage his affairs by reason of lunacy, idiocy or habitual drunkenness, or an inchoate right of dower in real property belonging to an infant or an incompetent person or the possibility that upon breach of a condition a right of re-entry will vest in or real property will revert to an infant or an incompetent person or his heirs solely or in common with others may be sold, conveyed, mortgaged, released or leased as prescribed in the following sections of this title:

1. Where the personal property, and the income of the real property, of the infant or incompetent person, are together, insufficient for the payment of his debts, or for the maintenance and necessary education of himself and his family.

2. Where the interest of the infant in being or the contingent interest of an infant not in being, or the interest of an incompetent person require or will be substantially promoted by such disposition, on account of the real property or term, or estate, or other interest in real property being exposed to waste or dilapidation; or being wholly unproductive, or for the purpose of raising funds to preserve or to improve the same, or for other peculiar reasons, or on account of other peculiar circumstances.

3. Where an action might be maintained against the infant or incompetent person, to procure a judgment, directing the conveyance of the real property, or interest in real property, as prescribed in sections twenty-three hundred and forty-five and twenty-three hundred and forty-six of this act.

4. Where the interest of the infant or incompetent person will be substantially promoted by releasing or joining with others in releasing for a valuable consideration the possibility that upon breach of a condition

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a right of re-entry will vest in or real property will revert to the infant or incomeptent person or his heirs solely or in common with others. Such possibility is referred to in the following sections of this title as a possibility of reverter.

2 R. S. 194, 195 (Part 3, c. 1, tit. 2), §§ 167, 170, 175; 2 R. S. 53-55 (Part 2, c. 5, tit. 2), §§ 11, 16, 19, 22; L. 1864, c. 417, §§ 1, 5; L. 1869, c. 627; L. 1870, c. 37; see L. 1874, c. 446, tit. 1, § 38, and Id., tit. 2, §§ 6, 9, 17, 23; L. 1875, c. 574, § 6; L. 1876, c. 267, § 2.

Amended by chap. 237 of 1890, chap. 639 of 1893, chap. 154 of 1903 and chap. 49 of 1907.

a. The sureties on the bond of a general guardian are liable for the proceeds of real property sold under an order of the county court in proceedings to procure the sale, necessary for the support of the ward, which were paid over to the general guardian without requiring any additional security since under §§ 2348, 2360 and 2361 and General Rule of Practice No. 59, the court has the right so to do without requiring additional security: Allen v. Kelly, 171 N. Y. 1, rev'g 66 App. Div. 623; 73 N. Y. Supp. 1129.

b. The court may direct that the proceeds of a sale of lands of an infant be invested in other real estate and may also dictate the terms of the deed: Brown by Wadsworth, 68 N. Y. 225.

c. Circumstances held sufficient to justify sale of infant's interest in real property: Matter of Asch, 75 App. Div. 486; 78 N. Y. Supp. 561.

d. **Proceedings.**—Proceedings for the sale of infant's real estate are to be instituted before the court, and a judge of the court has no authority to entertain the proceedings: Matter of Wright, Peters Co., 73 App. Div. 75; 76 N. Y. Supp. 775.

e. **Order of reference.**—A proceeding to sell an infant's real property being in derogation of the common law must strictly comply with the statute. If in such proceeding there was no order of reference, the proceeding is absolutely void; although the record of such proceeding shows the confirmation of the report of a referee, the proceeding is invalid where the attorney who conducted it testifies that, although he prepared an order of reference it was never signed by a judge. A title acquired upon such sale is not marketable: Hegeman v. Stearns Realty Co., 117 App. Div. 754.

f. Where infants and other persons are tenants in common in five separate parcels of real estate, a proceeding by which it is sought to effect an exchange of the interests of the infants in four of the parcels to the other tenants in consideration of a conveyance of their interests in the other parcel to the infants, is unauthorized: Matter of Adderley, 50 Misc. 189.

§ 2349. Id.; by whom; notice when incompetent is inmate of state institution.

An application, in either of the cases prescribed, in the last section, must be made by the petition of the general guardian, or the guardian of the property of the infant; or by the committee of the property of the lunatic or other incompetent person; or by any relative, or other person, in behalf of either. Where the application is in behalf of an infant of the age of fourteen years or upwards, the infant must join therein. Where the application is made to the supreme court, the petition must be presented at a term held within the judicial district, in which the property, or a part thereof, is situated. Where such application affects the interest of an incompetent person who has been committed to a state institution and is an inmate thereof, notice of such application must be given to the superintendent, acting superintendent, or state officer having special jurisdiction over the institution where the incompetent person is confined.

From Id.
Amended by chap. 434 of 1905.

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§ 2350. Contents of petition.

See rule 55 (Sup. Ct.), Requisites of petition to sell real property of incompetent.

§ 2351. Bond of committee of lunatic, etc.

An application to sell, mortgage, release, or lease real property, or an interest in real property, of a lunatic, idiot or habitual drunkard, cannot be granted, unless a committee of his property has been appointed. Upon such an application, if it is made by the committee, the court must make an order, directing him to file with the clerk, a bond, in such a form, in such an amount, and with such sureties, as it directs, conditioned for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all moneys received by him in the special proceeding, according to the direction of any court having authority to give directions in the premises; and for the observance of the directions of the court, in relation to the trust. If the application is made by any other person, an order must be made thereupon, requiring the committee to show cause why he should not file such a bond. If, after hearing the committee, the court is of the opinion, that there is a probable cause for granting the application, it may make an order, requiring the committee to file such a bond; or, if the committee so elects, or fails to file the bond as directed in the order, it may appoint a suitable person to be the special guardian of the incompetent person, with respect to the proceedings; who must thereupon file such a bond. Where an application is made to release an inchoate right of dower, application must be made by the husband of the lunatic, idiot or habitual drunkard and may be made before or after a committee has been appointed, except that application may be made by the committee of the property of the lunatic, idiot, or habitual drunkard in any case where, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband and the wife has not joined in the conveyance or otherwise released her inchoate right of dower. When the application is made by the husband, the court may appoint him special guardian, and he must file a bond as herein provided.

2 R. S. 54, § 14; L. 1864, c. 417, § 2; L. 1874, c. 446, tit. 2, §§ 7, 20.

Amended by chap. 639 of 1893, chap. 368 of 1903 and chap. 49 of 1907.

See rule 57 (Sup. Ct.), Security required of guardian to sell real property of an infant.

See § 810 et seq., ante, General provisions relating to bonds and undertakings.

§ 2352. Id.; of guardian of infant.

Upon an application to sell, mortgage, release or lease real property or an interest in real property of an infant, the court must appoint a suitable person to be the special guardian of the infant with respect to the proceedings, who must thereupon file with the clerk a bond as prescribed in the last section. Any trust company authorized by the laws

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of this state to act as general guardian of the estate of an infant without giving security may be appointed such special guardian and in such case the court in the order of appointment may dispense with the giving and filing of any such bond.

Amended by chap. 268 of 1893 and chap. 49 of 1907.

§ 2354. Reference to inquire into the application.

a. The report of a referee appointed under this section to examine into the truth of the allegations of a petition for the sale of infant's real estate is not binding upon the court: Matter of Wyckoff, 50 Misc. 190.

b. A proceeding to sell an infant's real property being in derogation of the common law, must strictly comply with the statute. If in such proceeding there was no order of reference, the proceeding is absolutely void; although the record of such proceeding shows the confirmation of the report of a referee, the proceeding is invalid where the attorney who conducted it testifies that, although he prepared an order of reference, it was never signed by a judge. A title acquired upon such sale is not marketable: Hegeman v. Stearns Realty Co., 117 App. Div. 754.

§ 2355. Final order.

Upon the filing of the referee's report, and after examining into the matter, the court must make a final order upon the application. In a proper case a final order, confirming the referee's report, must direct that the real property or term, estate, possibility of reverter or other interest in real property or a part thereof or an inchoate right of dower therein, as is necessary, or as justice requires, be mortgaged, let for a term of years, sold, released or conveyed by the special guardian appointed as prescribed in this title, or by the committee of the property of the lunatic or other incompetent person. The final order must also contain such directions, respecting the time, manner and conditions of the sale, release or conveyance directed thereby, as the court thinks proper to insert therein.

Amended by chap. 639 of 1893 and chap. 49 of 1907.

See rule 58 (Sup. Ct.), When proceeds of the sale exceed $500, they must be brought into court.

c. The report of a referee appointed under § 2354, to examine into the truth of the allegations of a petition for the sale of an infant's real estate, is not binding upon the court: Matter of Wyckoff, 50 Misc. 190.

§ 2357. Certain sales, etc., prohibited.

d. The sale of infant's interests is not prohibited by § 2357 where there is no clause of the will from which an application might be drawn that the sale would be contrary to its provisions, and the fact that the estates of the infants were contingent remainders in fee does not prevent the court from directing a sale: Matter of Asch, 75 App. Div. 486; 33 Civ. Pro. R. 177.

e. Where the mother and surviving parent of an infant who had an interest in certain real estate acquired the title thereto a few days after it had been sold, under an order in a proceeding to sell the infant's real estate, instituted upon the petition of the mother, the circumstances are sufficient to create a reasonable doubt as to the good faith of the proceeding and as to the marketability of the title, and the vendees, under a contract of sale with the mother as owner, are entitled to recover back their deposit and the expenses incurred in the examination of the title: Feller v. Mitchell, 53 Misc. 489.

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§ 2358. Effect of conveyance, etc.

A deed, mortgage, release or lease, made in good faith, as prescribed in this title, either upon an application in behalf of the infant or an incompetent person or pursuant to the directions contained in a judgment rendered against him, has the same validity and effect, as if executed by the person in whose behalf it was executed, and as if the infant was of full age or the lunatic, idiot, or habitual drunkard was of sound mind and competent to manage his or her affairs. And the same shall be valid and effectual to vest in any purchaser or purchasers any interest therein of any infant not in being, at the time of the said sale, and any mortgage so executed shall be a valid lien and charge upon the contingent interest of any infant not in being, at the time of the execution and delivery of the same. And a release of an inchoate right of dower as authorized by this title shall have the same effect as if the wife had joined with the husband in a deed or conveyance of the property affected thereby and had duly acknowledged the same in the manner required by law to pass the estate of married women.

2 R. S. 55, § 21; chap. 417, § 8, of 1864; chap. 446, tit. 2, §§ 12, 25, of 1874; 2 R. S. 194, §§ 168, 178.

Amended by chap. 639 of 1893, chap. 127 of 1906 and chap. 49 of 1907.

§ 2359. Proceeds of sale deemed real property.

A sale of real property, or of an interest in real property, other than a possibility of reverter of an infant or incompetent person, made as prescribed in this title, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he or she had in the property or interest sold. Those proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed. The proceeds of the release of a possibility of reverter shall be deemed and treated as if they were proceeds of real property of which the infant was seized and possessed. If the infant should die before arriving at full age, or the incompetent person should die before the incompetency is removed not leaving any personal property, or not leaving sufficient personal property to pay funeral expenses and expenses that may be necessary or necessarily incurred, then in either or each case the proceeds are to be deemed personal property so far as may be necessary to pay the funeral and other necessary expenses. The proceeds are to be paid upon order of the surrogate's court or court having jurisdiction of the estate of the deceased, to an administrator appointed by the surrogate to administer upon decedent's estate, and after paying all funeral expenses and expenses of administration and any indebtedness, the remainder, if any there be, shall, upon the order of the surrogate, be paid into the hands of the trustee who held the same, to be distributed as the law directs. This act is to

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include the said proceeds of any infant or incompetent person that has died prior to this amendment, the proceeds now remaining in the hands of a trustee.

Amended by chap. 523 of 1892 and chap. 49 of 1907.

a. Moneys, representing realty, declared by the supreme court to represent an infant's share in real estate as heir-at-law, remain real estate while in the hands of her guardians, and are such until after her own death where she dies before majority, are still real estate when in the hands of her administratrix, and are not affected as to their nature by a decree of a surrogate's court improperly treating them as personalty: Matter of McKay, 37 Misc. 590; 75 N. Y. Supp. 1069.

b. Proceeds of real estate inherited by an incompetent and subsequently sold by his committee under the statute are real estate in the hands of the administratrix and the surrogate's court has no jurisdiction over them: Matter of Reeve, 38 Misc. 409; 77 N. Y. Supp. 936.

§ 2360. Infant deemed a ward of court.

c. The sureties on the bond of a general guardian are liable for the proceeds of real property sold under an order of the county court in proceedings to procure the sale, necessary for the support of the ward, which were paid over the general guardian without requiring any additional security, since under §§ 2348, 2360 and 2361 and General Rule of Practice No. 59, the court had the right so to do without requiring additional security: Allen v. Kelly, 171 N. Y. 1, rev'g 66 App. Div. 623; 73 N. Y. Supp. 1129.

§ 2361. Disposition of proceeds; accounting.

The court must, by order, direct the disposition of the proceeds of such a sale, mortgage, release or lease. It must direct the investment of any portion thereof belonging to the infant or incompetent person, which is not needed for the payment of debts or the safe keeping, or the immediate maintenance and education, of himself or his family, or for the preservation or improvement of his real property or his interest in real property. It must require a report, under oath, of the disposition and investment thereof, to be made as soon as practicable, and must compel periodical accounts to be rendered thereafter by each person, who is intrusted with the proceeds, or any part thereof. Where an inchoate right of dower is released as prescribed in this title and such release is to accompany a sale by the husband of the property to which the inchoate right of dower attaches, the court shall make an order requiring one-third of the amount realized on the sale of the property to which the inchoate right of dower attached to be invested by the special guardian, or paid into the court to be held for the benefit of the husband during his life and upon his death for the benefit of the wife during her life, or the court may direct said amounts to be paid to the husband upon his giving a bond in the penalty of at least double the amount so received for such release, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the repayment as the court shall direct by his executors or administrators of such amount upon the death of the husband. Where an inchoate right of dower is released as prescribed in this title, and, at the time of the application, the property to which the inchoate right of dower attaches has already been sold by the husband, and the wife has

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not joined in the conveyance or otherwise released her inchoate right of dower, the court shall make an order that, as the consideration for the release, or as part of the consideration therefor, there be paid to the special guardian or into the court an amount to be fixed by the court as equal to one-third of the fair market value of the property, to be invested by the special guardian or held by the court for the benefit of the person making such payment during the life of the husband, and upon his death for the benefit of the wife during her life, and upon her death to be returned to the person making such payment or to his executors, administrators or assigns; or in lieu of such payment the court may allow a bond to be given in the penalty of at least double the amount so fixed as equal to one-third of the fair market value of the property, with at least two sureties, who shall justify in double the amount of such penalty, conditioned for the payment as the court shall direct, upon the death of the husband leaving the wife surviving, of the said sum so fixed as equal to one-third of the fair value of the property, to be held for the benefit of the wife during her life and upon her death to be returned to the person giving such bond or to his executors, administrators or assigns. In case by any contingency, infants not in being may thereafter become possessed of any interest in said premises so sold, mortgaged or leased, the court, in case of a sale, shall cause the proceeds of the sale, after paying the cost and expenses of the same, to be placed at interest for the benefit of the persons who are, or who may ultimately be entitled to the same, and shall not authorize the distribution of the same in advance of said contingency, except upon a petition of some person entitled thereto, and and upon filing a bond in such penalty as the court shall direct, with two or more sureties approved by the court, and conditioned that in case of any contingency by which any infant not then in being shall thereafter become entitled to any of the proceeds of the sale, that said petitioner will pay to said person or persons his or their proportionate share of the money so paid over to said petitioner; and in the case of the mortgaging of said real estate the proceeds of the same, after paying cost and expenses, shall be paid out and disbursed under the direction of the court only for the purpose of paying lawful charges thereon or repairing, improving, building upon or otherwise enhancing in value any real estate so mortgaged as aforesaid.

2 R. S. 195, § 179; Id., 54, §§ 14, 17; L. 1864, c. 417, §§ 2, 9; L. 1874, c. 446, tit. 2, §§ 7, 13, 20.

Amended by chap. 237 of 1890, chap. 639 of 1893, chap. 368 of 1903, chap. 127 of 1906 and chap. 49 of 1907.

See rule 58 (Sup. Ct.), Payment of proceeds into court.

See rule 59 (Sup. Ct.), Payment of moneys to general guardian.

a. The sureties on the bond of a general guardian are liable for the proceeds of real property sold under an order of the county court in proceedings to procure the sale, that were necessary for the support of the ward, which were paid over to the general guardian without requiring any addi-

tional security, since, under §§ 2348, 2360 and 2361 and General Rule of Practice No. 59, the court had the right so to do without requiring additional security: Allen v. Kelly, 171 N. Y. 1, rev'g 66 App. Div. 623; 73 N. Y. Supp. 1129.

§ 2365. When submission to arbitration cannot be made.

See § 411, ante, Statute of limitations in case of submission to arbitration.

a. **Appraisal.**—An appraisal made under the provisions of a contract to lease for a further term of years is not governed by §§ 2365-2367: Wurster v. Armfield, 67 App. Div. 158; 73 N. Y. Supp. 609.

b. Where a lease provides that, at the time fixed for its renewal, if the parties did not agree upon the value of the premises, that it shall be determined by two disinterested persons who shall select a third, etc., the determination of such persons is not the submission of a controversy to arbitration within the meaning of §§ 2365, 2368 and 2369, but is a decision made under the provisions of such contract: Wurster v. Armfield, 175 N. Y. 256, rev'g 67 App Div. 158; 73 N. Y. Supp. 609.

§ 2366. What controversies may be submitted, and how.

c. When an agreement to arbitrate is not acknowledged, proved or certified, as required by this section, the court has neither power to order a judgment on an award made therein, nor to vacate such award; the court can take no action upon an arbitration which is not a statutory arbitration: Electric Steel Elevator Co. v. Kam Malting Co., 112 App. Div. 686.

d. **Interest.**—When the owner of lands and a contractor who has erected a building thereon submit controversies as to amounts due under the contract and for extra work to arbitration, pursuant to chap. 17, title 8 of the Code of Civil Procedure, and submit all manner of actions, causes of actions, suits, controversies, claims and demands whatsoever now pending and existing between them, the arbitrator has jurisdiction to determine whether the contractor is entitled to interest on the sum found due, for that issue is clearly within the terms of the submission: Matter of Burke, 117 App. Div. 477.

§ 2368. Time for hearing; adjournment, etc.

e. Where a lease provides that, at the time fixed for its renewal, if the parties did not agree upon the value of the premises, that it shall be determined by two disinterested persons, who shall select a third, etc., the determination of such persons is not the submission of a controversy to arbitration within the meaning of §§ 2365, 2368 and 2369, but is a decision made under the provisions of such contract: Wurster v. Armfield, 175 N. Y. 256, rev'g 67 App. Div. 158; 73 N. Y. Supp. 609.

§ 2369. Arbitrators to be sworn.

f. Where a lease provides that, at the time fixed for its renewal, if the parties did not agree upon the value of the premises, that it shall be determined by two disinterested persons, who shall select a third, etc., the determination of such persons is not the submission of a controversy to arbitration within the meaning of §§ 2365, 2368 and 2369, but is a decision made under the provisions of such contract: Wurster v. Armfield, 175 N. Y. 256, rev'g 67 App. Div. 158; 73 N. Y. Supp. 609.

g. This section applies to common-law arbitrations, and the arbitrators in such arbitrations must be sworn, and where a waiver is relied upon to defeat an award it must be in writing: Hinkle v. Zimmerman, 184 N. Y. 114, aff'g 102 App. Div. 616; 92 N. Y. Supp. 1128.

§ 2370. Attendance of witnesses, etc.

See § 843, ante, Arbitrator may administer oath.
See § 854 et seq., ante, Arbitrator may issue subpoena.

§ 2372. Award; to be authenticated, etc.

h. An award of arbitrators, acting within their jurisdiction, untainted by corruption, fraud or like misconduct, operates as a final conclusive judgment and must be submitted to, however unsatisfactory and disappointing it may be to the parties to the arbitration agreement: Ehrlich v. Pike, 53 Misc. 328.

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§ 2373. Motion to confirm award.

a. On appeal from the decision of an arbitrator the appellate division cannot review the merits of the decision when there is nothing on the face of the award showing that the arbitrator decided wrongly; the court is limited in its review by §§ 2373, 2374 and 2375, and is confined to the grounds specified in those sections: Matter of Burke, 117 App. Div. 477.

§ 2374. Id.; to vacate award.

b. **Appeal.**—An appeal under § 2381 from a judgment entered upon the award of an arbitrator, to whom questions of law were submitted upon an agreed statement of facts, presents for review only such questions as would be raised by a motion to vacate, modify or correct the award as provided in §§ 2374 and 2375, and does not bring up for review the question of the correctness of the award upon the merits either as to the law or the facts; and where no such motion is made the award is not reviewable: Matter of Wilkins, 169 N. Y. 494, aff'g 48 App. Div. 433; 62 N. Y. Supp. 1068.

c. An award of an arbitrator can be attacked only on the grounds stated in §§ 2374 and 2375, and the merits cannot be reinvestigated: Dobson v. Central R. R. Co. of N. J., 38 Misc. 582; 78 N. Y. Supp. 82.

d. On appeal from the decision of an arbitrator the appellate division cannot review the merits of the decision when there is nothing on the face of the award showing that the arbitrator decided wrongly; the court is limited in its review by §§ 2373, 2374 and 2375, and is confined to the grounds specified in those sections: Matter of Burke, 117 App. Div. 477.

e. When an agreement to arbitrate is not acknowledged, proved or certified, as required by this section, the court has neither power to order a judgment on an awarded made therein, nor to vacate such award; the court can take no action upon an arbitration which is not a statutory arbitration: Electric Steel Elevator Co. v. Kam Malting Co., 112 App. Div. 686.

§ 2375. Id.; to modify or correct award.

f. An appeal under § 2381 from a judgment entered upon the award of an arbitrator, to whom questions of law were submitted upon an agreed statement of facts, presents for review only such questions as would be raised by a motion to vacate, modify or correct the award as provided in §§ 2374 and 2375, and does not bring up for review the question of the correctness of the award upon the merits either as to the law or the facts; and where no such motion is made the award is not reviewable: Matter of Wilkins, 169 N. Y. 494, aff'g 48 App. Div. 433; 62 N. Y. Supp. 1068.

g. An award of an arbitrator can be attacked only on the grounds stated in §§ 2374 and 2375, and the merits cannot be reinvestigated: Dobson v. Central R. R. Co. of N. J., 38 Misc. 582; 78 N. Y. Supp. 82.

h. On appeal from the decision of an arbitrator the appellate division cannot review the merits of the decision when there is nothing on the face of the award showing that the arbitrator decided wrongly; the court is limited in its review by §§ 2373, 2374 and 2375, and is confined to the grounds specified in those sections: Matter of Burke, 117 App. Div. 477.

§ 2380. Effect of judgment; how enforced.

See § 1240, ante, When judgment may be enforced by execution.

See § 1241, ante, When a judgment may be enforced by punishment for disobeying it.

See § 1270, ante, Clerk to file and note assignment of judgment.

i. Where a person appointed general guardian of an infant by the surrogate's court appropriated his ward's moneys and removed to another state in which he died insolvent, leaving no assets in this state upon which letters of administration might be issued, his ward may maintain an action in equity in the courts of the state of New York against the surety on the guardian's bond to secure a determination of the amount due from the guardian and to compel payment of the same by the surety: Parker v. Dominick, 105 App. Div. 440.

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§ 2381. Appeal.

a. An appeal, under § 2381, from a judgment entered upon the award of an arbitrator to whom questions of law were submitted upon an agreed statement of facts, presents for review only such questions as would be raised by a motion to vacate, modify or correct the award, as provided in §§ 2374 and 2375, and does not bring up for review the question of the correctness of the award upon the merits either as to the law or the facts; and where no such motion is made, the award is not reviewable: Matter of Wilkins, 169 N. Y. 494, aff'g 48 App. Div. 433; 62 N. Y. Supp. 1068.

§ 2384. Liability of party who revokes.

b. Where an administrator wrongfully revokes an agreement to arbitrate a matter connected with his decedent's estate, the other party may, under § 1815, sue the administrator both as such and individually to recover damages, *it seems* that the administrator in such a case is liable individually; the administrator is a party to the submission within the meaning of § 2384 that "where a party expressly revokes a submission * * * any other party to the submission may maintain an action against him," but § 2384 does not afford an exclusive remedy for the wrongful revocation of a submission to arbitration: Magoun v. Magoun, 84 App. Div. 232.

§ 2386. Application of this title.

c. The reading of this section indicates that there are provisions in the Code which were intended to include and provide for common-law arbitrations: Hinkle v. Zimmerman, 184 N. Y. 114, aff'g 102 App. Div. 616; 92 N. Y. Supp. 1128.

§ 2387. When mortgage may be foreclosed.

d. The supreme court has jurisdiction in an action to foreclose a mortgage upon a parcel of land located partly in the state of New York and partly in the state of Connecticut, and may, when the mortgagors are residents of the state of New York, have been personally served with the process therein, provide in the decree that the referee shall sell all the mortgaged land and that the mortgagors shall convey the Connecticut land to the purchaser: Mead v. Brockner, 82 App. Div. 480; 81 N. Y. Supp. 594.

§ 2388. Notice of sale; how given.

The person entitled to execute the power of sale, must give notice, in the following manner, that the mortgage will be foreclosed, by a sale of the mortgaged property, or a part thereof, at a time and place specified in the notice:

1. A copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of sale, in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.

2. A copy of the notice must be fastened up, at least eighty-four days before the day of sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place, at or near the entrance of the building where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.

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3. A copy of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.

4. A copy of the notice must be served, as prescribed in the next section, upon the mortgagor, or, if he is dead, upon his executor or administrator, if an executor or administrator has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy of the notice may also be served, in a like manner, upon a subsequent grantee or mortgagee of the property, whose conveyance was recorded, in the proper office for recording it in the county, at the time of the first publication of the notice of sale; upon the wife or widow of the mortgagor, and the wife or widow of each subsequent grantee whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee; or in the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, then upon his heirs; or upon any person, then having a lien upon the property, subsequent to the mortgage by virtue of a judgment or decree duly docketed in the county clerk's office and constituting a specific or general lien upon the property. The notice, specified in this section, must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent.

Id., § 3; L. 1842, c. 277, § 5; L. 1844, c. 346, § 1; L. 1857, c. 308, § 1.

Amended by chap. 730 of 1894, chap. 766 of 1900, chap. 49 of 1905 and chap 433 of 1905.

§ 2389. Id.; how served.

a. Notice of sale should be served on the subsequent grantee of the property: Kellogg v. Dennis, 38 Misc. 82; 77 N. Y. Supp. 172.

§ 2393. Id.; how conducted.

See rule 62 (Sup. Ct.), Place of sale of lands in certain cities.

See § 1678, ante, Notice of sale.

§ 2395. Effect of sale.

See § 1626, ante, Final judgment in an action to foreclose a mortgage must direct sale of property.

See §§ 1636, 1637, ante, When property may be sold in separate parcels.

b. A court of equity will not, on the ground that the statute of limitations has run against a mortgage, restrain, as a cloud upon title, a sale under a power of sale contained in the mortgage, in the absence of any allegation in the complaint or finding by the court that the bond and mortgage have been paid: House v. Carr, 185 N. Y. 453, rev'g 105 App. Div. 625; 93 N. Y. Supp. 1135.

§ 2396. Affidavit of sale, and of posting, serving, etc., notices.

c. A judicial sale will not be set aside for inadequacy of price alone: Barnard v. Jersey, 39 Misc. 212; 79 N. Y. Supp. 380.

§ 2398. Affidavits may be filed and recorded.

The affidavits, specified in the last two sections, may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they

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are filed, in the proper book for recording deeds. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.

2 R. S. 547, §§ 11, 12.
Amended by chap. 679 of 1904.

§ 2404. Surplus money to be paid into supreme court.

See rule 64 (Sup. Ct.), Application for surplus moneys.
See § 743, ante, Party bringing money into court is discharged.
See § 745, ante, Money to be paid to county treasurer.

§ 2405. Claimant of surplus money to file petition.

a. Where tenants pay rents to a receiver of mortgaged premises, during the pendency of a foreclosure suit, in advance of the terms of their leases, the purchaser cannot obtain such rents through proceedings for the distribution of the surplus moneys arising on the foreclosure sale, under § 2405, but must have recourse to the tenants to enforce proper payment to himself: American Mort. Co. v. Merrick Const. Co., 50 Misc. 464.

§ 2413. Notice of presentation of petition.

If the petition be to change the name of an infant, and is made by the infant's next friend, notice of the time and place when and where the petition will be presented must be served upon the father, or if he is dead or cannot be found, upon the mother, or if both are dead or cannot be found, upon the general guardian or guardian of the person of the infant, in like manner as a notice of a motion upon an attorney in an action, unless it appears to the satisfaction of the court that the infant has no father or mother, or that both reside without the state or cannot be found, and that he has no guardian residing within this state, in which case the court may dispense with notice or require notice to be given to such persons and in such manner as the court thinks proper. If the petition be made by a corporation located elsewhere than in the city and county of New York, notice of the presentation thereof shall be published once in each week for three successive weeks in the state paper, and in a newspaper of every county in which such corporation shall have a business office, or if it has no business office, of the county in which its principal corporate property is situated, or in which its operations are or theretofore have been principally conducted, which newspaper, if it be a banking corporation, shall be designated by the superintendent of banks, if an insurance corporation, other than a town or county co-operative insurance corporation, by the superintendent of insurance, or if a railroad corporation, by the railroad com-

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missioners. In the city and county of New York such notice shall be published once in each week for three successive weeks in two daily newspapers published in such county. If the petition be made by a corporation, a copy of the petition and notice of motion shall be filed with the secretary of state, and the proposed name shall thereupon be reserved for said corporation until three weeks after the date of such motion, and until three weeks after the date of any adjournment of such motion if notice of such adjournment shall be filed with the secretary of state, and no certificate of incorporation of a proposed corporation, having the same name as the name proposed in such petition, or a name so nearly resembling it as to be calculated to deceive, shall be filed in any office for the purpose of effecting its incorporation, and no corporation formed without the state of New York having the same name or a name so nearly resembling it as to be calculated to deceive shall be given authority to do business in this state.

Chap. 464, § 1, of 1847.

Amended by chap. 366 of 1893, chap. 264 of 1894, chap. 374 of 1901, chap. 110 of 1904 and chap. 89 of 1906.

§ 2419. When a majority of directors, etc., may petition for dissolution.

See § 1785 et seq., ante, Action to dissolve a corporation.

See § 1797 et seq., ante, Action to annul a corporation.

See § 2429, post, Final order.

a. The proceeding is purely statutory and § 2419 must be strictly construed: Matter of Malcom Brewing Co., 78 App. Div. 592; 79 N. Y. Supp. 1057.

b. Officers.—Where all the officers of a corporation, except the secretary, and all its directors resign for the express purpose of instituting an action to procure the appointment of a receiver under subd. 2 of § 1810, such resignations are not effected, and if the interest of the stockholders require it, the officers of the corporation may ask for its dissolution and for the appointment of a receiver under §§ 2419-2423, in which case the officers are not required to resign, but the action is instituted in their official capacity: Zeltner v. Zeltner Brewing Co., 174 N. Y. 247, aff'g 79 App. Div. 136; 80 N. Y. Supp. 338.

§ 2423. Presentation of petition, etc.; order to show cause; receiver.

The papers must be presented at a special term of the supreme court, held within the judicial district, embracing the county wherein the principal office of the corporation is located. In a case specified in section twenty-four hundred and twenty of this act the court may in its discretion entertain or dismiss the application. Where it entertains the application, or where the cause is one of those specified in section twenty-four hundred and nineteen of this act, the court must make an order, requiring all persons interested in the corporation to show cause before it, or before a referee designated in the order, at a time and place therein specified, not less than six weeks after the granting of the order, why the corporation should not be dissolved. The order must be entered, and the papers must be filed, within ten days after the order is made, with the clerk of the county where the principal office of the corporation is located. If it shall be made to appear to the satisfaction of the court that the corporation is insolvent, the

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court may at any stage of the proceedings before the final order, on motion of the petitioners on notice to the attorney-general, or on motion of the attorney-general on notice to the corporation, appoint a temporary receiver of the property of the corporation, which receiver shall have all the powers and be subject to all the duties that are defined as belonging to temporary receivers appointed in an action, in section seventeen hundred and eighty-eight of this act. The court may also, in its discretion, at any stage in the proceeding, after such appointment, upon like motion and notice, confer upon such temporary receiver the powers and authority, and subject him to the duties and liabilities of a permanent receiver, or as much thereof as it thinks proper, except that he shall not make any final distribution among the creditors and stockholders, before final order in the proceedings, unless he is specially directed so to do by the court. If such receiver be appointed, the court may, in its discretion, on like motion and notice, with or without security, at any stage of the proceeding before the final order, grant an injunction, restraining the creditors of the corporation from beginning any action against the said corporation for the recovery of a sum of money, or from taking any further proceedings in such an action theretofore commenced. Such injunction shall have the same effect and be subject to the same provisions of law as if each creditor upon whom it is served was named therein.

2 R. S. 467, § 61; chap. 442 of 1876.

Amended by chap. 314 of 1889, chap. 946 of 1895 and chap. 293 of 1906.

a. In a proceeding for the voluntary dissolution of a brewing corporation, the court should not, except for most cogent reasons, authorize a sale of all the property of the corporation prior to the entry of the final order dissolving the corporation: Matter of Malcom Brewing Co., 78 App. Div. 592; 79 N. Y. Supp. 1057.

b. **Receiver.**—Occupation by a temporary receiver of certain premises creates no personal liability: Metropolitan Life Ins. Co. v. Sanborn, 34 Misc. 531; 69 N. Y. Supp. 1009.

c. **Officers.**—Where all the officers of a corporation, except the secretary, and all its directors resign for the express purpose of instituting an action to procure the appointment of a receiver under subd. 2 of § 1810, such resignations are not effected, and, if the interest of the stockholders require it, the officers of the corporation may ask for its dissolution and for the appointment of a receiver under §§ 2419-2423, in which case the officers are not required to resign, but the action is instituted in their official capacity: Zeltner v. Zeltner Brewing Co., 174 N. Y. 247, aff'g 79 App. Div. 136; 80 N. Y. Supp. 338.

§ 2425. Order to be served on creditors and stockholders.

A copy of the order must also be served upon each of the persons, specified in the schedule as a creditor or stockholder of the corporation, or as a person to whom an engagement of the corporation is to be performed, other than a person whose residence is stated to be unknown, or to be without the United States. The service must be made either personally, at least ten days before the time appointed for the hearing; or by depositing a copy of the order, at least twenty days before the time so appointed, in the post-office, inclosed in a postpaid wrapper, addressed to the person to be served, at his residence, as stated in the schedule.

Amended by chap. 293 of 1906.

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§ 2429. Final order.

See § 715, ante, Security of receiver.

See § 1788, ante, Receiver may be appointed; permanent and temporary receiver; powers, etc., of temporary receiver.

See § 1810, ante, Receiver can only be appointed by the court.

See § 1888, ante, Action on receiver's bond.

§ 2431a. Commissions of receiver.

A receiver appointed pursuant to this title is entitled, in addition to his necessary expenses, to commissions upon the sums received and disbursed by him as the court by which or the judge by whom he is appointed allows, as follows: On the first twenty thousand dollars, not exceeding five per centum; on the next eighty thousand dollars, not exceeding two and one-half per centum; and on the remainder, not exceeding one per centum; but in case the commissions of a receiver so computed shall not amount to one hundred dollars, said court or judge may in his or its discretion allow said receiver such a sum not exceeding one hundred dollars for his commissions as shall be commensurate with the services rendered by said receiver.

Added by chap. 293 of 1906.

§ 2431b. Final accounting.

A receiver appointed under this title shall apply within one year after qualifying as such for a final settlement of his accounts and an order for distribution, or shall apply to the court upon notice to the attorney-general for an extension of time, setting forth the reasons why he is unable to close his accounts, which order may be granted in the discretion of the court. The attorney-general or any creditor, or any party interested, may apply for an order that the receiver show cause why an accounting and distribution shall not be had at any time after the expiration of one year after the receiver qualifies; and it shall be the duty of the attorney-general after the expiration of eighteen months from the time the receiver enters upon his duties, in case he has not applied for a final settlement of his accounts, to apply for such an order on notice to such receiver. In case of such application by a party other than the receiver the court shall direct the receiver to take steps to account with all convenient speed. The receiver is not required or authorized to file any account, except as herein provided, except by special order of the court.

Added by chap. 293 of 1906.

§ 2432. The different remedies under this title.

See Tax Law, chap. 908 of 1896, § 259, Supplementary proceedings collecting tax.

See Rule 25 (Sup. Ct.), Ex parte application — statement as to previous application.

See § 1362 et seq., ante, General provisions relating to executions.

a. If an execution issued against the property of a judgment debtor is returned unsatisfied, he may be compelled to disclose under oath all his business transactions, tell what he has done with his estate, and if he still has any property in the name of some one else, and divulge all the facts relating thereto: Wright v. Hart, 182 N. Y. 330, rev'g 103 App. Div. 218; 93 N. Y. Supp. 60.

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a. **Bill of discovery.**—Proceedings supplementary to execution have taken the place of the former bill of discovery, and as such bill would lie only where a valid execution had been issued and returned unsatisfied, such matters are prerequisites to the institution of proceedings supplementary to execution: Matter of Lisner v. Toplitz, 86 App. Div. 1; 83 N. Y. Supp. 423.

b. Aside from the bill of discovery established by the courts, formerly in force, there is the statutory right to discover property through proceedings supplementary to execution: Matter of Davies, 168 N. Y. 89; 32 Civ. Pro. R. 163.

c. **Alimony.**—A wife who has obtained an order awarding her alimony pending her husband's action for a divorce from her, cannot maintain supplementary proceedings, under § 2436, before return of an execution for alimony unpaid, in aid of the execution, as no provision of law authorizes such procedure: Ostrom v. Ostrom, 38 Misc. 232.

d. **Junior creditor.**—The objection that the execution, on which the supplementary proceedings were based, was irregular under subd. 1 of § 338, which objection was apparent upon the face of the affidavit presented on the application for the judgment debtor's examination, is available to the junior judgment creditor and entitles her to have the order appointing the receiver vacated: Matter of Shannon v. Steger, 75 App. Div. 279; 78 N. Y. Supp. 163.

e. **Attorney.**—Where a judgment is satisfied pending proceedings supplementary to execution and the judgment creditor is not shown to be insolvent, the proceedings will not be kept alive to the end that the attorney for the creditor may recover his costs of the judgment debtor: Rook v. Dickinson, 38 Misc. 690; 78 N. Y. Supp. 287.

f. **Judgment void.**—While, in proceedings supplementary to execution, the judgment upon which they are taken cannot be attacked collaterally, a third party may show that the judgment is and was void, and, therefore, is no judgment at all: Matter of Stewart, 39 Misc. 275; 79 N. Y. Supp. 525.

§ 2433. Nature of the remedies. Review of orders.

g. An order in supplementary proceedings, requiring the judgment debtor to attend for examination, is an order in an action: Deane v. Sire, 48 Misc. 606.

h. An order appointing a receiver in supplementary proceedings is not appealable: Happel v. Lippe, 48 Misc. 604.

i. Under § 26 an order made by a judge of the city court of N. Y. for the examination of a judgment debtor upon a judgment obtained in the municipal court may only be vacated by a judge of the city court, or, under § 2433, upon a motion in the supreme court if the execution was issued from that court: McAlpin v. Stoddard, 54 Misc. 647.

§ 2434. What judge may entertain the proceedings.

See rule 25 (Sup. Ct.), Ex parte application — statement as to previous application.

j. The appointment in the city court of the city of New York of a receiver in supplementary proceedings, upon a judgment of a municipal court in Brooklyn, is proper under the provisions of § 2434: Fine v. Rabinbauer, 49 Misc. 437.

§ 2435. Order to examine judgment debtor after return of execution.

k. **Alimony.**—A wife who has obtained an order awarding her alimony pending her husband's action for a divorce from her, cannot maintain supplementary proceedings, under § 2436, before return of an execution for alimony unpaid, in aid of the execution, as no provision of law authorizes such procedure: Ostrom v. Ostrom, 38 Misc. 232.

l. **Divorce.**—§ 2345 does not authorize supplementary proceedings, where the execution was issued on an order for the support of the wife and children pending an action for divorce or separation, as the statute does not authorize an execution in that case: Weber v. Weber, 93 App. Div. 149.

m. **Ten years.**—A lapse of ten years from the date of the return of an execution issued upon a judgment bars the judgment creditor's right to examine a third person as to personal property of the judgment debtor alleged to be in his hands, and, therefore, an order appointing a receiver, based upon property discovered in the hands of the third person after ten years must be vacated: Peck v. Disken, 41 Misc. 473; 84 N. Y. Supp. 1094.

n. An affidavit on which an order to examine a debtor in proceedings supplementary to execution is based, is not defective because it states the amount of the judgment as reduced on a retaxation of costs instead of at the amount for which it was originally entered, when the facts are well known to the debtor: Matter of Seeley v. Connors, 109 App. Div. 279.

o. If proceedings supplementary to execution are begun within ten years of the return of the execution, the date

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of the subsequent appointment of a receiver therein is immaterial: Fawcett v. City of New York, 112 App. Div. 155.

a. **Judgment.**—An order for the examination of a debtor in proceedings supplementary to execution on a judgment obtained by an executrix will not be set aside merely because the same plaintiff has had a prior examination of the debtor conducted by the same attorney on a judgment obtained by the plaintiff individually, in the absence of a specific statement by the debtor under oath that he has power to set aside the order: Smith v. Cowles, 114 App. Div. 295.

b. A judgment debtor may not object to a second order for his examination in proceedings supplementary to execution upon the ground that a prior proceeding was pending in which, upon his application, an order was granted vacating the first order and dismissing the proceeding thereunder, whether said order was entered or not: McAlpin v. Stoddard, 54 Misc. 647.

c. **Lien.**—When the plaintiff and defendant have settled a suit in good faith, the defendant's attorney has no statutory lien if no counterclaim was involved and no fraud or collusion is shown; a defendant's attorney will not be permitted to prosecute an appeal for the mere purpose of securing his fee after the parties to the action have settled in good faith: Crossman v. Smith, 116 App. Div. 791.

§ 2436. Id., before return of execution.

d. A wife who has obtained an order awarding her alimony pending her husband's action for a divorce from her, cannot maintain supplementary proceedings, under § 2436, before return of an execution for alimony unpaid, in aid of the execution, as no provision of law authorizes such procedure: Ostrom v. Ostrom, 38 Misc. 232.

e. **Defective affidavit.**—An affidavit for an order in supplementary proceedings under this section made by the attorney, based as to material allegations on information and belief, which gives neither the grounds of the belief nor the sources of the information is defective: Matter of Garcia v. Morris, 51 Misc. 592.

§ 2441. Order to examine persons having property, etc., of judgment debtor.

f. An allegation in the moving affidavit that the third party "has personal property of the judgment debtor exceeding ten dollars in value, or is indebted to him in a sum exceeding ten dollars," is insufficient: Smith v. Cutter, 64 App. Div. 412; 72 N. Y. Supp. 99.

g. A third party, ordered to attend an examination under § 2441, cannot avoid such examination by submitting an affidavit asserting its ownership of the property which has belonged to the judgment debtor and showing how much property there was and under what circumstances the transfer thereof took place. The rule under the old Code has been changed: Matter of De Leon, 63 App. Div. 41.

h. **Ten years.**—A lapse of ten years from the date of the return of an execution issued upon a judgment bars the judgment creditor's right to examine a third person as to personal property of the judgment debtor alleged to be in his hands and, therefore, an order appointing a receiver, based upon property discovered in the hands of the third person after ten years, must be vacated: Peck v. Disken, 41 Misc. 473; 84 N. Y. Supp. 1094.

i. **Defective affidavit.**—An affidavit which states on information and belief that the third person "has personal property of the said judgment debtor exceeding $10 in value or is indebted to the said judgment debtor in a sum exceeding $10," is defective in being in the disjunctive and an order issued thereon should be vacated: Lowther v. Lowther, 110 App. Div. 122.

§ 2442. Either order may require attendance before a referee.

j. An order punishing a witness for contempt in failing to appear before a referee, in pursuance of an order, and testify in supplementary proceedings, is void; the attendance of witnesses in such proceedings can be enforced only by the due service of the process of subpoena as upon the trial of an action: Matter of Depue, 185 N. Y. 60.

§ 2444. Proceedings upon examination; adjournment.

k. A subpoena in proceedings supplementary to execution cannot be signed by the attorney for a party: Lowther v. Lowther, 115 App. Div. 307.

§ 2445. Referee to be sworn.

See § 1016, ante, Referee to be sworn.

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§ 2447. Order requiring delivery of money or property to sheriff or receiver.

See § 1879, ante, Application of this article; what property cannot be reached.

See § 2463, post, Cases where this chapter is not applicable; what property cannot be reached.

a. An order requiring a judgment debtor to pay money over to the receiver of his property appointed in supplementary proceedings, which order purported to be an order of the county court, granted at a special term thereof, and was treated as a county court order by the parties, is unauthorized, as § 2447 provides that the order shall be made by "the judge by whom the order or warrant was granted or to whom it is returnable:" Matter of Fiss v. Haag, 75 App. Div. 241.

b. **Wages.**—§ 2447 does not authorize the court to make an order directing a wife to pay over to the receiver in supplementary proceedings against her husband certain moneys received by her as wages and paid before the service on her of any papers in such proceedings: Broderick v. Archibald, 61 App. Div. 473; 70 N. Y. Supp. 617.

c. **Junior creditor.**—The supreme court may, under § 2447, in its discretion, vacate an *ex parte* order directing that property stored in the name of the judgment debtor be delivered to the receiver appointed in supplementary proceedings, that the receiver have power to sell such property where it was not shown to the judge who made the order that the possession and ownership of the property in question claimed by the junior judgment creditor claiming under a bill of sale from the judgment debtor: Matter of Shannon v. Steger, 75 App. Div. 279; 78 N. Y. Supp. 163.

§ 2449. How money or property applied to pay the judgment.

d. The object of the appointment of a receiver in supplementary proceedings is to reach the property of judgment debtors so that it may be applied to the payment of the judgment: Hunter v. Hunter, 67 App. Div. 470.

§ 2450. Balance to be paid or delivered to judgment debtor, etc.

e. The object of the appointment of a receiver in supplementary proceedings is to reach the property of judgment debtors so that it may be applied to the payment of the judgment: Hunter v. Hunter, 67 App. Div. 470.

§ 2452. Mode of service of certain orders.

f. The service upon a judgment debtor of a copy of an affidavit and order for his examination in proceedings supplementary to execution, which copy was defective, in that it read "that said judgment was duly rendered upon said judgment debtor's appearance, or personal service of the summons upon said judgment debtor," while in the original the words "said judgment debtor's appearance, or" had been stricken out, is sufficient to authorize the examination of the judgment debtor: Matter of Wyman, 76 App. Div. 292; 78 N. Y. Supp. 54.

g. An order for the examination of a third party in proceedings supplementary to execution may not lawfully be served upon the third party by the judgment creditor: Matter of Dawes, 108 App. Div. 174.

§ 2454. How proceedings discontinued or dismissed.

h. A proceeding supplementary to execution must be discontinued by an order of a judge, and does not fall of its own weight because of a failure to prosecute it: Matter of Rothschild v. Gould, 84 App. Div. 196.

i. It is too late for a judgment debtor, after having submitted to an examination in supplementary proceedings, to move to vacate the order for the examination on the ground that the judgment was not properly entered: Matter of Mennen C. Co. v. Dressner, 53 Misc. 370.

j. Under the present practice, proceedings supplementary to an execution can only be discontinued or dismissed by an order; and, until the entry of such an order, the pendency of such proceedings is a valid objection to another order for the examination of the judgment debtor and the latter order must be vacated: Matter of Schwarmecke v. Glenny, 54 Misc. 36.

§ 2455. Costs to judgment creditor.

k. A violation of an injunction order in supplementary proceedings may be punished as a contempt by imposing the costs of such supplementary proceedings as an additional fine, and the order directing such payment need not require

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the payment of such costs within a specified time; the order is governed by § 2284 and not by § 2455, which relates to the costs awarded in supplementary proceedings: Fitzsimmons v. Ryan, 64 App. Div. 404.

§ 2457. Disobedience to order; how punished.

See § 14, ante, Civil contempts.

See § 2286, ante, When court may release offender.

a. Where the judgment was obtained in the first judicial district and the judgment creditor institutes supplementary proceedings in Rensselaer county, an order to show cause why the judgment creditor should not be adjudged guilty of contempt for refusing to answer questions propounded to him by the referee appointed in the supplementary proceedings, cannot be issued by a justice, and be made returnable at a special term of the supreme court in the first judicial district: Matter of Backus, 91 App. Div. 266; 86 N. Y. Supp. 638.

b. Where an examination was held in the absence of the judge who swore the debtor and where the creditor's attorney subsequently made an affidavit that the debtor had refused to answer certain proper questions, without specifying them, the special term had no power to adjudge the debtor guilty of contempt: Matter of East River Bank v. DeLacy, 37 Misc. 765; 76 N. Y. Supp. 927.

§ 2458. Upon what judgment and to what county the execution must have issued.

See § 1362 et seq., ante, General provision relating to executions.

c. **Residence.**—Where a judgment debtor has his permanent residence in Hamilton county but has hired lodgings in the city of New York from month to month for three or four years, and has occupied such lodgings, the issuing of an execution to the sheriff of New York county is sufficient under § 2458 to authorize the institution of supplementary proceedings: Matter of Rose v. Durant, 87 App. Div. 240; 84 N. Y. Supp. 276.

d. **Judgment-roll.**—The appellate division will not vacate an order for the examination of a judgment debtor in proceedings supplementary to execution, upon the ground that the affidavit used on the motion did not show the county in which the action was brought or the county in which the judgment was entered or the judgment-roll filed, where the order recites that it was based upon the affidavit and the judgment-roll, and such judgment-roll is not incorporated in the appeal papers: Binghamton Trust Co. v. Grant, 65 App. Div. 178; 72 N. Y. Supp. 580.

e. **Affidavit.**—An affidavit upon which an order for examination in supplementary proceedings, alleging the issuance of the execution to the sheriff of a specified county, "where said judgment debtor has a place for the regular transaction of business * * * in person or by agent, as deponent is informed and believes," does not meet the requirements of subd. 1 of § 2458, as the statement "or by agent as deponent is informed and believes," makes possible the construction that the affiant does not depose in the terms of the subdivision at all, and, moreover, is an interpolation for which there seems no authority; the allegations are bad and this defect goes to the foundation and is fatal to the supplementary proceedings: Bank of Port Jefferson v. Darling, 102 App. Div. 431.

f. An affidavit on which an order to examine a debtor in proceedings supplementary to execution is based, is not defective because it states the amount of the judgment as reduced on a retaxation of costs instead of at the amount for which it was originally entered, when the facts are well known to the debtor: Matter of Seeley, 108 App. Div. 279.

§ 2461. Proceedings where judgment is against joint debtors.

See § 1871, ante, When judgment creditor may bring action.

§ 2462. Proceedings commenced before one judge may be continued before another.

g. An order for the examination of a judgment debtor in proceedings supplementary to execution, made by a justice of the city court of the city of New York a short time before his resignation, is sufficient to require the judgment debtor to attend before his successor in office, sitting at the same term of the court and at the time and place designated in the order: Dodge v. Albers, 54 Misc. 37.

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§ 2463. Cases where this chapter is not applicable; what property cannot be reached.

See § 1390 et seq., ante, Exemptions.

See § 1391, ante, When earnings may be reached.

See § 1781 et seq., ante, Action against corporate officers.

See § 1784 et seq., ante, Action to sequestrate property of corporation.

See § 1804 et seq., ante, Injunction against corporations.

See § 1812, ante, Application of §§ 1809-1811 to domestic, etc., corporations.

a. If an execution issued against the property of a judgment debtor is returned unsatisfied, he may be compelled to disclose, under oath, all his business transactions, tell what he has done with his estate, and, if he still has any property in the name of some one else, to divulge all the facts relating thereto: Wright v. Hart, 182 N. Y. 330, rev'g 103 App. Div. 218; 93 N. Y. Supp. 60.

b. **Milk.**—When milk sold by the judgment debtor during the month previous to the service of the order for his examination, and which, he testified, "was the proceeds of labor" from such farm, is not exempt under § 2463: Matter of Wyman, 76 App. Div. 292; 78 N. Y. Supp. 546.

c. An order in supplementary proceedings appointing a receiver need not in terms except property exempt from execution; such an order is irregular and not void when the debtor has not made it appear that his earnings are necessary for the use of his family: Matter of Seeley, 109 App. Div. 279.

d. **Desk, wagons.**—A desk, counter, two chairs, three wagons, two sets of harness and a Dutch collar, not shown to be worth over $250, owned by a judgment debtor who is a widow and supports herself and five children from an income ranging from nothing to fourteen dollars a week derived from an express business conducted by her together with less than ten dollars in the bank are exempt from execution, and, where that is all the property discovered, a motion for a receiver of the judgment debtor in supplementary proceedings will be denied and the proceedings dismissed with ten dollars costs: Matter of Galowitz v. Bumford, 54 Misc. 41.

§ 2464. When and how receiver may be appointed.

e. A receiver can be appointed only after the making of an order for examination, where no warrant was issued in the action: Bank of Port Jefferson v. Darling, 102 App. Div. 431.

f. **Accounting.**—A receiver appointed in proceedings supplementary to execution, issued on a judgment against a mortgagor of chattels may maintain an action for an accounting by the mortgagee who has sold the mortgaged goods and become the purchaser, upon the ground that the mortgage was void because not filed in the proper county: Brunnemer v. Cook & Bernheimer Co., 180 N. Y. 188, mod'y 89 App. Div. 406; 85 N. Y. Supp. 954.

g. **Further order.**—The appointment of a receiver does not prevent the creditor from obtaining a further order for the examination of the third party: Smith v. Cutter, 64 App. Div. 412; 72 N. Y. Supp. 99.

h. **Exempt property.**—An order in supplementary proceedings appointing a receiver need not in terms except property exempt from execution; such an order is irregular and not void when the debtor has not made it appear that his earnings are necessary for the use of his family: Matter of Seeley v. Connors, 109 App. Div. 279.

i. **Executor.**—A judgment against the executor of an estate cannot be enforced by a receiver appointed in proceedings supplementary to execution; such a judgment against a decedent's estate must be enforced in appropriate proceedings in the surrogate's court: Jones v. Arkenburgh, 112 App. Div. 483; 98 N. Y. Supp. 532.

j. **Ten years.**—If proceedings supplementary to execution are begun within ten years of the return of the execution, the date of the subsequent appointment of a receiver therein is immaterial: Fawcett v. City of New York, 112 App. Div. 155.

k. **Third party.**—A receiver in supplementary proceedings should be appointed when property of a judgment debtor appears by the examination of a third party to be in his hands though a claim is made that it belongs to another; a receiver is entitled to contest such claim by action: Matter of Thompson v. Sage, 47 Misc. 357.

l. **Appeal.**—An order appointing a receiver in supplementary proceedings is not appealable: Happel v. Lippe, 48 Misc. 604.

m. **Order.**—What recital in an order appointing a receiver is insufficient to show that the debtor could not be found within the state: Matter of Darling, 108 App. Div. 48.

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§ 2466. Only one receiver to be appointed; former receivership may be extended.

See rule 81 (Sup. Ct.), Receiver cannot employ more than one counsel.
See rule 77 (Sup. Ct.), Powers and duties of receiver.
See rule 78 (Sup. Ct.), When receiver may sue.

§ 2468. When property is vested in receiver.

See § 2479, post, Jurisdiction in new or altered county.

a. Assuming, without deciding, that §§ 2468 and 2469 were intended to extend, by relation, the receiver's title to the tangible assets of the judgment debtor as well as to the intangible assets, a receiver appointed in supplementary proceedings instituted upon a senior judgment and execution returned unsatisfied, cannot recover, from a creditor holding a junior judgment and execution issued out of a court not of record, the proceeds received from a sale under such execution of tangible personal property of the judgment debtor, which sale took place before the appointment and qualification of the receiver; such a case is within the exception contained in § 2469 and the junior execution creditor should not be deprived of the benefit of such exception because he purchased the property at the execution sale under his judgment; *quaere*, whether §§ 2468 and 2469 control § 1408 of that Code, which provides: "but an execution issued out of a court not of record * * * if actually levied, has preference over another execution issued out of any court of record or not of record which has not been previously levied:" Droege v. Baxter, 69 App. Div. 58, aff'd 171 N. Y. 654; 74 N. Y. Supp. 585.

b. **Real property.**—A receiver in supplementary proceedings does not acquire any title to the real property of the judgment debtor or any power to sell or transfer such real property, but only such interest as is given by § 2468, subd. 1: Chadeayne v. Gwyer, 83 App. Div. 403; 82 N. Y. Supp. 198.

c. A receiver appointed in proceedings supplementary to execution does not acquire any title to the real property of the judgment debtor nor any power to sell or transfer the same, but only a right to take possession thereof for the purpose of satisfying the judgment, subject to be terminated by the sale of the real property under execution and the delivery of a deed thereof to the purchaser, and also subject to be terminated by the expiration of the ten years during which the judgment under which the receiver is appointed is a lien upon the premises: Hall v. Senior, 54 Misc. 463.

d. A motion by a receiver in proceedings supplementary to execution for leave to sell a judgment debtor's interest in real property consisting of a remainder, will be denied when it appears that the question is *res adjudicata* by reason of the denial of a similar application and the dismissal of the complaint in a prior action brought for the same purpose by the receiver's predecessor; although the denial of the prior application and the dismissal of the prior action were made upon the erroneous legal conclusion that the receiver's right to sell the remainder must be postponed until the death of the life tenant, the prior decisions are nevertheless *res adjudicata* and bar a subsequent application for the same leave, and the receiver must await the death of the life tenant: Barber v. Barnum, 117 App. Div. 325; 101 N. Y. Supp. 1065.

e. An order will not be made authorizing a receiver, appointed in proceedings supplementary to execution, to sell the judgment debtor's real property; for the receiver acquires no title thereto nor power to sell and convey it; the judgment creditor must exhaust his remedy against the debtor's real property before resorting to supplementary proceedings: Matter of Damers v. Sternberger, 52 Misc. 532.

f. **Lien.**—A fair construction of § 2468, subd. 1, limits the interest that the receiver takes to a right to possession as a means of satisfying the plaintiff's judgment and the right to possession is subject to a valid sale of the property under an execution regularly issued; that upon a sale under execution and delivery of a deed thereunder the right of possession as receiver is terminated and at the end of ten years from the docket of judgment, when the judgment ceases to be a lien upon the property, whatever interest or right of possession was vested in the receiver, is at an end: Van Loan v. City of New York, 105 App. Div. 572; 94 N. Y. Supp. 221.

g. **Mortgage.**—The title of a receiver appointed in proceedings supplementary to execution, to a real estate mortgage owned by the judgment debtor, is not affected by the judgment debtor's discharge in bankruptcy, the petition for which was not filed until more than four months after the receiver had commenced an action to foreclose the mortgage, notwithstanding

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the fact that the judgment foreclosing the mortgage was not rendered until after the discharge in bankruptcy was granted: Pickert v. Eaton, 81 App. Div. 423; 81 N. Y. Supp. 50.

a. **Consideration.**—A receiver in supplementary proceedings only obtains title to property owned by the judgment debtor at the time of his appointment. When the judgment debtor transferred property prior to the receivership the receiver cannot show lack of consideration in an action of replevin. Even if the transfer be fraudulent as to creditors, the action to set aside the transfer for lack of consideration must be in equity: Gilroy v. Everson-Hickok Co., 118 App. Div. 733.

b. When a receiver in supplementary proceedings is appointed before an award made for lands taken by eminent domain, the judgment debtor ceases to have any interest in the lands and the award vests in the receiver; as such award is personal property, the ten-year limitation as to lien of judgments upon real estate has no application: Fawcett v. City of New York, 112 App. Div. 155.

§ 2469. How receiver's title to personal property extended by relation.

See § 1217, ante, Attachment and undertaking for restitution, required in certain actions.

c. Assuming, without deciding, that §§ 2468 and 2469 were intended to extend, by relation, the receiver's title to the tangible assets of the judgment debtor as well as to the intangible assets, a receiver appointed in supplementary proceedings instituted upon a senior judgment and execution returned unsatisfied, cannot recover, from a creditor holding a junior judgment and execution issued out of a court not of record, the proceeds received from a sale under such execution of tangible personal property of the judgment debtor; which sale took place before the appointment and qualification of the receiver; such a case is within the exception contained in § 2469 and the junior execution creditor should not be deprived of the benefit of such exception because he purchased the property at the execution sale under his judgment; *quaere*, whether §§ 2468 and 2469 control § 1408 of that Code, which provides, " but an execution issued out of a court not of record * * * if actually levied has preference over another execution issued out of any court of record or not of record which has not been previously levied:" Droege v. Baxter, 69 App. Div. 58, aff'd 171 N. Y. 654; 74 N. Y. Supp. 585.

§ 2471. Receiver to be subject to control of court.

d. The receiver is subject to the direction and control of the court out of which the execution was issued: Brein v. Max Light, 37 Misc. 771; 76 N. Y. Supp. 935.

e. **Successor.**—The successor of a supervisor chosen by the town board may compel the delivery of the books and papers of the office and is not obliged to bring *quo warranto* proceedings against his predecessor: Matter of Smith, 116 App. Div. 665; 101 N. Y. Supp. 992, aff'd 188 N. Y. 549.

§ 2471a. Delivery of books and papers, how enforced.

See rule 14 (Sup. Ct.), Discovery of books and papers, when compelled.

f. § 2471 can only be revoked where the petitioner has a clear *prima facie* title, free from reasonable doubt, to the office: Matter of Fitzgerald, 88 App. Div. 434.

g. **Unconstitutional.**—In a proceeding for books and papers of a public office under § 2471a, an act of the legislature or any act of the governor under which one of the contestants claimed, may be adjudged unconstitutional and void: Matter of Guden v. Dike, 37 Misc. 390; 75 N. Y. Supp. 786.

h. An order of the appellate division reversing an order of the special term granting an application made under § 2471a, to compel the delivery of books and papers to a public officer, and which denied the application, is a final order in a special proceeding and is reviewable by the court of appeals: Matter of Brenner, 170 N. Y. 185, aff'g 67 App. Div. 375; 73 N. Y. Supp. 689.

A certificate of appointment to public office made under and pursuant to a statute does not establish a *prima facie* right to the office and to the books and papers pertaining thereto so as to prevent the question of the validity of the statute from being raised and decided in proceedings under § 2471a, to compel the delivery of the books and papers to the appointee, and if the statute is void, no rights are conferred thereby and the application must be denied. Id.

i. Where the incumbent of an office under a term unexpired, refused, upon the ground of the unconstitutionality of the act, to surrender the books and

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papers of the office to the appointee of a majority of the justices of the appellate division, as required by statute, and the appointee proceeded under § 2471a to compel a delivery of the same, and the allegations of his motion papers were not denied by the incumbent nor any papers submitted by the latter other than a brief, the special term considered that all the allegations of the moving papers must be taken to be true and that the question of the constitutionality of the statute and of the title to the office thereunder were directly involved; § 2471a, relative to compelling delivery of the books and papers of an office, can be invoked only by a claimant who has an unquestionable *prima facie* legal title to the office, and therefore where a grave constitutional question existed as to the legality of the claimant's appointment the court stayed an order, requiring the incumbent to deliver him the said books and papers, until the constitutional question should have been decided on the incumbent's appeal: Matter of Brenner, 35 Misc. 212, 306; 32 Civ. Pro. R. 88, 136; 70 N. Y. Supp. 744, rev'd 67 App. Div. 375; 73 N. Y. Supp. 689, aff'd 170 N. Y. 185.

a. **Adjournment.**—The county judge having made an order under § 2471a, requiring the delivery of books and papers, cannot "hold open" the proceeding but must under the provisions of the section adjourn it for a definite time: People ex rel. Stryker v. Van Bergen, 40 Misc. 139.

b. **Sheriff.**—The question of the effectiveness of an action of the governor in removing a sheriff for making a corrupt ante-election agreement may be determined in a proceeding under § 2471a, brought by the person appointed to succeed the officer removed against such former officer although as a general rule the title to a public officer will not be determined in such a proceeding: Matter of Guden, 71 App. Div. 422; 75 N. Y. Supp. 794.

c. **Title.**—While the court, in a proceeding taken under § 2471a, by a person elected to an office to compel by order the delivery to him of its books and papers withheld by a former incumbent holding over the term, will not try title to the office, a mere denial of title is insufficient to defeat the proceeding and the court will look into the matter far enough to determine whether the petitioner has a *prima facie* title, and if he has received a certificate of election or appointment from the proper person or persons he has such title as will entitle him to maintain the proceeding: Matter of Application of Brearton, 44 Misc. 247.

d. **Issue of fact.**—Under § 2471a, in relation to compelling the delivery of books and papers belonging to a public office, it is the duty of the court where an issue of fact is raised by an affidavit in opposition to the application, to take evidence and determine such issue of fact may be determined upon the petition and affidavit or by oral evidence: Matter of Gill, 95 App. Div. 174.

e. **Bill of discovery.**—Aside from the bill of discovery established by the courts, formerly in force, there is the statutory right to discover property, through proceedings supplementary to execution: Matter of Davies, 168 N. Y. 89; 32 Civ. Pro. R. 163.

f. **Supervisor.**—In a proceeding by a newly elected supervisor under this section to obtain possession of the books and papers pertaining to the office, though the title to the office cannot in general be tried, yet, where the facts are undisputed, the rights of the parties can properly be determined: Matter of Smith, 49 Misc. 567.

§ 2472. General jurisdiction of surrogate's court.

Each surrogate must hold, within his county, a court, which has, in addition to the powers conferred upon it, or upon the surrogate, by special provision of law, jurisdiction, as follows:

1. To take the proof of wills; to admit wills to probate; to revoke the probate thereof; and to take and revoke probate of heirship.

2. To grant and revoke letters testamentary and letters of administration, and to appoint a successor in place of a person whose letters have been revoked.

3. To direct and control the conduct, and settle the accounts, of executors, administrators, and testamentary trustees; to remove testamentary trustees, and to appoint a successor in place of a testamentary trustee so removed.

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4. To enforce the payment of debts and legacies; the distribution of the estates of decedents; and the payment or delivery, by executors, administrators, and testamentary trustees, of money or other property in their possession, belonging to the estate.

5. To direct the disposition of real property, and interests in real property, of decedents, for the payment of their debts and funeral expenses, and the disposition of the proceeds thereof.

6. To administer justice, in all matters relating to the affairs of decedents, according to the provisions of the statutes relating thereto.

7. To appoint and remove guardians for infants; to compel the payment and delivery by them of money or other property belonging to their wards; and, in the cases specially prescribed by law, to direct and control their conduct, and settle their accounts.

8. To settle the accounts of a father, mother or other relative having the rights, powers and duties of a guardian in socage, and to compel the payment and delivery of money or other property belonging to the ward.

This jurisdiction must be exercised in the cases, and in the manner, prescribed by statute.

2 R. S. 220 (Part 3, c. 2, tit. 1), § 1; L. 1871, c. 482; L. 1874, c. 267.

Amended by chap. 407 of 1903.

See § 842, ante, Surrogate may administer oath.

See § 1825, ante, Leave to issue execution against executor.

a. **Control of administrator.**—The conduct of the personal representative in the administration of an estate is subject to the direction and control of the court: Matter of Crouch, 41 Misc. 349; 84 N. Y. Supp. 936.

b. **Accounting.**—In a proceeding to require the personal representative of an executor to render an account of the latter's proceedings, the surrogate has jurisdiction to determine that the executor did not separate a trust fund from the *corpus* of the testator's estate and that the will created such an equitable conversion of the testator's real estate in personalty, as authorized the executor to collect rents and sell the realty and apply the proceeds to the payment of legacies: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

c. The supreme court, succeeding to the jurisdiction of the old court of chancery, which had jurisdiction in proceedings to compel executors to account, would have jurisdiction of such proceedings, except for the fact that the surrogate's court having been invested by § 2472 with power to deal with this class of cases, has an adequate remedy at law for persons desiring an accounting in such premises: Meeks v. Meeks, 79 App. Div. 49; 79 N. Y. Supp. 718.

d. In the second judicial department, court of the surrogate and the supreme court are deemed to have equal jurisdiction of an action requiring executors of personalty to account, and the latter court cannot lawfully refuse to take or retain jurisdiction of such an action unless there is interposed, in bar thereof, a plea that a proceeding is pending in the former court involving the same subject matter: Haughian v. Conlon, 39 Misc. 584; 80 N. Y. Supp. 586.

e. Upon the judicial settlement of the accounts of an executor or trustee the surrogate has full power to pass upon all questions necessarily involved in such accounting, whether they refer to real estate or are simply confined to personalty: Matter of Bruchaeser, 49 Misc. 194.

f. Neither § 2602, as to joint custody or deposit of assets, nor § 2472, relating to the general power of the surrogate to control executors, authorizes the surrogate's court to direct, before the accounting has been concluded, the accounting executor to communicate to the other executors the knowledge they sought and execute such assignments as they wish: Matter of Freligh, 42 Misc. 11.

g. While the supreme court has jurisdiction to compel an executor to account, it will refuse to exercise such jurisdiction, unless the circumstances require the interposition of a court of equity rather than the usual proceedings before

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the surrogate: Volhard v. Volhard, 119 App. Div. 266.

a. **Decree for overpayment.**—A surrogate cannot make a decree in favor of an executor for overpayment, and, in any event, his decree would not be lien on real estate: Johnson v. Weir, 34 Misc. 683; 70 N. Y. Supp. 1020.

b. **Execution.**—The surrogate has jurisdiction to make a decree directing payment by the administratrix of a sum for which an execution was authorized and to enforce compliance therewith by contempt proceedings in the same manner as though the judgment or decree directing payment of the money had been rendered in the surrogate's court instead of the supreme court: Matter of Mahoney, 88 App. Div. 140; 84 N. Y. Supp. 329.

c. **Construction of will.**—As a necessary incident to their general powers to control executors, and to direct the payment or charging of legacies and the like, a surrogate's court has jurisdiction to look into the will and determine its true construction, but such court has no inherent power to construe the provisions of a will except in so far as such construction may be necessary in order that it may properly perform some duty imposed by law upon it: Matter of Davis, 105 App. Div. 221; 93 N. Y. Supp. 1004, aff'd 182 N. Y. 468.

d. The surrogate's court has no inherent power to construe the provisions of a will except as a necessary incident to its general powers to control executors and testamentary trustees and to direct the payments or charging of legacies or the like: Kirk v. McCann, 117 App. Div. 56.

e. **Testamentary trustees.**—Executors clothed with certain powers under a will held to be "testamentary trustees," defined in subd. 6 of § 2414 and that upon the settlement of the account of one of two testamentary trustees, who alone qualified, the surrogate's court had jurisdiction under § 2472 to determine whether one of the executors had properly disposed of the principal of the trust fund: Matter of Wilkin, 90 App. Div. 324; 86 N. Y. Supp. 360.

f. A surrogate has no power, in a proceeding by a testamentary trustee for a final accounting, to order a transfer of specific bonds to a legatee who contests the account, with a provision that the trustee be credited therewith at a value thereafter to be determined by the court: Matter of Hunt, 110 App. Div. 583.

g. **Claims.**—A surrogate has power under §§ 2472 and 2722 upon the petition of numerous creditors to direct the administrators to make a partial payment upon the petitioner's claims and may provide in his decree that the administrators may apply to have the decree modified if it appeared that the estate was insufficient to pay the petitioning creditors: Matter of Miner, 39 Misc. 605.

h. **Property.**—The surrogate will award possession of property of a decedent in the hands of a bailee, subject to conflicting claims, to the administrator: Matter of Scott, 34 Misc. 446; 70 N. Y. Supp. 425.

i. The surrogate has no jurisdiction, upon a summary application to him to compel the administrators to deliver over property to the owner thereof, which property has been taken possession of by them as a part of the estate to be administered by them, although their claim to such property is wholly unfounded, or is merely colorable; § 2472, subds. 3 and 4, are not sufficient authority in the premises: Matter of Case v. Spencer, 86 App. Div. 454.

j. **Residuum.**—Executors have a right to distribute a residuum of the estate of their testator which was not effectually disposed of by will, and therefore the surrogate has no power or occasion to appoint an administrator to dispose of it: Matter of Haughian, 37 Misc. 457; 75 N. Y. Supp. 932.

k. **Fraud.**—The supreme court will not entertain an action to prove a will and to adjudge a subsequent one and a transfer, executed by the testator, to have been secured by fraud: Delebarre v. McAlpin, 71 App. Div. 591; 76 N. Y. Supp. 301.

l. **Rights of heirs-at-law.**—The surrogate has no jurisdiction to inquire into or settle the rights of heirs-at-law in real estate or its proceeds or to divide the proceeds according to the laws of descent: Matter of McKay, 37 Misc. 590; 75 N. Y. Supp. 1069.

m. **Judicial settlement.**—Upon the final judicial settlement of an administrator, the surrogate has jurisdiction and must inquire into allegations of payments made by the administrator and all the material facts should be before the surrogate: Matter of Robinson, 42 Misc. 169; 85 N. Y. Supp. 1087.

n. **Validity of will.**—The surrogate's court has jurisdiction to determine as to the validity of a provision of a will to accumulate under certain conditions: Matter of Raymond, 73 App. Div. 11; 76 N. Y. Supp. 355.

o. **Jurisdiction limited.**—The surrogate's court is one of limited jurisdiction and has only such power as is conferred on it by § 2472 and other statutes: Matter of Gilman, 92 App. Div. 462; 87 N. Y. Supp. 128.

p. Where a claim that an accounting executrix should be surcharged with the value of certain bonds and mortgages involves the question of whether their assignment had been procured by fraud, the surrogate's court has not jurisdiction to pass upon the claim: Matter of Dittrich, 53 Misc. 514.

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a. **Legacy.**—The court of the surrogate has no power or jurisdiction to decide, upon a judicial settlement, in regard to rival claims to a legacy, made respectively by the legatee, by virtue of the will, and parties claiming under an assignment of the legacy made to them by the legatee and apparently valid on its face: Matter of Grant, 37 Misc. 151; 74 N. Y. Supp. 958.

b. **General guardian.**—The surrogate's court has no power to allow the claim of a general guardian against his ward for legal services rendered by him prosecuting a claim in favor of his ward before his appointment: Matter of Tyndall, 48 Misc. 39.

c. **Transfer tax.**—When, in a proceeding to appraise the estate of a decedent for the purpose of levying a transfer tax, the question as to whether the decedent was a resident of this state is at issue, the surrogate has power, under § 2546, to refer the question to a referee to take testimony and report with an opinion, and to direct the appraiser to await the coming in of such report: Matter of Bishop, 111 App. Div. 545.

d. **Creditor's lien.**—A surrogate's court has not the broad powers of a court of equity which are necessary to enforce a creditor's lien upon the proceeds of a policy of insurance issued on the life of a husband in which the wife was named as beneficiary and the annual premium on which was in excess of $500: Matter of Thompson, 184 N. Y. 36, rev'g 102 App. Div. 617; 92 N. Y. Supp. 1147.

e. **Annulment.**—A surrogate has power to decide whether the supreme court acquired jurisdiction in an action to annul a marriage: Matter of McGarren, 112 App. Div. 503.

f. **Surety.**—A surrogate has not jurisdiction over a controversy between the surety of a temporary administrator and a third person as to alleged improper dealings of the latter with assets of the estate alleged to have been fraudulently or collusively obtained by him from the temporary administrator; such controversy must be settled in a court of general jurisdiction: Matter of Weisell, 51 Misc. 325.

g. **Amendment.**—A petition for a probate of a will which alleges that the deceased was a resident of France and died, leaving assets in this state, may be amended to allege that the testator was a resident of this state, temporarily residing abroad: Matter of Rubens, 117 App. Div. 523.

h. By virtue of the amendment to § 2732, amended by chap. 319 of 1898, the descendants of brothers and sisters are entitled absolutely to all the personal estate of an intestate who leaves no widow or descendants to the exclusion of the descendants of uncles and aunts; when the descendants of uncles and aunts have by error in the construction of said section been allowed to share in the estate, the surrogate has power to correct his decree so far as it affects the shares of those collateral relatives who have not appeared and taken the benefits of the decree: Matter of Hoes, 119 App. Div. 288.

i. **Indians.**—The surrogate's court of Niagara county is without jurisdiction to admit to probate the will of a Tuscarora Indian residing upon the Tuscarora reservation in that county: Matter of Jack, 52 Misc. 424; 102 N. Y. Supp. 383.

j. **Concurrent jurisdiction.**—Although the supreme court and the surrogate's court have concurrent jurisdiction to entertain an accounting by an executor, the supreme court will not act when complete relief can be obtained in the surrogate's court; to obtain an accounting in the supreme court the executor must show that complete relief cannot be had before the surrogate; such special fact is not shown by an allegation that by reason of the stringent rules under § 2729, governing the admission of evidence as to payments where no vouchers can be produced, he would be unable to testify to payments and introduce all his evidence thereof, thereby working great hardship and injustice. The provisions of said section are applicable to accountings in the supreme court, as well as to accountings in the surrogate's court: Matter of Smith, 120 App. Div. 199.

k. The supreme court and the surrogate's court have concurrent jurisdiction to require the personal representatives of deceased executors and trustees to account for property which came into their hands. Ordinarily the supreme court will refuse to exercise its jurisdiction unless the jurisdiction of the surrogate's court be insufficient to determine all the questions involved; the surrogate's court having a limited jurisdiction and being without power to try title to real estate, should refuse to require the representative of a deceased trustee to account when a question involving the title to real estate must be decided as a prerequisite to the accounting: Matter of Fogarty, 117 App. Div. 583.

l. The supreme court and the surrogate's court have concurrent jurisdiction to compel executors and trustees to account, but the supreme court will only act where the surrogate's court may not have full jurisdiction to decide the questions, as where there are conflicting claims to real estate: Bushe v. Wright, 118 App. Div. 320.

m. **Foreign witness.**—Where, in a proceeding for the probate of a will involv-

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ing the interests of an infant contestant, an open commission has been granted upon the application of the proponent to take the testimony of a foreign witness, and the special guardian applies for an allowance from the estate to defray his expenses in attending the execution of the commission or employing counsel to represent him, and the proponent opposes such allowance, the court, being without power to order the allowance, should vacate the order for an open commission and make an order providing for a commission to take the testimony upon written interrogatories: Matter of Sentell, 53 Misc. 165.

§ 2473. Presumption of jurisdiction.

a. **Temporary administrator.**—A temporary administrator, whose function is only to collect and preserve the estate, may be appointed upon much weaker proof, raising a presumption of the death of the intestate, than a permanent administrator: Czech v. Bean, 35 Misc. 729; 72 N. Y. Supp. 402.

b. **Judicial settlement void.**—A judicial settlement of an administrator's accounts is void as against interested parties not cited or appearing thereon: Matter of Killain, 172 N. Y. 547, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

c. **Title to real estate.**—When the absence of proof of service, by publication, on next of kin, of the citation to attend the proof of a will is not alone of itself a sufficient ground for the rejection of a title to real estate: Sisco v. Martin, 61 App. Div. 502; 70 N. Y. Supp 597.

d. **Disputed claim.**—Under § 1822 and § 2743, as amended by chap. 595 of 1895, the surrogate has no power even with the consent of the parties to determine the validity of a disputed claim, at any time except on the "judicial settlement of the accounts," although § 2743 authorizes the decree to provide for the payment of a debt, the validity of which is established "upon the final accounting or other proceeding:" Matter of Clark v. Hyland, 88 App. Div. 392.

e. **Residence.**—Where a surrogate, upon an application to him for letters of administration, determines, upon a sufficient affidavit, that the decedent was a resident of the county at the time of his death, the surrogate's jurisdiction to issue the letters cannot, in the absence of collusion or fraud, be attacked in an action brought by the administratrix, on the ground that the decedent was not a resident of the county: Van Gaasbeek v. Staples, 85 App. Div. 271; 83 N. Y. Supp. 225.

f. **Service of citation.**—Under § 2473, when the jurisdiction of a surrogate's court is attacked collaterally, the recital in the decree, authorizing the sale, of service of the citation upon plaintiffs is sufficient, in the absence of any proof to the contrary, to sustain a finding that the plaintiffs had been regularly served with the citation: Mott v. Fort Edward Water Works Co., 79 App. Div. 179; 79 N. Y. Supp. 1100.

§ 2474. Jurisdiction not lost by defect in record.

g. The surrogate obtains jurisdiction of a proceeding in his court by the presentation and filing of a petition, setting forth the necessary jurisdictional facts, and of the parties either by the issue and service of a citation or by the waiver of such issue and service pursuant to § 2528 or by appearance by attorney: Matter of Graham, 39 Misc. 226; 79 N. Y. Supp. 573.

h. An omission to name in a petition for the disposition of real property of a decedent for the payment of debts, and to cite one claiming an interest in such real property under the heirs of the decedent, is not fatal to the proceeding; but the petition may be amended or a supplemental citation issued upon the proper affidavits at any time prior to an order affecting the sale of the premises themselves: Matter of Wheeler, 48 Misc. 323.

§ 2476. Exclusive jurisdiction.

See § 2503, post, What papers to be transmitted to secretary of state.

See § 2611, post, What wills may be proved.

See § 2695, post, When surrogate to issue ancillary letters.

i. **Letters.**—Where letters of administration are issued upon a petition, in which the only fact stated conferring jurisdiction on the surrogate to issue letters is that the decedent was a resident of the county in which the court is held, if, upon the trial of an action brought by the administratrix, it appears that the decedent was not a resident of the state of New York, but of Canada, the administratrix cannot maintain the action; in the action, the jurisdiction of the surrogate's court to issue letters may be attacked and the letters cannot

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be upheld by showing facts which were not before the surrogate when he issued the letters: McCarthy v. Supreme Court of Foresters, 107 App. Div. 185.

a. Chapter 230 of the laws of 1898, § 4, subd. 2, relating to the public administrator of New York, and § 2476, defining the exclusive jurisdiction of surrogates' courts, must be construed as meaning that the assets must "arrive" or "come" into the state in good faith, in due course of business and not for the purpose of securing a resident plaintiff who can prosecute a negligence action against a foreign corporation on a cause of action arising between citizens of another state: Hoes v. N. Y., N. H. & H. R. R. Co., 173 N. Y. 435; 33 Civ. Pro. R. 308, rev'g 73 App. Div. 363; 77 N. Y. Supp. 117.

b. Though an administrator appointed in another state, brings into this state securities belonging to the decedent, the fact that such securities are in this state does not empower a surrogate of the county where they are situated to issue letters of administration under § 2476, subd. 3: Matter of McCabe, 84 App. Div. 145; 82 N. Y. Supp. 180.

c. **Will in another state.**—Under the provisions of the Code, letters testamentary or letters of administration under the 4th subdivision of § 2476 cannot be issued without probate proceedings. The fact that the will is filed and remains in another state does not change the situation, for the reason that a commission might be issued to take proof of the will and the commissioners would be considered as officers of the court and the production of the will before them would be held to be a production before the court in the person of its commissioner: Spratt v. Syms, 104 App. Div. 232.

d. Even if the surrogate's court had jurisdiction to issue ancilliary letters of administration with the will annexed upon the estate of a testator who died in New Jersey, it should not exercise such jurisdiction when the estate is insolvent and all the personal property is in that state, etc.: Matter of Gennert, 96 App. Div. 8; 89 N. Y. Supp. 37.

e. Payment of a decedent's savings bank account to a foreign administrator under letters of administration issued in the state of New York, considered: Maas v. German Sav. Bank, 73 App. Div. 524; 77 N. Y. Supp. 256.

§ 2477. Concurrent jurisdiction of two or more surrogates.

f. **Non-resident.**—Where a non-resident dies, owning stock of several domestic corporations whose principal places of business are in different counties, such stock is, within § 2476, subd. 3, property within the county where the corporation has its principal place of business, and if a petition for letters testamentary or of administration has not been filed in any other county, the surrogate of such county has jurisdiction to assess a transfer tax on the stock situated in all the counties, under § 229, Tax Law, and § 2477 of the Code of Civil Procedure: Matter of Arnold, 114 App. Div. 244.

§ 2478. Jurisdiction, how affected by locality of debts.

g. A temporary administrator, whose function is only to collect and preserve the estate, may be appointed upon much weaker proof, raising a presumption of the death of the intestate, than a permanent administrator: Czech v. Bean, 35 Misc. 729; 72 N. Y. Supp. 402.

§ 2481. Incidental powers of the surrogate.

See § 1282 et seq., ante, Setting aside a judgment in a court of record.

See § 2647, post, Probate of will may be revoked.

h. **Accumulations.**—The surrogate's court has jurisdiction to determine as to the validity of a provision of a will to accumulate under certain conditions: Matter of Raymond, 73 App. Div. 11; 76 N. Y. Supp. 355.

i. **Judicial settlement.**—A judicial settlement of an administrator's accounts is void as against interested parties not cited or appearing thereon: Matter of Killain, 172 N. Y. 547, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

j. **Trust fund.**—In a proceeding to require the personal representative of an executor to render an account of the latter's proceedings, the surrogate has jurisdiction to determine that the executor did not separate a trust fund from the *corpus* of the testator's estate and that the will created such an equitable conversion of the testator's real estate in personalty, as authorized the executor to collect rents and sell the realty and apply the proceeds to the payment of legacies: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

k. **Abating proceeding.**—The right to revive a proceeding for a compulsory accounting by an administrator, in the event of his death during the pendency of the proceedings, provided for by § 2606, is a valuable right to the parties to the proceedings, and the surrogate

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before whom the accounting is pending has no power of his own motion, without notice to any of the parties, to make an order adjudging that the proceeding has abated and directing the petitioner to pay the stenographer's fees: Matter of Armstrong, 72 App. Div. 286; 76 N. Y. Supp. 37.

a. **Sale of real estate.**—A surrogate's decree directing a sale of a decedent's estate for the payment of debts is proper, notwithstanding a devise charging the property with the decedent's debt or a power of sale therefor: Matter of Wood, 70 App. Div. 321; 75 N. Y. Supp. 402.

b. **Revoking letters.**—Upon an application for the revocation of letters testamentary to an executor who was not required to give the bond provided for in § 2638, the surrogate's court has power, under § 2481, subds. 6 and 11, as a condition of denying the application, to require the executor to give a bond: Matter of Wischmann, 80 App. Div. 520.

c. **Appeal.**—On an appeal from an order of the surrogate's court denying an application to vacate a decree of that court settling the accounts of executors, it is the duty of the appellate division, under § 2481, subd. 6, to examine the question involved as though an original application to open the decree had been made to that court, and the appellate division is not obliged to affirm the order, simply because it does not appear that the surrogate has abused the discretionary power vested in him with respect to the opening of decrees: Matter of Wicke, 74 App. Div. 221.

d. **Opening a decree.**—The surrogate may in his discretion open a decree upon the ground of newly discovered evidence, but will do so only where the evidence is likely to change the result, is material, is not cumulative and could not have been obtained on the former trial or hearing by the moving party by the exercise of reasonable diligence: Matter of McManus, 35 Misc. 678; 72 N. Y. Supp. 409.

e. The power of the surrogate, under the provisions of § 2481, to open decrees, is the same as that possessed by the supreme court over its judgments, so far as the statute authorizes it to exercise the same, but does not extend over final decrees made by an appellate tribunal: Matter of Westerfield, 61 App. Div. 413; 70 N. Y. Supp. 641.

f. The surrogate has no authority to grant a new hearing for newly discovered evidence under subd. 6 of § 2481, unless the moving party shows that the new evidence sought to be introduced could not with reasonable diligence have been obtained upon the hearing: Matter of McManus, 66 App. Div. 53.

g. **Modifying decree.**—Although a corporation and legatee, exempt by law from taxation, has been duly notified by a transfer tax appraiser of the time and place of the appraisal of the estate of the decedent who gave the legacy and has made default thereon, yet, where the corporation was not subsequently notified by the surrogate, as required by the Tax Law, of his determination of the taxable value of the legacy, the surrogate may in the absence of laches entertain in his discretion an application upon the part of the corporation, made more than sixty days subsequent to the decree, to modify it and may thereupon exempt the corporation from the transfer tax: Matter of Daly, 34 Misc. 148; 69 N. Y. Supp. 494.

h. A surrogate cannot open or modify his decree in order to correct errors of substance alleged against it, as the remedy of the party aggrieved is by appeal and not by motion, and such a motion will be denied where its purpose is to review a decision of the surrogate refusing to charge an accounting executor with certain interest, allowing a payment made him for preparation of his account, giving him commissions and making an allowance to his counsel: Matter of Walrath, 37 Misc. 696.

i. A surrogate has power, without limitation as to time, to vacate or modify a decree in a proper case, provided it is exercised in the same manner as in a court of record, and the two years' limitation of § 1290 does not apply to the surrogate's court, nor is he precluded from acting by expiration of the time to appeal: Matter of Mather, 41 Misc. 414; 84 N. Y. Supp. 1105.

j. Where it appears that the statute under which a surrogate acted in assessing a tax was declared unconstitutional by the court of appeals, the surrogate has power under § 2481, subd. 6, and § 229 of the Tax Law to vacate such decree although the time to appeal has expired: Matter of Scrimgeour, 80 App. Div. 388; 80 N. Y. Supp. 330.

k. It would seem that the overvaluation of real estate by a surrogate for the purpose of fixing the amount of the transfer tax constitutes an error of fact arising upon the trial and hence is not within the purview of § 1283, made applicable to surrogates' courts by § 2481, authorizing the court to set aside a judgment for an error of fact not arising upon the trial: Matter of Lowery, 89 App. Div. 226.

l. Where the surrogate has determined the cash value of an estate for the purposes of the transfer tax, he has no power to modify his determination in order to allow the executor the amount of a judgment subsequently recovered: Matter of Connelly, 38 Misc. 466; 77 N. Y. Supp. 1032.

m. A proceeding under subd. 6 of § 2481 authorizing the surrogate to

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open, modify or set aside his order is not a proper method to attack the probate of a will, and after probate and after the lapse of two years without any contest being made, the surrogate should deny a petition to open the probate brought under the section aforesaid: Matter of Gaffney, 116 App. Div. 583.

a. § 2481 does not authorize the vacating of a decree settling the accounts of an administrator after many delays and adjournments covering a period of twenty years, when said administrator was served with a notice of entry but allowed the time to expire: Matter of Bodine, 119 App. Div. 493.

b. **Transfer tax.**—Where, in assessing a transfer tax, one of the debts of the decedent was inadvertently overlooked, the surrogate may modify his decree by reducing the tax to the proper amount and may order the excess refunded: Matter of Campbell, 50 Misc. 485.

c. **Validity of will.**—When a will and codicil have been admitted to probate, the validity of said will, so far as it relates to personal property, cannot be attacked collaterally in a proceeding to contest the validity of payments made to legatees therein; such probate is conclusive so far as it relates to personal property until reversed on appeal, or revoked by the surrogate on the petition of an interested person within one year after probate, or opened, vacated, modified or set aside by the surrogate under like conditions as in a court of record, or unless an action is brought in the supreme court to determine its validity within two years: Matter of Wohlgemuth, 110 App. Div. 645.

d. The surrogate's court has no inherent power to construe the provisions of a will except as a necessary incident to its general powers to control executors and testamentary trustees and to direct payments or charging of legacies or the like: Kirk v. McCann, 117 App. Div. 56.

e. **Lien.**—A surrogate's court has not the broad powers of a court of equity which are necessary to enforce a creditor's lien upon the proceeds of a policy of insurance issued on the life of a husband, in which the wife was named as beneficiary and the annual premium on which was in excess of $500: Matter of Thompson, 184 N. Y. 36, rev'g 102 App. Div. 617; 92 N. Y. Supp. 1147.

§ 2502. Books for recording instruments settling estates, etc.

Each surrogate must provide a book in which shall, upon the application of any person interested, be recorded instruments settling estates, in whole or in part, executed by one or more executors, administrators, or testamentary trustees and one or more legatees, devisees, distributees or creditors; also like instruments executed by guardians and wards who have attained full age; also instruments acknowledging payment of moneys pursuant to the provisions of decrees for the judicial settlement of accounts of executors, administrators, testamentary trustees and guardians. Every such instrument to be recorded shall be acknowledged or proved and certified in like manner as would be required in the case of a deed of real estate to be recorded in the same county; and the record thereof, or a certified copy of such record, shall be presumptive evidence of the contents of such instrument and its due execution. The person presenting any such instrument for record shall pay to the clerk of the surrogate's court a fee of ten cents for each folio. The expense of providing the book specified in this section is a county charge.

Added by chap. 350 of 1906.

§ 2509. Clerk of surrogate's court; deputy clerk of surrogate's court; how appointed; their powers.

By a written order filed and recorded in his office, which he may in like manner revoke at pleasure, a surrogate may appoint a clerk of the surrogate's court, and in any county containing a city of the second class the surrogate may also appoint a deputy clerk of said court. Both said

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clerk and deputy clerk shall be paid by the county, and the board of supervisors or board of aldermen, as the case requires, must fix the compensation of the clerk and deputy clerk so appointed. The clerk and deputy clerk so appointed may severally exercise, concurrently with the surrogate, the following powers of the surrogate:

1. He may certify and sign as clerk of the court, or as deputy clerk of the court, as the case may be, any of the records of the court, including the certificate specified in section twenty-six hundred and twenty-nine of this act, and the records and papers specified in subdivision nine of section twenty-four hundred and eighty-one of this act.

2. He may issue any mandate, to which a party is entitled as of course, either unconditionally or on the filing of any paper; and may sign, as clerk of the court, or as deputy clerk of the court, as the case may be, and affix the seal of the court to any letters or mandate issued from the court.

3. He may certify in the manner prescribed by chapter ninth of this act, a copy of any paper, required or permitted by law to be filed or recorded in the surrogate's office.

4. He may adjourn to a definite time, not exceeding thirty days, any matter, when the surrogate is absent from his office, or unable, by reason of other engagements, to attend to the same.

5. He may take the acknowledgment or proof of any instrument, to be used or filed in the court of which he is clerk or deputy clerk. Said deputy clerk shall also act as confidential clerk to the surrogate.

6. The clerk of the surrogate's court of each of the counties of Kings and New York may, with the approval of the surrogate or surrogates of his county, authorize or deputize one or more of the other clerks, employed in the surrogate's office of his county, to sign his name, and exercise such of the other powers conferred upon him by this section, as he shall designate. The surrogate may prohibit the clerk and deputy clerk, or either of them, from exercising any powers specified in this section, but the prohibition does not affect the validity of any act of the clerk or deputy clerk done in disregard of the prohibition. The clerk or deputy clerk or other person employed in any capacity in a surrogate's office, shall not act as appraiser, as attorney or counsel, or as referee, or special guardian, in any matter before the surrogate.

L. 1863, c. 362, § 9; L. 1874, c. 456; L. 1877, c. 206, § 3; Id., c. 274, §§ 1, 2, 3; L. 1878, c. 3.

Amended by chap. 686 of 1893, chap. 651 of 1900, chap. 42 of 1903 and chap. 209 of 1907.

§ 2510. Additional powers of clerks of surrogates' courts.

The clerk of the surrogate's court, and in the county of Kings two other clerks to be designated by the surrogate, in addition to the powers enumerated in section twenty-five hundred and nine, may exercise, concurrently with the surrogate of the county the following powers of the surro-

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gate: On the return of a citation issued from such surrogate's court on a petition for the probate of a will, where no objection to the same is filed, or, where all the persons entitled to be cited, sign and verify the petition, or personally, or by attorney, appear on the probate thereof, cause the witnesses to the will to be examined before him. Such examination must be reduced to writing, and for such purpose, they are hereby authorized to administer and certify oaths and affirmations in such cases in the same manner and with the same effect as if administered and certified by the surrogate.

Added by chap. 686 of 1893.
Amended by chap. 211 of 1894, chap. 615 of 1895 and chap. 95 of 1906.

§. 2511. Surrogate liable for clerk's acts.

A surrogate hereafter elected or appointed, and the sureties in his official bond, are liable for any act of the clerk or deputy clerk of the surrogate's court in the discharge of his official duties, during the surrogate's term of office, as if the act was performed by the surrogate. The surrogate may take security from the clerk or deputy clerk, or either of them, to indemnify him against the liability created by this section.

Amended by chap. 209 of 1907.

§ 2513. Stenographers in other counties.

The surrogate of each county, except New York, Kings, Hamilton, Queens and Richmond, may, in his discretion, appoint, and at pleasure remove, a stenographer for his court, who, except in Sullivan county, shall receive a salary to be fixed by such surrogate, not exceeding in counties having a population less than thirty thousand, eight hundred dollars per annum; in counties having a population of thirty thousand and not more than fifty thousand, not exceeding one thousand dollars per annum, and in counties having a population exceeding fifty thousand, not exceeding twelve hundred dollars per annum, except that in counties in which are located cities of the second class, such salary shall not exceed eighteen hundred dollars per annum; and in any county wholly containing a city of the first class, such salaries shall not exceed two thousand dollars per annum. The population of the several counties shall be determined by the last preceding census. If a regular stenographer is appointed in Sullivan county, his salary shall be five hundred dollars per annum. The board of supervisors shall provide for the payment of such salary in the same manner as other county expenses are paid. Such stenographer shall deliver to the surrogate of the county a full copy of all the minutes taken by him; and on receipt of his fees, not exceeding three cents per folio, a like copy to the party, or each of the parties, to the proceeding in which the minutes were taken, except that in the county of Onondaga, such fees shall not exceed six cents per folio. When not actually engaged in the discharge of his duties as stenographer, he shall perform such clerical duties in connec-

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tion with the surrogate's court as the surrogate directs. In counties wherein the surrogate is also county judge, the stenographer so appointed shall be the stenographer of the county court, and shall perform the duties pertaining to a stenographer of the county court without additional compensation. In counties where, for any cause, a regular stenographer for his court has not been appointed, as provided by this section, the surrogate may, in individual proceedings requiring the services of a stenographer, appoint a stenographer who shall be paid a reasonable compensation, certified by the surrogate in every case in which he takes notes of testimony, from the estate or matter in which such services are rendered.

§ 2. The compensation of a stenographer for the surrogate's court of the county of Sullivan appointed pursuant to this section shall be paid monthly out of the contingent fund of the county until provision shall be made by the board of supervisors therefor.

Chap. 874, §§ 1, 2, of 1871.

Amended by chap. 686 of 1893, chap. 248 of 1896, chap. 265 of 1902, chap. 470 of 1903, chap. 59 of 1904, chap. 570 of 1905 and chap. 226 of 1906.

§ 2514. Definition of expressions used in this chapter.

See § 1870, ante, Next of kin; defined.

See § 1905, ante, Next of kin; defined.

a. **Person interested.**—"A person interested" does not apply to representatives of deceased uncles and aunts of a decedent who left nephews and niece: Matter of Thompson, 41 Misc. 223; 83 N. Y. Supp. 983.

b. The term "person interested" includes a person entitled contingently to a share in the estate as legatee: Matter of Hunt, 84 App. Div. 159; 82 N. Y. Supp. 538.

c. When an application is made by a "person interested" within § 2514, subd. 11, the surrogate, before granting such application, may ordinarily examine into the question of whether the applicant is a party interested in the estate, and if necessary in order to aid him in determining the question, may in a proper case send the issue to a referee: St. John v. Andrews, 104 App. Div. 460; 34 Civ. Pro. R. 279.

d. An agreement between an attorney and his client as to the attorney's compensation, and which provides that it shall be a certain part of the recovery, creates a lien on the recovery but does not constitute an assignment of that part of the recovery so as to make the attorney a party interested in the estate within the meaning of § 2514, subd. 11: Matter of Evans, 65 App. Div. 100; 72 N. Y. Supp. 495.

e. A judicial settlement of the accounts, etc., of an administrator is void as against persons interested in the estate, within the meaning of subd. 11 of § 2514, whether known or unknown, who were not duly cited to appear or did not voluntarily appear, since §§ 2518-2523 provides ample protection to such administrator by permitting him to sue out a citation running against persons unknown: Matter of Killan, 172 N. Y. 547; 33 Civ. Pro. R. 241, rev'g 66. App. Div. 312; 72 N. Y. Supp. 714.

f. **Testamentary trustees.**—Executors clothed with certain powers under a will held to be "testamentary trustees," defined in subd. 6, § 2414, and that upon the settlement of the account of one of two testamentary trustees who alone qualified the surrogate's court had jurisdiction under § 2472 to determine whether she had properly disposed of the principal of the trust fund: Matter of Wilkin, 90 App. Div. 324; 86 N. Y. Supp. 360.

g. **Creditor.**—A person who alleges that he is a stockholder in a corporation out of which the testator, as officer and director, improperly made large profits — for which the applicant has sued in its behalf because the corporation would not sue — is not a creditor of the estate nor interested in it, and therefore cannot compel the executors of it to file an inventory: Matter of Huntington, 39 Misc. 477; 80 N. Y. Supp. 220.

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§ 2516. Proceedings to be commenced by citation.

a. This section does not confer on the surrogate power to take notice of the waiver of the issuing and service of a citation executed before any proceedings had been begun: Matter of Graham, 39 Misc. 226.

§ 2517. Id.; within the statute of limitations.

See § 399, ante, Attempt to commence action in a court of record.

b. **Claims.**—Where administrators, upon being cited to account, file a voluntary petition to have their accounts settled and the parties in interest cited to attend the same, and no citation is issued in the latter proceeding until after another petition has been filed for a compulsory accounting nine years later, the claims of creditors, presented to the administrators in time and not disputed, do not become outlawed by lapse of time, and the next of kin are not entitled to take the surplus to the exclusion of such creditors: Matter of Hannon, 46 Misc. 229.

§ 2518. Persons constituting a class; when to be cited; citation when some are unknown.

c. **Inquiry.**—§ 2753 provides for an inquiry by the surrogate in the event that any of the matters necessary to be set forth cannot be ascertained by the petitioners, and this "inquiry" conforms to that authorized by § 2518: Richmond v. Freeman's National Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

d. **Citation.**—A judicial settlement of the accounts, etc., of an administrator is void as against persons interested in the estate, within the meaning of subd. 11 of § 2514, whether known or unknown, who were not duly cited to appear or did not voluntarily appear, since §§ 2518-2523 provide ample protection to such administrator by permitting him to sue out a citation running against persons unknown: Matter of Killan, 172 N. Y. 547, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

e. In a proceeding for the sale of real estate for the payment of debts and funeral expenses, an allegation in the petition that the names and number of the heirs-at-law of the deceased are unknown to the petitioner and she does not know of any persons claiming to be such, is insufficient to enable the court to dispense with a citation to such heirs by name to issue a citation to them as a class; diligent inquiry to discover them should be shown: Matter of O'Neill, 49 Misc. 285.

f. When the citation of a legatee under a will is not required, the will cannot be attacked collaterally on the ground that such legatee was not cited: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367, aff'd 184 N. Y. 578.

§ 2522. Service by publication, etc.

See § 2526, post, Service upon a corporation, infant, lunatic, etc.

§ 2523. Id.; upon persons unknown, etc.

See § 2520, ante, Citation; how served within the state.

g. **Citation.**—A judicial settlement of the accounts, etc., of an administrator is void as against persons interested in the estate, within the meaning of subd. 11 of § 2514, whether known or unknown, who were not duly cited to appear or did not voluntarily appear, since §§ 2518-2523 provide ample protection to such administrator by permitting him to sue out a citation running against persons unknown: Matter of Killan, 172 N. Y. 547, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

§ 2524. Order, when and how made; contents thereof.

See § 440, ante, By whom order may be made; contents of order.

h. A publication of a citation in a proceeding in a surrogate's court, made pursuant to § 2524, need not be completed eight days before the return day of the citation: Matter of Denton, 86 App. Div. 359.

§ 2525. What time required for delivery of copy, etc.

See § 439, ante, Papers upon which order for publication may be made.
See § 440, ante, By whom order may be made; contents of order.

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§ 2526. Service upon a corporation, infant, lunatic, etc.

See § 431, ante, How personal service of summons made upon a domestic corporation.

See § 432, ante, How personal service of summons made upon a foreign corporation.

§ 2528. Appearance; how made, and effect thereof.

See § 55, ante, Party may appear in person or by attorney.

See § 424, ante, Effect of voluntary appearance.

See § 796, ante, Paper may be served personally.

a. **Attorney and client.**—An attorney has a lien, for services rendered in a surrogate's court, upon a decree in a probate matter, made before the amendment of § 66 of the Code giving an attorney a lien in a special proceeding took effect, and upon his application, when the amount thereof has been liquidated by a judgment at law, the surrogate has power to protect the lien by vacating a satisfaction of the decree made in disregard of the attorney's rights: Matter of Regan, 167 N. Y. 338.

§ 2529. Surrogate's father or son not to practice before him.

See § 50, ante, Judge's partner or clerk not to practice before him, judge not to practice in a cause which has been before him.

§ 2530. Special guardian; when to be appointed.

See § 468 et seq., ante, Appointment of guardian ad litem for infant parties.

b. The fact that the special guardian of an incompetent has been allowed and has been paid costs out of the estate on an accounting by the committee of said incompetent, does not constitute a waiver of the right of such special guardian to appeal from a decree of the surrogate settling the account; the incompetent is not prejudiced because the special guardian has merely received just compensation for his services and the committee is not prejudiced because the sum was paid out of the estate: Matter of Edwards, 110 App. Div. 623.

§ 2534. Verification thereof.

See § 2794, post, Dower in lands under contract; how computed.

§ 2537. Money paid into court and securities taken; how disposed of.

See § 743 et seq., ante, Disposition and care of money paid into court.

See rule 68 (Sup. Ct.), Investment of money paid into court.

c. **Decree.**—A decree directing an administrator, if unable to pay a distributive share to the distributee, to pay it "to the surrogate's court" of the county, must be taken to mean payment into court in the manner prescribed by § 2537, and therefore payment to the surrogate himself cannot discharge the administrator: Matter of Sackett, 38 Misc. 463.

§ 2538. Certain provisions made applicable to proceedings in surrogates' courts.

See § 721 et seq., ante, Correction of mistakes, omissions, defects, etc.

See § 796 et seq., ante, Service of papers.

See § 803 et seq., ante, Discovery of books and papers.

See § 887 et seq., ante, Depositions for use within the state.

d. Where, in fixing a transfer tax upon the estate of a deceased person, there is included an item for a tax upon property erroneously assumed to have passed to a son, such error may be corrected by the surrogate within two years from the entry of the order fixing the tax and the tax order refunded: Matter of Willets, 51 Misc. 176.

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§ 2545. Exceptions upon a trial.

See § 992 et seq., ante, Exceptions and motions for a new trial.

a. **Prejudice.**—Exceptions to the admission and rejection of evidence in a special proceeding in the surrogate's court will not be considered by the appellate division on review unless "necessarily" prejudicial: Matter of Watson, 101 App. Div. 550; 34 Civ Pro. R. 150.

b. An appeal must fail unless it is apparent that without the improper evidence the respondent would not have succeeded: Matter of Benton, 75 App. Div. 522; 78 N. Y. Supp. 314.

c. **Decree reversed.**—Where there was no evidence that executors had sufficient funds to pay certain judgment and no such finding by the surrogate, the decree should be reversed and the proceeding remitted to the surrogate's court for trial and decision: Matter of Sherwood, 75 App. Div. 342; 78 N. Y. Supp. 186.

d. Evidence considered and held insufficient, under § 2545, to authorize a reversal of a decree admitting a will to probate: Matter of Woodward, 167 N. Y. 28, rev'g 52 App. Div. 494.

e. It is reversible error for a surrogate not to allow the cross-examination of a witness, who had been paid money for his interest in an estate and testifies in support of a claim against him as to his previous opposition thereto: Matter of Steenwerth, 97 App. Div. 116.

f. **Reference.**—The surrogate is not required by § 2545, or by any other section, to make separate findings of fact and conclusions of law where he confirms the report of a referee as his own, in which are such separate findings of fact and conclusions of law: Matter of Bettman, 65 App. Div. 229.

g. Where the surrogate has appointed a referee to examine an executor's account and to hear and determine the questions arising upon the objections thereto and to report to the court, the surrogate, when the report is filed, is not bound to comply with the provisions of § 2545 which require him to file in his office a decision stating separately the facts found and the conclusions of law: Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755.

h. **Evidence not considered.**—Where the surrogate admits evidence of declarations, subject to the contestant's motion to strike out, and over the latter's objection reserves his decision upon the motion, the error, if any, is cured by a statement in the surrogate's opinion that the evidence in question was stricken out by him and was not considered by him in his decision: Matter of Hopkins, 73 App. Div. 559, at 570; 77 N. Y. Supp. 178.

i. Upon an appeal from an order denying an application for the revocation of letters of administration, heard upon the moving papers and those submitted in opposition, where no issues were tried, the appellant should print the papers recited in the order, which should either be certified by the surrogate's court or stipulated to be the papers in accordance with the rules governing such matters; in such case an application to settle a case on appeal or to pass upon requests to find will be denied: Matter of Sprathoff, 50 Misc. 109.

§ 2546. Surrogate may refer question of fact, or account.

j. In a proceeding for the sale of a decedent's real estate for the payment of his debts, the surrogate has power, under § 2546, to appoint a referee to take and report the evidence upon the facts with his opinion thereon, and the referee has the same power to pass on question of evidence as a referee appointed by the supreme court: Matter of Walker, 43 Misc. 475.

k. **Short decision.**—Where a surrogate appoints a referee to examine an executor's account and to hear the questions arising upon the objections thereto, the reference is governed by § 2546, and the report of the referee is subject to confirmation or modification by the surrogate, and the referee may, under § 1022, file a short decision: Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755.

l. **Referee's report.**—Under this section, a surrogate has power to reject the report of a referee, finding that charges against an executor were not sustained, and enter a decree removing such executor unless the party desiring a confirmation of the report has previously, and after the expiration of ninety days, given the notice prescribed by the statute: Matter of Clark, 168 N. Y. 427; 32 Civ. Pro. R. 226, rev'g 61 App. Div. 337; 70 N. Y. Supp. 353.

What constitutes a waiver of the right conferred by the statute. Id.

m. **Report modified.**—Under § 2546, the surrogate has power to modify the report of a referee, and himself determine upon the evidence submitted to the referee any question presented upon an accounting: Matter of Schaefer, 65 App. Div. 378; 73 N. Y. Supp. 57.

n. **Objections.**—Where objections are filed to an account, an order of reference is properly made, on the motion of the surrogate and without notice to any of the parties: Matter of Wood, 34 Misc. 209; 69 N. Y. Supp. 491.

o. **Account.**—Even though a referee is appointed by a surrogate under

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§ 2546 to examine the account of an administratrix and to hear and determine the questions arising upon its settlement, yet his report is not final, as his conclusions are to be reported to the surrogate, who may confirm, modify or reject the report, and the surrogate's decree is the first binding adjudication, and from it only an appeal can be taken: Matter of Barefield, 177 N. Y. 387, rev'g 82 App. Div. 463; 81 N. Y. Supp. 843.

a. When, in a proceeding to appraise the estate of a decedent for the purpose of levying a transfer tax, the question as to whether the decedent was a resident of this state is at issue, the surrogate has power, under § 2546, to refer the question to a referee to take testimony and report with an opinion, and to direct the appraiser to await the coming in of such report: Matter of Bishop, 111 App. Div. 545.

b. A report of a referee appointed to take and state the accounts of an assignee for the benefit of creditors, which is filed after the death of the assignee is a nullity, but the administrator or sureties of the deceased assignee may avail themselves of § 1019 and elect to end the reference, on the ground that the referee's report was not filed or delivered to the attorneys of one of the parties within sixty days from the time the case was finally submitted: Matter of Venable, 111 App. Div. 508.

c. A surrogate has power under § 66 to determine the value of services rendered by an attorney to executors and to charge the same as a lien upon the estate, and may appoint a referee to take the testimony and report the value of such services: Matter of Smith, 111 App. Div. 23.

d. **Report.**—While a referee appointed by a surrogate to take and state an account must separately state and number his findings of fact and conclusions of law, yet when he has substantially done so by making a report with numbered paragraphs in which each successive issue is taken up, the facts stated and a conclusion reached, a subsequent motion to open the surrogate's decree thereon for the making of more formal findings and conclusions is properly denied: Matter of Schroeder, No. 2, 113 App. Div. 221.

e. **Accounts.**—When a surrogate has sent the account of an administratrix to a referee he may, after the referee's report, send the case back for further proof: Matter of Schroeder, 113 App. Div. 204; 99 N. Y. Supp. 176.

f. **Fees.**—Where a contested application for an increase of the bond of administrators is referred by the surrogate for the taking of testimony and by stipulation the fees of the stenographer are made a part of the referee's fees and payable out of the estate, the administrators are not individually liable for the referee's fees: Bottome v. Neely, 54 Misc. 258.

g. When a testatrix made a bequest to a benevolent organization by a name descriptive of its objects, adding the words "by whatever name said society may be known" and there is more than one society coming within the description, the court will take proof of the objects of the different societies, the names by which they have been known, the testatrix's knowledge of them and her previous gifts and declarations for the purpose of determining which society the testatrix intended: Matter of North, 52 Misc. 430.

§ 2547. Trial by jury; when ordered.

See § 823, ante, Feigned issues abolished and order for trial substituted.

h. Under §§ 2547 and 2548, the only authority given to the court to which the questions of fact are sent is to try those questions and certify the result to the surrogate's court: Matter of Murphy, 79 App. Div. 541; 81 N. Y. Supp. 102.

§ 2548. Id.; how reviewed.

See § 1001, ante, Motion for new trial before appellate division.

See § 1003, ante, Review of trial of one or more specific questions by a jury.

i. Under §§ 2547 and 2548 the only authority given to the court to which the questions of fact are sent is to try those questions and certify the result to the surrogate's court: Matter of Murphy, 79 App. Div. 541; 81 N. Y. Supp. 102.

§ 2550. Definition of "final order" and "decree."

j. A decree of a surrogate is not conclusive upon the parties in establishing a rule of law which will control in the later administration of the estate: Matter of Hurlbut, 51 Misc. 264.

§ 2551. Decree settling an account, to contain summary thereof.

See § 2498, subd. 4, Book for decrees to be kept by surrogate.

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§ 2552. Decree or order; when evidence of assets.

a. A decree of the surrogate's court, entered against the administratrix of a deceased trustee in a proceeding for a judicial settlement of the accounts of the said trustee, is not conclusive evidence that there are sufficient assets in her hands as administratrix of the deceased trustee to satisfy the sum directed to be paid by the decree, and an execution cannot be issued upon the decree against the individual property of the administratrix, unless the leave of the surrogate is first obtained: Matter of Seaman, 63 App. Div. 49; 32 Civ. Pro. R. 194; 71 N. Y. Supp. 376.

b. When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except on appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

c. A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of §§ 2714 and 2552, conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under § 2555; if the executor is insolvent, he may be relieved from imprisonment under § 2286: Matter of Strong, 111 App. Div. 281; 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

§ 2553. Decree for money; how docketed.

See § 1245 et seq., ante, Docketing a judgment in the supreme court.

d. The docketing of a decree has the same force and effect as if it was a judgment, and the surrogate or his clerk alone has power to enforce the decree: People ex rel. Sackett v. Woodbury, 70 App. Div. 416; 72 N. Y. Supp. 236.

e. **Inquiry.**—§ 2753 provides for an inquiry by the surrogate in the event that any of the matters necessary to be set forth cannot be ascertained by the petitioners, and this "inquiry" conforms to that authorized by § 2518: Richmond v. Freeman's National Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

§ 2554. Enforcement of decree by execution.

See § 1825, ante, Leave to issue execution against an executor.

f. **Docketing.**—The docketing of a decree has the same force and effect as if it was a judgment, and the surrogate or his clerk alone has power to enforce the decree: People ex rel. Sackett v. Woodbury, 70 App. Div. 416; 72 N. Y. Supp. 236.

g. **Execution.**—Where a surrogate's decree directs the payment of a sum of money by an executor, as such, execution thereunder must run against his property, as he is the party directed to make the payment: Matter of Quackenbos, 38 Misc. 66.

h. This section authorizes the issuance of an execution to enforce the payment of moneys directed by the decree of a surrogate's court, whether the sum to be paid consists in costs alone or otherwise: Matter of Hirsch, 185 N. Y. 598.

§ 2555. Id.; punishment for contempt.

See § 1241, ante, When a judgment may be enforced by punishment for disobeying it.

See § 2266 et seq., ante, Proceedings to punish contempt of court other than criminal contempts.

i. **Debt.**—Where a decree has charged an executor with the debt, his failure to comply with the decree is punishable with fine and imprisonment, and these the surrogate may inflict: Matter of David, 44 Misc. 337; 89 N. Y. Supp. 927.

j. **Supreme court.**—The surrogate has jurisdiction to make a decree directing payment by the administratrix of a sum for which an execution was authorized and to enforce compliance therewith by contempt proceedings in the same manner as though the judgment or decree directing payment of the money had been rendered in the surrogate's court instead of the supreme court: Matter of Mahoney, 88 App. Div. 140; 84 N. Y. Supp. 329.

k. **Punishment.**—Since the enactment of § 2555, an executor, who disobeys the decree of a surrogate directing the payment by him of money generally and not out of a specific fund, should be pun-

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ished as for a contempt of court, and a fine to the amount of the legacy which he had been directed to pay: Matter of Holmes, 79 App. Div. 267; 79 N. Y. Supp. 687.

a. An executor who refuses to obey an order requiring him to pay over moneys to testamentary trustees in lieu of unauthorized securities held by him is guilty of contempt of court. He is liable for interest on the sum accruing during a futile appeal from the order; and under the circumstances a fine of an amount equal to the unpaid interest is proper: Matter of Ryer, 120 App. Div. 154.

b. A provision in a decree of a surrogate's court rendered upon the judicial settlement of an administrator's accounts directing the administrator to pay personally a specified amount of costs to the contestants, cannot be enforced by contempt proceedings pursuant to § 2555: Matter of Banning, 108 App. Div. 12.

c. A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of §§ 2714 and 2552, conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under § 2555; if the executor is insolvent, he may be relieved from imprisonment under § 2286: Matter of Strong, 111 App. Div. 281; 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

§ 2556. Definition of "order;" how enforced.

See § 767, ante, Definition of an order.
See § 779, ante, Collection of motion costs.
See §§ 3236, 3251, post, Motion costs.

§ 2557. Costs; how made payable.

d. A surrogate is not justified in imposing, pursuant to § 2557, the costs of a contested accounting upon a contestant personally, where it appears that some of the contestant's objections were well founded and should have been sustained: Matter of Corbin, 101 App. Div. 25.

e. Costs may properly be charged personally against an administrator appointed in another state, where he has been made a party, on his own application, to proceedings in the state of New York for a probate of a will of the decedent, and has appealed from a decree admitting such will to probate: Matter of Davis, 105 App. Div. 221; 93 N. Y. Supp. 1004, aff'd 183 N. Y. 468.

f. **Discretionary.**—In an action under § 2653a, brought to establish the invalidity of a will, the court in its discretion may award costs out of the estate to unsuccessful contestants of the will; in such an action the costs are governed by § 3230 and are discretionary; they are not governed by § 3228: Larkin v. McNamee, 109 App. Div. 884; 96 N. Y. Supp. 827.

g. **General guardian.**—Where, in a proceeding to compel a general guardian to account, the facts and circumstances indicate a lack of fairness and suggesting a disposition on the part of the guardian to deplete the estate of his ward, commissions may be denied him and costs awarded against him personally: Matter of Ward, 49 Misc. 181.

h. **Contempt.**—A provision in a decree of the surrogate's court, rendered upon the judicial settlement of an administrator's accounts directing the administrator to pay personally a specified amount of costs to the contestants, cannot be enforced by contempt proceedings pursuant to § 2555: Matter of Banning, 108 App. Div. 12.

i. **Special guardian.**—The fact that the special guardian of an incompetent has been allowed and has been paid costs out of the estate on an accounting by the committee of said incompetent does not constitute a waiver of the right of such special guardian to appeal from a decree of the surrogate settling the account; the incompetent is not prejudiced because the special guardian has merely received just compensation for his services and the committee is not prejudiced because the sum was paid out of the estate: Matter of Edwards, 110 App. Div. 623.

j. **Accounting.**—Neither the services rendered by counsel in aiding the administrator to establish his individual claim against the estate nor the disbursements incurred in the same effort may be paid for out of the assets; but costs payable out of the estate may be allowed to those who, in effect, represented the estate upon the questions litigated upon the accounting: Matter of Seigler, 49 Misc. 189.

§ 2558. Id.; when awarded.

k. The awarding of costs is entirely within the discretion of the surrogate's court, and the amounts awarded by him are properly based on affidavits and information submitted to him: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

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§ 2561. When surrogate to fix amount of costs.

a. **Discretion.**—The awarding of costs is entirely within the discretion of the surrogate's court, and the amounts awarded by him are properly based on affidavits and information submitted to him: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

b. In all cases where disputed claims are submitted to a surrogate for determination on a judicial settlement, pursuant to § 1822, the allowance or disallowance of costs to the claimant is in the surrogate's discretion, limited only by § 2561: Matter of Coonley, 38 Misc. 219; 77 N. Y. Supp. 269.

c. Where a disputed claim against a decedent's estate is referred by consent to the surrogate and is heard by him upon the judicial settlement, costs to the successful claimant are discretionary, their amount must be within the limits prescribed by § 2561, and should be determined upon the principles which govern the allowance or disallowance of costs in actions at law against such estates: Matter of Ingraham, 35 Misc. 577; 72 N. Y. Supp. 62.

d. **Contest.**—Where a surrogate had, without objection on the part of one party, treated the litigation as to the termination of a trust as a contest, such party could not object to allowances made by the surrogate through the word "contest," as used in § 2561, relates to the trial of an issue of fact: Matter of Hogarty, 62 App. Div. 79; 70 N. Y. Supp. 839.

e. **Counsel.**—The amount which executors may lawfully expend and be allowed for the services of counsel, upon the judicial settlement of their account, in preparing the same and for procuring it to be passed and settled is not limited by §§ 2561, 2562: Matter of Mitchell, 39 Misc. 120; 78 N. Y. Supp. 976.

f. **Infants.**—A surrogate has no power to allow a special guardian, appointed to represent infants upon the accounting of an executor any sum greater than that specified in § 2561: Matter of O'Keeffe, 80 App. Div. 513.

§ 2562. Additional allowance in settling accounts.

g. The amount which executors may lawfully expend and be allowed for the services of counsel, upon the judicial settlement of their account, in preparing the same and for procuring it to be passed and settled is not limited by §§ 2561, 2562: Matter of Mitchell, 39 Misc. 120; 78 N. Y. Supp. 976.

§ 2563. Allowance upon sale of real property.

h. A freeholder appointed to sell the real estate of a decedent may, under §§ 2563 and 2786, be allowed his expenses, counsel fees, etc., by the surrogate upon rendering his account of the sale, and is not obliged to pay over to the county treasurer the gross proceeds of the sale and wait for such payment until the final distribution under § 2763: Matter of McGee, 65 App. Div. 460.

§ 2567. Fees of the surrogate.

A surrogate shall not charge or receive any fee, except as follows:

1. Where, in a case prescribed by law, or in any other case, upon the application of a party, he goes to a place, other than his office, or the court room where he is required to hold court, in order to take testimony, he may charge, and receive to his own use, ten cents for each mile for going, and the same sum for returning.

2. He must charge, and receive to the use of the county, for a copy of a paper, ten cents for each folio, and for comparing and certifying a copy of papers on appeal or a case on appeal where printed copies thereof are presented by any party to any proceeding, one cent for each folio, except where the board of supervisors have allowed his clerk to receive fees for his own use; and in that case, his clerk may charge and receive the same fee. Where in a proceeding in the surrogate's court the attorneys for all the adult parties interested and special guardians, or general guardians, appearing for all infant parties interested, other than parties in default, or against whom a final order has been taken and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a

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certified copy is required by any provision of this act, the stipulation takes the place of a certificate as to the parties so stipulating, and the surrogate or his clerk is not required to certify the same or entitled to any fee therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts, and shall be used or filed with the same force and effect as if certified by the surrogate or his clerk.

L. 1869, c. 246, § 1; L. 1870, c. 359; L. 1844, c. 300, § 2; L. 1837, c. 460, § 69.
Amended by chap. 137 of 1904.
See chap. 137 of 1904, § 2, Repealing clause.

§ 2568. When party may appeal.

See § 1294, ante, When party may appeal.

a. **Executor.**—A person nominated as executor in an instrument offered for probate as a last will and testament is a party aggrieved by a decree of the surrogate, denying probate to such instrument, and is, therefore, entitled to appeal to the appellate division from such decree: Matter of Rayner, 93 App. Div. 114; 87 N. Y. Supp. 23.

b. An executor is a "party aggrieved" within the meaning of §§ 1294 and 2568 by a decree refusing to admit a codicil to probate: Matter of Stapleton, 71 App. Div. 1; 75 N. Y. Supp. 657; 33 Civ. Pro. R. 25.

c. **Party.**—It is not necessary that a party intending to take an appeal from the decree of a surrogate under § 2569 should first seek to intervene and become a party to the proceeding by means of a petition, or file exceptions to the findings of the surrogate: Matter of Sullivan, 84 App. Div. 51.

d. **Decree.**—On an appeal from a surrogate's decree, the appellate division may disregard incompetent testimony received by the surrogate and affirm the decree, if it finds on an examination of the other evidence in the case that the decision of the surrogate was correct: Matter of Crane, 68 App. Div. 355.

e. **Adjournment.**—A surrogate has power to grant an adjournment, and the remedy for the improper refusal to exercise such power is by appeal to the appellate division from the order refusing to grant the adjournment, and not by resort to a writ of prohibition: People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339; 76 N. Y. Supp. 865.

f. **Comptroller.**—The comptroller of the state of New York may appeal from an order of the surrogate's court determining that a part of a decedent's estate was not subject to the transfer tax: Matter of Dingman, 66 App. Div. 228; 72 N. Y. Supp. 694.

g. **Appellate division.**—§§ 2568 and 2572 govern cases on an appeal from surrogates' courts to appellate division and not appeals to surrogates' courts from one of its own decrees: Matter of Daly, 34 Misc. 148; 69 N. Y. Supp. 494.

h. Where, on an appeal to the appellate division from a decree of the surrogate's court, made in a proceeding for the probate of a will, it appears that the disposition which should be made of the questions of fact presented by the evidences given is not free from doubt, and the result reached in the surrogate's court is not entirely satisfactory, the appellate division will send the case to a trial term for a jury trial: Matter of Warnock, 103 App. Div. 62.

i. Upon an appeal from a judgment of the surrogate refusing the probate of a will on the ground of undue influence and testamentary incapacity, if the appellate division is not satisfied with the decisions of the surrogate, and if doubts exist as to his conclusions drawn from the evidence, the appellate division will reverse the decision and order the issues to be tried before a jury: Matter of Finch, 115 App. Div. 871.

j. The fact that the special guardian of an incompetent has been allowed and has been paid costs out of the estate on an accounting by the committee of said incompetent does not constitute a waiver of the right of such special guardian to appeal from a decree of the surrogate settling the account; the incompetent is not prejudiced because the special guardian has merely received just compensation for his services and the committee is not prejudiced because the sum was paid out of the estate: Matter of Edwards, 110 App. Div. 623.

k. **Special guardian.**—The supreme court has power to review the discretion of a surrogate in making an allowance to a special guardian; trustees are parties "not aggrieved" by such allowance within the meaning of § 2568 only when the *cestui que* trust is an adult: Matter of Stevens, 114 App. Div. 607.

l. **Jurisdiction.**—An order of a surrogate overruling objections to his jurisdiction to fix the value of attorney's

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services is not applicable until the surrogate has exercised such jurisdiction, for no substantial rights have been affected: Matter of Loewenguth, 114 App. Div. 754.

a. **Order, review of.**—The review of a surrogate's order exempting an estate from taxation without the appointment of an appraiser should be taken first by an appeal to the surrogate and then by appeal to the appellate division from the affirmance or reversal by the surrogate of his order. The original order of the surrogate being in the nature of an *ex parte* order, no direct appeal therefrom lies to the appellate division: Matter of Costello, Nos. 1, 2, 117 App. Div. 807.

§ 2569. When person not a party may appeal.

See § 1296, ante, When a person entitled to become a party may appeal.

See § 2514, subd. 11, ante, "Person interested" defined.

§ 2570. Appeal; to what court it may be taken.

b. §§ 2568 and 2572 govern cases on appeal from surrogates' courts to appellate division and not appeals to surrogates' courts from its own decrees: Matter of Daly, 34 Misc. 148; 69 N. Y. Supp. 494.

c. A surrogate, in assessing a transfer tax, acts judicially, not ministerially, and the appellate division has jurisdiction to entertain an appeal by the comptroller from the order of such surrogate reversing an order assessing the tax: Matter of Hull, 109 App. Div. 248.

§ 2571. Intermediate order; how reviewed.

See § 1301, ante, Notice of appeal shall specify interlocutory judgment which the appellant intends to bring up for review in appellate court.

See § 1315, ante, Interlocutory order may be reviewed on appeal from final order.

§ 2572. Time to appeal.

d. §§ 2568 and 2572 govern cases on appeal from surrogates' courts to appellate division and not appeals to surrogates' courts from its own decrees: Matter of Daly, 34 Misc. 148 69 N. Y. Supp. 494.

e. **Comptroller.**—When the comptroller was not made a party to a proceeding determining that the property of a decedent was not subject to the transfer tax, he had three months from the time of the entry of the order in which to take an appeal, as provided by § 2572: Matter of Dingman, 66 App. Div. 228; 72 N. Y. Supp. 694.

§ 2573. Who must be made parties.

See § 1294 et seq., ante, Parties on an appeal.

§ 2574. Appeal; how taken.

See § 1300, ante, Appeal, how taken.

§ 2576. Appeal may be on the law or the facts; case to be made, etc.

f. Upon an appeal from an order denying an application for the revocation of letters of administration, heard upon the moving papers and those submitted in opposition, where no issues were tried, the appellant should print the papers recited in the order, which should either be certified by the surrogate's court or stipulated to be the papers in accordance with the rules governing such matters; in such case an application to settle a case on appeal or to pass upon requests to find will be denied: Matter of Sprathoff, 50 Misc. 109.

g. The appellate division will review the merits of an order removing executors, although no evidence was taken before the surrogate who decided the matter upon the pleadings and admissions of counsel, which do not appear in the printed case as settled by the surrogate under this section: Matter of Waterman, 112 App. Div. 313; 98 N. Y. Supp. 583, appeal dis. 186 N. Y. 534; 185 N. Y. 618.

h. An appeal from a decree in a proceeding to prove a will, rendered upon the trial of an issue of fact, must be heard upon a case made and settled by the surrogate as provided by § 2576. Where the exceptions to the decision of the surrogate in such case contain a specific exception to his findings as to the sanity of the decedent, and it is proposed to incorporate them in the record on ap-

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peal, there must be included in the case all the evidence which any party to the proceeding may claim to be material to the determination of the questions to be passed upon by the appellate court: Matter of Goldsticker, 54 Misc. 174.

§ 2577. Security to perfect appeal.

a. Where an appellant gave an undertaking for costs, as required by § 2577, to perfect an appeal, but did not give the undertaking required by § 2578, for staying the execution of the decree, the respondent is at liberty to proceed with the enforcement of the execution as if it had not been appealed from: Matter of Holmes, 79 App. Div. 267; 79 N. Y. Supp. 687.

b. An undertaking given under §§ 2577 and 2581 on an appeal to the appellate division from a decree or order of the surrogate is not governed by § 1335 providing for the justification of sureties. Such latter section relates only to the appeals to the court of appeals and is not applicable to the surrogates' court. Hence, when such undertaking has been filed with the surrogate and has been allowed and approved by him, an exception to the sureties is not well taken, and a motion to perfect an appeal under § 1303 will be dismissed: Matter of Sheldon, 117 App. Div. 357.

§ 2578. Id.; where decree is for money or delivery of property, etc.

c. Where an appellant gave an undertaking for costs, as required by § 2577, to perfect an appeal, but did not give the undertaking required by § 2578, for staying the execution of the decree, the respondent is at liberty to proceed with the enforcement of the execution as if it had not been appealed from: Matter of Holmes, 79 App. Div. 267; 79 N. Y. Supp. 687.

d. To obtain a stay of proceedings upon an appeal from a decree removing the appellant as executrix and directing her to account and turn over the property of the estate to her successor, an undertaking must be given in an amount to be fixed by the surrogate or by the judge of the appellate court: Matter of Dittrich, 52 Misc. 277.

§ 2579. Security to stay proceedings in case of commitment.

e. To obtain a stay of proceedings upon an appeal from a decree removing the appellant as executrix and directing her to account and turn over the property of the estate to her successor, an undertaking must be given in an amount to be fixed by the surrogate or by the judge of the appellate court: Matter of Dittrich, 52 Misc. 277.

§ 2580. Amount of undertaking; how fixed.

f. To obtain a stay of proceedings upon an appeal from a decree removing the appellant as executrix and directing her to account and turn over the property of the estate to her successor, an undertaking must be given in an amount to be fixed by the surrogate or by the judge of the appellate court: Matter of Dittrich, 52 Misc. 277.

§ 2581. Requisites of undertaking.

See § 1334, ante, Undertakings may be in one instrument; form and service thereof.

g. An undertaking given under §§ 2577 and 2581 on an appeal to the appellate division from a decree or order of the surrogate is not governed by § 1335 providing for the justification of sureties. Such latter section relates only to the appeals to the court of appeals and is not applicable to the surrogate's court. Hence, when such undertaking has been filed with the surrogate and has been allowed and approved by him, an execution to the sureties is not well taken, and a motion to perfect an appeal under § 1303 will be dismissed: Matter of Sheldon, 117 App. Div. 357.

§ 2582. Decree for probate, etc.; how far suspended by appeal.

h. The power of an executor, nominated in a will, will not continue, after the reversal of the decree admitting the will to probate, unless an express order to that effect is made by the surrogate under § 2582: Matter of Hopkins, 95 App. Div. 57.

i. Upon the entry of a decree admitting a will to probate and the issuance of letters testamentary to the executors nominated therein, a temporary administrator theretofore appointed becomes *functus officio;* if an appeal be taken from the decree admitting the will to probate

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the surrogate may, under § 2582, authorize the executors appointed by him to continue to act as such, during the pendency of the appeal: Matter of Choate, 105 App. Div. 356.

§ 2584. Perfected appeal stays proceedings in other cases.

See 1310, ante, When appeal stays proceedings; effect thereof.

§ 2585. Appeal; proceedings thereupon.

See § 1340, ante, Appeal to the appellate division of the supreme court.
See § 1345, ante, Order of the appellate division; where entered.

a. Under §§ 2585 to 2588, an appeal to the appellate division from a decree of the surrogate's court admitting a will to probate, or from a decree of the surrogate's court revoking the probate of a will, operates to remove the probate proceeding into the appellate division, and, until its work is finished and the matter is finally remitted to the surrogate's court, exclusive jurisdiction of the proceeding is vested in the appellate division and the surrogate's court has no authority in the premises: Matter of Murphy, 79 App. Div. 541; 81 N. Y. Supp. 102.

b. **Questions of fact.**—The appellate court has the same power to decide questions of fact which the surrogate had, and may, in its discretion, receive further testimony, or documentary evidence and appoint a referee: Matter of Gilman, 92 App. Div. 462; 87 N. Y. Supp. 128.

c. The appellate court may consider testimony stricken out which is printed in the record and then decide the questions of fact involved: Matter of Rice, 81 App. Div. 223; 81 N. Y. Supp. 66.

d. The appellate court has the same power to determine questions of fact which the surrogate had and it may receive further testimony or documentary evidence, or appoint a referee, and may, if necessary or proper, direct the jury trial of the material questions of fact: Matter of Stapleton, 71 App. Div. 1; 75 N. Y. Supp. 657.

e. Upon an appeal from an order of the appellate division reversing the surrogate's decree, upon the law and the facts, where the inferences from the uncontradicted evidence all point in one direction so that a reasonable mind can reach but one conclusion, there is no question of fact and the court of appeals has jurisdiction of the appeal: Matter of Totten, 179 N. Y. 112.

f. The appellate court has the same power to decide the questions of fact which the surrogate had: Matter of Hall, 61 App. Div. 266; 70 N. Y. Supp. 406.

g. **Exceptions.**—Exceptions to a surrogate's conclusion of law, in dismissing a proceeding in a surrogate's court, present questions of law which are reviewable by the court of appeals upon an appeal from an order of the appellate division affirming the decree of the surrogate's court, entered upon and in accordance with such conclusions of law: Matter of Killan, 172 N. Y. 547.

h. **Decree.**—The surrogate's court cannot open a decree of the appellate division finally disposing of an appeal: Matter of Westerfield, 61 App. Div. 413; 70 N. Y. Supp. 641.

i. **Referee.**—Upon an appeal from a decree of the surrogate's court entered upon the report of a referee, the appellate division may, under §§ 993 and 2586, supply an essential finding of fact which was omitted from the referee's report and from the surrogate's decree: Matter of Snedeker, 95 App. Div. 149; 88 N. Y. 847.

§ 2586. Power of appellate court; further testimony.

j. Upon an appeal from a judgment of the surrogate refusing the probate of a will on the ground of undue influence and testamentary incapacity, if the appellate division is not satisfied with the decision of the surrogate, and if doubt exist as to his conclusions drawn from the evidence, the appellate division will reverse the decision and order the issues to be tried before a jury: Matter of Finch, 115 App. Div. 871.

k. Under § 2586 the appellate division on appeal has the same power to decide questions of fact as the surrogate has and may take further testimony through a referee; when an executor, who has been removed from office for failing to inventory a demand note due from him to the estate, claims to have paid the note and accounted therefor, the appellate division will send the issues to a referee, if the executor did not have a chance to litigate the question before the surrogate: Matter of Burr, 116 App. Div. 518.

l. Although the appellate division under § 2586 and § 2587 has the same power as the surrogate to decide questions of fact and to receive further testimony, and to reverse or modify the surrogate's decree, nevertheless, where it does not have before it the order of the court in the matter, the matter should be remitted to the surrogate: Matter of Tyndall, 117 App. Div. 294; 102 N. Y. Supp. 211.

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§ 2587. Judgment or order upon appeal.

See § 1317, ante, Judgment or order on appeal.

See §§ 1319-1320, ante, Mode of enforcing affirmed or modified judgment or order.

See § 1323, ante, Restitution; when ordered.

a. **Appellate court.**—The appellate court has power to enter a judgment or decree in accordance with its determination or to take proper proof in reference to the subject matter and enter a final decree: Matter of Westerfield, 61 App. Div. 413; 70 N. Y. Supp. 641.

b. **Appeal.**—Where an appeal is taken from a decree reciting that the possession of funds was proven to the satisfaction of the surrogate, and upon such appeal it was admitted that no proof as to such possession of funds had been made, and that the surrogate had made no decision in writing and no findings, and that there had been no settlement of the case on appeal, the appellate division should reverse the decree and the proceedings should be remitted to the surrogate's court for trial and decision: Matter of Sherwood, 75 App. Div. 342.

c. Although the appellate division under §§ 2586 and 2587 has the same power as the surrogate to decide questions of fact and to reverse or modify the surrogate's decree, nevertheless, where it does not have before it the order of the court in the matter, the matter should be remitted to the surrogate: Matter of Tyndall, 117 App. Div. 294; 102 N. Y. Supp. 211.

§ 2588. Award of jury trial upon reversal in probate cases.

d. Where the appellate court reverses a decree of the surrogate on questions of fact, the relief which they may grant is to direct a trial of the issue by a jury: Matter of Babcock, 42 Misc. 235; 86 N. Y. Supp. 670.

e. **Doubt.**—Where there is a doubt as to the correctness of the conclusion reached by a surrogate, the appellate division will direct a trial by jury of the material questions of fact involved: Matter of Rayner, 93 App. Div. 114; 87 N. Y. Supp. 23: Matter of Van Dawalker 63 App. Div. 550; 71 N. Y. Supp. 705.

f. If, upon an appeal to the appellate division from a decree of the surrogate's court, granting or denying probate of an instrument propounded as the last will and testament of a decedent, it appears that the disposition of the questions of fact raised by the evidence is not free from doubt, and the surrogate's decision is not entirely satisfactory, the questions of fact will be sent to a jury for determination pursuant to § 2588: Matter of Burtis, 107 App. Div. 51; 94 N. Y. Supp. 961.

g. **Trial by jury.**—Under § 2588 an appellate court " must make an order directing the trial by a jury of the material questions of fact arising upon the issues between the parties," where its reversal or modification of a decree is founded upon a question of fact, and it may do it in any other case where, in its opinion, it would seem that the ends of justice might be best promoted: Matter of Hopkins, 176 N. Y. 595.

h. **Sufficient facts.**—Facts considered and held sufficient to warrant the bringing of the parties within the provisions of § 2588, so that the trial may be before a jury: Matter of Campbell, 67 App. Div. 418; 73 N. Y. Supp. 753.

i. **Probate.**—Where the court of appeals have reversed a decree for the probate of a will which is presumed to be on the law, *quaere*, whether the new trial must not be had before the surrogate, as § 2588 authorizes a trial before a jury only in a case where the reversal is on the facts: Matter of Hopkins, 41 Misc. 83; 83 N. Y. Supp. 890.

§ 2589. Costs of appeal.

See § 3251, post, Costs of appeal.

§ 2590. Requisites of letters.

See §§ 2485-2486, ante, Who to act, if the surrogate is disqualified.

§ 2591. Their effect.

j. Where the death of a party occurred in the county of Albany, the surrogate of that county had jurisdiction to grant letters and they cannot be attacked collaterally, but are conclusive until proceedings are instituted to revoke them: Tanas v. Municipal Gas Co., 88 App. Div. 251; 84 N. Y. Supp. 1053.

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§ 2595. Deposit of securities to reduce penalty of bond.

See § 2667, post, When authority of county treasurer superseded.

a. Under § 2595, the surrogate may direct that securities belonging to an estate be deposited, subject to the order of the trustee, with a trust company, where the value of the estate or fund is so great that the surrogate does not deem it expedient to require security in the full amount prescribed by law; an administratrix has no right to bring an action on a note so deposited with the trust company without an order of the surrogate: Ditmas v. McKane, 92 App. Div. 344.

§ 2596. Sureties liable for money, etc., received in another capacity.

b. Under § 2596, a surety on an undertaking of an administrator is not liable for moneys which came into the hands of such administrator while acting as general guardian before appointed administrator: Matter of Maybee, 40 Misc. 518.

c. A surety company is liable under § 2596 for moneys withdrawn by a guardian on the day before the letters of guardianship were issued: Matter of Fardette v. U. S. & G. Co., 86 App. Div. 50.

d. When instead of disposing of lands with due diligence and dividing the proceeds among those entitled thereto, executors trade the property for other property, they become personally responsible for the value of the land at the time of the exchange, unless it were made with the consent of the persons entitled to the estate or were subsequently ratified by them: Hine v. Hine, 118 App. Div. 585.

§ 2600. Sureties may apply to be released as to future breaches.

e. Where the surety for an administratrix cites her to show cause why he should not be released, and she files a new bond and an account of her proceedings, and he does not object to the latter nor make any affirmative application in the matter, a decree "settling" the account as filed should be entered and the parties interested in the estate need not be brought in by a supplementary citation and be heard, but such a decree will not bind those who are not made parties to the proceeding: Matter of Sogaard, 39 Misc. 519.

§ 2601. Release of old sureties on the giving of new.

f. Where the surety for an administrix cites her to show cause why he should not be released, and she files a new bond and an account of her proceedings, and he does not object to the latter nor make any affirmative application in the matter, a decree "settling" the account as filed should be entered and the parties interested in the estate need not be brought in by a supplementary citation and be heard, but such a decree would not bind those who are not made parties to the proceeding: Matter of Sogaard, 39 Misc. 519.

§ 2602. Surrogate may direct as to custody, where co-executors, etc., disagree.

g. Neither § 2602, as to joint custody or deposit of assets, nor § 2472, relating to the general power of the surrogate to control executors, authorize the surrogate's court to direct, before the accounting has been concluded, the accounting executor to communicate to the other executors the knowledge they sought and execute such assignments as they wish: Matter of Freligh, 42 Misc. 11.

h. Contempt.—An executor who refuses to obey an order requiring him to pay over moneys to testamentary trustees in lieu of unauthorized securities held by him is guilty of contempt of court. He is liable for interest on the sum accruing during a futile appeal from the order; and under the circumstances, a fine of an amount equal to the unpaid interest is proper: Matter of Ryer, 120 App. Div. 154.

§ 2603. Effect and contents of decree revoking letters.

i. The power conferred on the surrogate by § 2606 in connection with § 2603, to compel an executor of a deceased executor to account for unadministered money or property of the first estate in his hands, does not require the surrogate to direct payment or delivery to the legatee under the will of the first testator: Squire v. Bugbee, 65 App. Div. 429; 72 N. Y. Supp. 1023.

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§ 2605. Successor may be appointed, and may compel accounting, etc.

See § 2694, post, Successor to executors or administrators.

a. **Accounting.**—The surrogate's court has the same jurisdiction to compel an accounting which it would have upon the petition of a creditor or person interested in the estate, if the term of office of the letters had expired by its own limitation: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

b. § 2728, providing that the sureties upon the official bond of an executor or administrator may be cited to attend a settlement of his accounts, only applies to a voluntary accounting by the executor or administrator; the surrogate, under § 2605, has authority at the instance of a substituted trustee to require the removed trustee to render an account, even though there had been no express order revoking the letters issued to the removed trustee: Matter of Storm, 84 App. Div. 552.

§ 2606. Accounting by executor, etc., of deceased executor.

c. The surrogate's court has precisely the same jurisdiction to require an executor of a deceased executor to account as it would have if the letters of the deceased executor had been revoked during his lifetime and he had been called upon to deliver up the assets in his hands: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

d. **Trustee.**—A decree of the surrogate's court, entered against the administratrix of a deceased trustee in a proceeding for a judicial settlement of the accounts of the said trustee, is not conclusive evidence that there are sufficient assets in her hands as administratrix of the deceased trustee to satisfy the sum directed to be paid by the decree, and an execution cannot be issued upon the decree against the individual property of the administratrix unless the leave of the surrogate is first obtained: Matter of Seaman, 63 App. Div. 49; 32 Civ. Pro. R. 194; 71 N. Y. Supp. 376.

e. **Liability of testatrix.**—Under § 2606, where all of the parties interested are before the court, the surrogate has jurisdiction, upon the accounting of an executor, to determine his testatrix's liability as administrator of an estate and to determine what payments have been made upon such liability: Matter of Hull, 97 App. Div. 258; 89 N. Y. Supp. 939.

f. **Judicial settlement.**—When one of two executors die and his representatives bring a proceeding for the settlement of his accounts and all the parties interested are before the court, the surrogate has power, under § 2606, to turn the accounting into a judicial settlement: Matter of Furniss, 86 App. Div. 96; 83 N. Y. Supp. 530.

g. Although a deceased executor and trustee has never accounted for the trust estate, any right of a beneficiary to an accounting passes on his death to his personal representatives for the benefit of his estate, and his widow individually or as sole legatee and devisee has no cause of action enforcible in her own right; although under § 2606 the surrogate has jurisdiction when an executor dies to compel the executor of the deceased executor to account, on petition of his successor, as if the decedent had lived and his letters had been revoked and a proceeding for accounting been instituted against him, the section contemplates that the funds so reached should not be paid to a creditor or legatee instituting the accounting but to the successor of the deceased executor or into the court or to some person authorized by law to receive the fund: Bushe v. Wright, 118 App. Div. 320.

h. The right of the successor of a deceased administrator to compel his personal representative to account is not barred until the expiration of ten years from the appointment of the new administrator: Matter of Lesser, 119 App. Div. 507.

i. **Revival.**—The power of the surrogate to revive a proceeding for an accounting by an executor who dies pending the accounting, under the amendments to this section by chap. 409 of 1901 and chap. 349 of 1902: Matter of Treadwell, 77 App. Div. 155; 79 N. Y. Supp. 83; 85 App. Div. 570; 83 N. Y. Supp. 242.

j. The right to revive a proceeding for a compulsory accounting by an administrator, in the event of his death during the pendency of the proceedings, provided for by § 2606, is a valuable right to the parties to the proceedings, and the surrogate before whom the accounting is pending has no power of his own motion, without notice to any of the parties to make an order adjudging that the proceeding has abated and directing the petitioners to pay the stenographer's fees: Matter of Armstrong, 72 App. Div. 286; 76 N. Y. Supp. 37.

k. **Jurisdiction.**—In a proceeding under this section the jurisdiction of the court is sufficient to permit an accounting of all the acts of the deceased executor as fully as if the accounting were that of the executor and his letters had been revoked: Matter of Wood, 34 Misc. 209; 69 N. Y. Supp. 491.

l. **Assets.**—Under § 2606, the surrogate may compel an executor of a de-

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ceased executor to deliver property in his hands to the surrogate's court or to a representative of the first estate, but that such executor cannot be compelled to act as a representative of the estate in distributing its unadministered assets: Mount v. Mount, 68 App. Div. 144; 74 N. Y. Supp. 148.

a. **Guardian of infant.**—Where, on an accounting by an administrator of the estate of the deceased general guardian of an infant, a decree is rendered adjudging that the deceased guardian was chargeable with a certain sum, it is not necessary that all remedies against the administrator by execution or contempt proceedings shall be first exhausted before recourse may be had to the liability of the sureties on the guardian's bond: Van Zandt v. Grant, 67 App. Div. 70; 73 N. Y. Supp. 600.

b. An application for a compulsory accounting may be made as soon as the executor of the deceased guardian is appointed: Matter of Lewis, 36 Misc. 741; 74 N. Y. Supp. 469.

c. No presumption arises from the fact that a general guardian held trust funds for years unpaid and unaccounted for, that they are part of the estate in the hands of his executor, and the ward must, in order to obtain an order under § 2606, to compel the executor to pay over such trust funds, prove that the assets in the hands of the executor are a part of or derived from such trust funds: Matter of Hicks, 170 N. Y. 195, rev'g 54 App. Div. 582; 66 N. Y. Supp. 1028.

d. Where an executor dies more than eleven years after letters testamentary have been issued to him, and letters testamentary are issued upon the deceased executor's estate, March 25, 1896, an application made on the 2nd day of August, 1901, by a residuary legatee of the original testator, under § 2606, to require the executrix of the deceased executor to file an account, should not be denied on the ground that the statute of limitations is a bar thereto, when it appears that the deceased executor, at all times until within about one year of his death, expressly recognized that he held his testator's entire estate in trust: Matter of Irvin, 68 App. Div. 158; 74 N. Y. Supp. 443.

e. After a general guardian of an infant had obtained a decree in the surrogate's court adjudging that a certain sum was due the infant from the estate of a former deceased general guardian of such infant and a certified copy of such decree was served on the administrator of such deceased guardian and payment demanded, and payment was not paid, *held*, that the general guardian may maintain an action against sureties on the bond of the deceased guardian for the amount due the infant; that it was not necessary that the general guardian be appointed a guardian *ad litem* or that the execution be first issued upon the surrogate's decree and returned unsatisfied under § 2607, since that section must be read with § 2606, and that the recovery in such a case cannot be defeated by an attack upon the sufficiency of the bond of the general guardian as, under § 2746, the amount and sufficiency of such bond is within the discretion of the surrogate, and, if insufficient, it was his duty to recover an additional bond, but that such additional bond is not a condition precedent to the bringing of the action: Van Zandt v. Grant, 175 N. Y. 151, aff'g 67 App. Div. 70; 73 N. Y. Supp. 600.

f. **Surety.**—An administrator *de bonis non* of an intestate, appointed in the state of New York in place of a deceased administrator, may, without leave of court, and although the intestate left no debts, sue the surety on the bond of the administrator for moneys of the estate received by him, but for which neither he nor his executor has accounted or will account, and this although the deceased administrator removed from the state of New York to a foreign state, died there and did not leave in this state either personalty or personal representatives: Dunne v. American Surety Co., 34 Misc. 584.

g. **Executrix.**—Where an executrix is accounting in her husband's estate and he and she have been successively the legal representatives of another estate a person interested in that estate is a proper party to her accounting and may file objections to her account: Matter of Walton, 38 Misc. 723; 78 N. Y. Supp. 296.

h. A surrogate has power under this section to require the executrix of a deceased executor to account for the acts and doings of the decedent as to trust property which came into his possession, and may compel such executrix of a deceased executor to deliver over any of the trust property coming into her possession or under her control: Matter of Walton, 112 App. Div. 177.

i. **Legatee.**—The power conferred on the surrogate by § 2606 in connection with § 2603, to compel an executor of a deceased executor to account for unadministered money or property of the first estate in his hands, does not require the surrogate to direct payment or delivery to the legatee under the will of the first executor: Squire v. Bugbee, 65 App. Div. 429; 72 N. Y. Supp. 1023.

§ 2607. When bond may be prosecuted.

j. Where a decree upon the judicial settlement of the accounts of an administratrix directed payment of an assigned claim to the assignor thereof, the assignee may, under § 2607, maintain an action in his own name upon the official

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bond of the administratrix to recover the money: Bamberger v. Am. Surety Co., 48 Misc. 221; 96 N. Y. Supp. 665.

a. Action to enforce against a surety a decree made by the surrogate charging an administrator with the balance of cash due: Keegan v. Smith, 60 App. Div. 168, at 174, aff'd 172 N. Y. 624; 70 N. Y. Supp. 260.

b. **Execution.**—Although § 2607 includes executors, administrators, testamentary trustees and guardians, while § 2608, where authority is given to the successor to prosecute the official bond, does not enumerate testamentary trustees, yet it cannot be said that § 2607 is the only provision applying and that the issuance and return of an execution to the surrogate's court is a condition precedent to the right of action: Yates v. Thomas, 35 Misc. 552; 71 N. Y. Supp. 1113.

c. The return unsatisfied of an execution, issued upon the surrogate's decree upon the judicial settlement of the guardian's account, justifies an action against the guardian's sureties and is sufficient proof that the plaintiff, the late ward, has exhausted his remedy against the guardian: Rouse v. Whitney, 53 Misc. 56.

d. **Guardian ad litem.**—After a general guardian of an infant had obtained a decree in the surrogate's court adjudging that a certain sum was due the infant from the estate of a former deceased general guardian of such infant and a certified copy of such decree was served on the administrator of said deceased guardian and payment demanded, and payment was not paid, *held,* that the general guardian may maintain an action against sureties on the bond of the deceased guardian for the amount due the infant; that it was not necessary that the general guardian be appointed a guardian *ad litem* or that the execution be first issued upon the surrogate's decree and returned unsatisfied under § 2607, since that section must be read with § 2606, and that the recovery in such a case cannot be defeated by an attack upon the sufficiency of the bond of the general guardian, as under § 2746 the amount and sufficiency of such bond is within the discretion of the surrogate, and, if insufficient, it was his duty to recover an additional bond, but that such additional bond is not a condition precedent to the bringing of the action: Van Zandt v. Grant, 175 N. Y. 151, aff'g 67 App. Div. 70; 73 N. Y. Supp. 600.

§ 2608. Successor may prosecute official bond.

e. Although § 2607 includes executors, administrators, testamentary trustees and guardians, while § 2608, where authority is given to the successor to prosecute the official bond, does not enumerate testamentary trustees, yet it cannot be said that § 2607 is the only provision applying and that the issuance and return of an execution to the surrogate's court is a condition precedent to the right of action: Yates v. Thomas, 35 Misc. 552; 71 N. Y. Supp. 1113.

§ 2609. Action on official bond when no successor is appointed.

f. An administrator *de bonis non* of an intestate, appointed in the state of New York in place of a deceased administrator, may, without leave of court, and although the intestate left no debts, sue the surety on the bond of the administrator for moneys of the estate received by him, but for which neither he nor his executor has accounted or will account, and this although the deceased administrator removed from the state of New York to a foreign state, died there and did not leave in this state either personalty or personal representatives: Dunne v. American Surety Co., 34 Misc. 584.

§ 2611. What wills may be proved; change of residence not to affect validity.

See § 2694, post, Testamentary dispositions; what law governs.

g. **Evidence.**—Evidence deemed sufficient to decide that the testator was "not a resident of the state" within the meaning of § 2611, although a citizen thereof, that he was a resident of France, that his will was executed "according to the laws of the testator's residence," and was therefore entitled to be probated within the state of New York: Matter of Cruger, 36 Misc. 477.

§ 2612. Persons incompetent to serve as executors.

h. A foreign corporation, not being a citizen of the United States, it is, within the meaning of § 2612, "an alien not an inhabitant of this state," and hence incompetent to serve as executor in this state under the provisions of that section; art. 4 of the Banking Law, authorizing trust companies to accept appointments as executors, etc., applies only to domestic corporations: Matter of Avery, 45 Misc. 529.

i. The pardon of one who has been convicted of an infamous crime removes his disability under this section: Matter of Raynor, 48 Misc. 325.

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§ 2613. [Am'd, 1893.] Supplementary letters; executors not named in letters not to act; power of executor before letters of administration with the will annexed.

a. **Indorsement.**—An executor has no power to bind the estate by making a contract of indorsement, much less so before actual probate of the will: Packard v. Dunfee, 119 App. Div. 599.

b. **Equitable conversion.**—Where there is nothing in a will which, in express terms, commands a conversion of testator's real estate into personalty as of the date of his death, and where upon the trial of an action, brought by the administrator with the will annexed, to compel a co-tenant of testator to account for and to pay over the one-half part of the rents, income and profits received from a farm owned by such cotenant and testator as tenants in common, no fact appears, or is found, which reveals any such situation at the time when the will was made as to support an implication that the testator intended such a conversion, such action cannot be maintained upon the grounds that the terms of the will had effected an equitable conversion of the testator's real estate into personalty and "that the converted fund became personal assets in the hands of the executor" including the rents and profits of the interest in the farm, and went to the plaintiff as administrator with the will annexed: Coann v. Culver, 188 N. Y. 9, rev'g 108 App. Div. 360.

§ 2614. [Am'd, 1897.] Who may propound will.

c. A petition for a probate of a will which alleges that the deceased was a resident of France and died leaving assets in this state, may be amended to allege that the testator was a resident of this state temporarily residing abroad: Matter of Rubens, 117 App. Div. 523.

§ 2615. Who to be cited thereupon.

The following persons must be cited upon a petition, presented as prescribed in the last section:

1. If the will relates exclusively to real property, the husband or wife, if any, and all the heirs of the testator.

2. If the will relates exclusively to personal property, the husband or wife, if any, and all the next of kin of the testator.

3. If the will relates to both real and personal property, the husband or wife, if any, and all the heirs, and all the next of kin of the testator.

4. Any person designated in the will as executor.

L. 1837, c. 460, § 5.

Amended by chap. 174 of 1891, chap. 627 of 1892, chap. 118 of 1894 and chap. 438 of 1905.

d. When the citation of a legatee under a will is not required, the will cannot be attacked collaterally on the ground that such legatee was not cited: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367, aff'd 184 N. Y. 578.

e. Under the most favored nation clause in the Treaty of April 26, 1826, between the United States of America and the Kingdom of Denmark, the Danish consul cannot appear for an infant party to a proceeding for the probate of a last will and testament so as to confer upon a surrogate's court in this state jurisdiction of such infant party without the issuing and service of a citation: Matter of Peterson, 51 Misc. 367.

f. Right of parties under §§ 2514 and 2617 to appear and contest the probate of a will: Matter of Evans, 65 App. Div. 100, aff'd 171 N. Y. 645; 72 N. Y. Supp. 495.

g. **Interest.**—Any person who is interested in sustaining or defeating a will may make himself a party to the proceeding, and if the probate of the will be opposed, the surrogate shall cause to be given to him such notice as he thinks proper: Matter of Davis, 105 App. Div. 221; 93 N. Y. Supp. 1004, aff'd 182 N. Y. 468.

h. **Foreign administrator.**—The administrator of a deceased resident of this state, appointed by a foreign state to represent the estate of a decedent as one of the heirs-at-law and next of kin of a deceased resident of that state, is a proper party, under § 2617, in a subsequent proceeding here for the probate of an alleged will of the deceased resi-

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dent of this state and is entitled to intervene in such proceeding and oppose the probate of such will: Matter of Davis, 182 N. Y. 468, aff'g 105 App. Div. 636; 192 N. Y. Supp. 7.

§ 2617. Persons not cited may appear.

a. When the citation of a legatee under a will is not required, the will cannot be attacked collaterally on the ground that such legatee was not cited: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367; 184 N. Y. 578.

§ 2618. Witnesses to be examined; proof required.

b. **Experts.**—Evidence of experts, who never saw the testator alive, and took no personal part in the autopsy upon his body, to the effect that the testator must have been of unsound mind at the date of the will rejected, where it was contradicted by the testimony of every witness testifying from actual observation of the testator: Matter of Phillips, 34 Misc. 442; 69 N. Y. Supp. 1011.

c. **Probate.**—A will may be probated notwithstanding the lack of memory of a subscribing witness or even in the face of his positive testimony denying proper execution: Wyman v. Wyman, 118 App. Div. 109; 103 N. Y. Supp. 64.

§ 2620. Proof of handwriting. Commission to absent subscribing witness. When original will may be sent to another state or country.

d. Where one of the subscribing witnesses to the codicil testifies that the testator subscribed to the instrument after the witnesses, but subsequently qualifies his testimony by stating, "I am not sure about that; I think he signed it, afterwards," and the other subscribing witnesses and the attorney who supervised the execution of the will testify positively and explicitly that the testator subscribed first, the codicil may properly be admitted to probate: Matter of Cornell, 89 App. Div. 412; 85 N. Y. Supp. 920.

e. **Adjournment.**—The action of the surrogate in refusing to adjourn a trial until an insane person could be produced as a witness does not constitute an abuse of discretion, it appearing that it would certainly be months before the proposed witness could possibly be in a condition to testify and that he might never be in such a condition: Matter of Burbank, 104 App. Div. 312; 34 Civ. Pro. R. 247.

f. **Proof.**—The statute in terms contemplates that proof which would ordinarily satisfy a jury of the regularity of the will and whether that proof is produced is the issue in such a proceeding: Matter of Carll, 38 Misc. 471; 77 N. Y. Supp. 1036.

g. **Commission.**—Under § 2620, the will of a resident made and executed in this state and subscribed by witnesses residing here cannot be admitted to probate in this state, where its production is rendered impossible because it was filed in a probate court of another state, where it had previously been probated; such a will cannot be established by the issuance of a commission, as the commissioner would have no power to compel the attendance of the subscribing witnesses in the state in which the will was filed; it seems that in such a case an action to establish the will might be brought under § 1821: Matter of Law, 80 App. Div. 73; 80 N. Y. Supp. 410.

h. **Probate.**—A will may be probated notwithstanding the lack of memory of a subscribing witness or even in the face of his positive testimony denying proper execution: Wyman v. Wyman, 118 App. Div. 109; 103 N. Y. Supp. 64.

i. It is not the purpose of the statute to prohibit the probate of a will simply because one of two or more witnesses thereto wilfully or otherwise testifies against the facts necessary to constitute a due execution thereof: Matter of Eldred, 109 App. Div. 777.

§ 2621. Proof of lost or destroyed will.

See § 1861, ante, Action to establish or impeach a will.

j. **Evidence.**—What evidence, accompanied by a copy of a lost will, authorizes a surrogate to admit an alleged will to probate: Matter of Granacher, 74 App. Div. 567; 77 N. Y. Supp. 748

k. **Will.**—No presumption as to the continued existence of a will and codicil arises from the proof of their execution, so as to establish the existence thereof at the time of the testatrix's death, which is essential under the statute to permit the admission to probate of a lost or destroyed will in a surrogate's court, but failure to find such will and codicil, after careful and exhaustive search, raises a presumption that the decedent herself destroyed them *animo revocandi;* Matter of Kennedy, 167 N. Y. 163.

l. **Supreme Court.**—Under the statute a lost or destroyed will can be admitted to probate in the surrogate's court in a case where the judgment establishing

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the will could be rendered by the supreme court: Matter of Barnes, 70 App. Div. 523; 75 N. Y. Supp. 373.

a. **Accidentally destroyed.**—A surrogate cannot admit a destroyed will to probate unless the will was in existence at the testator's death or was fraudulently destroyed in his lifetime, and, hence, an accidental destruction of the will without his knowledge or consent while he was living, and the will was in the care of a custodian, is not enough to confer jurisdiction: Matter of Reiffeld, 36 Misc. 472.

b. **Adjournment.**—The action of the surrogate in refusing to adjourn a trial until an insane person could be produced as a witness does not constitute an abuse of discretion, it appearing that it would certainly be months before the proposed witness could possibly be in a condition to testify, and that he might never be in such a condition: Matter of Burbank, 104 App. Div. 312; 34 Civ. Pro. R. 247.

§ 2622. Probate not allowed, unless surrogate satisfied, etc.

c. A will which is the product of delusional insanity must be set aside *in toto* without regard to the question as to who does or who does not contest it: Matter of Long, 43 Misc. 560; 89 N. Y. Supp. 555.

d. Where the factum of a will is established to the satisfaction of a surrogate he should admit the will to probate unless want of testamentary capacity or fraud or undue influence is established beyond a reasonable doubt: Matter of Babcock, 42 Misc. 235; 86 N. Y. Supp. 670.

e. A surrogate should refuse to admit a will to probate where he is not satisfied that the signature is genuine and it is claimed to be a forgery: Matter of Burtis, 43 Misc. 437; 89 N. Y. Supp. 441.

f. It is not the purpose of the statute to prohibit the probate of a will simply because one of two or more witnesses thereto wilfully or otherwise testifies against the facts necessary to constitute a due execution thereof: Bates v. D., L. & W. R. Co., 109 App. Div. 777.

g. **Duplicates.**—In an action to establish the validity of a will purporting to have been executed in duplicate, in which one of the duplicates was received in evidence, an objection by the defendants to the introduction in evidence of the other duplicate, and its withdrawal by the plaintiff, precludes the defendants from insisting that the proof is insufficient to establish the identity of the two instruments: Roche v. Nason, 185 N. Y. 128.

h. **Equity.**—Although a will has not been admitted to probate, an action in equity will lie to set it aside on the ground of lack of testamentary capacity and undue influence exercised upon the testator, if the defendant has not alleged that the plaintiff has an adequate remedy at law: Irving v. Bruen, 110 App. Div. 558; 97 N. Y. Supp. 180, aff'd 186 N. Y. 605.

§ 2623. Will; when sufficiently proved.

i. **When admitted.**—When a surrogate is not judicially satisfied that an instrument in writing, propounded as a last will and testament, was executed in accordance with the formalities required by law, or expresses the true intention of the testator, or that at the time of its execution he was in all respects competent to make a will and not under restraint, probate should be refused: Matter of Eckler, 47 Misc. 320.

j. Where it appears from the evidence that the testatrix did not comprehend her situation, that she did not recall the fact that her mother was dead and that she objected to the will because no provision was made for her mother, the will is properly refused probate: Matter of Choate, 110 App. Div. 874.

k. **Insanity.**—Proof of insanity in the ancestry of decedent and of the fact that the decedent committed suicide, in the absence of any other evidence as to the mental condition of decedent, do not warrant the deduction that the decedent lacked testamentary capacity: Roche v. Nason, 185 N. Y. 128.

l. **Weight of evidence.**—When the only evidence tending to show testamentary incapacity is that of experts based upon hypothetical questions and the evidence of several witnesses who conversed with the testator was given showing no acts which would indicate incapacity, the will should not be set aside on the ground of want of capacity: Heyzer v. Morris, 110 App. Div. 313.

m. **Proof.**—Though there is a presumption that every man is sane, this section requires proof of the capacity of a testator on proceedings for probate, and this proof must be given by evidence: Matter of Schreiber, 112 App. Div. 495; 98 N. Y. Supp. 483, appeal dis. 185 N. Y. 610.

n. **Capacity.**—Lack of testamentary capacity is not shown by the fact that subsequent to the making of the will the testatrix, in accounting with her agent, was listless and indifferent and did not seem to grasp accounts as before, or because a physician who visited her when ill considered her mental condition weak: Matter of Brower, 112 App. Div. 370.

o. **Equity.**—Although a will has not been admitted to probate, an action in equity will lie to set it aside on the ground of lack of testamentary capacity and undue influence exercised upon the testator, if the defendant has not alleged

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that the plaintiff has an adequate remedy at law: Irving v. Bruen, 110 App. Div. 558; 97 N. Y. Supp. 180, aff'd 186 N. Y. 605.

a. Where all the facts required by § 2623 to be proved upon the probate of a will have been proved to the satisfaction of the surrogate, its probate cannot be defeated on the ground that the sole devisee legatee and executrix named therein had died before the testatrix; whether the will is effective to pass property or to appoint an executrix is a question to be determined after its probate: Matter of Davis, 182 N. Y. 468.

b. **Christian science.**—A belief in Christian Science, when founded on religious convictions, is consistent with testamentary capacity and beyond the scope of judicial inquiry: Matter of Brush, 35 Misc. 689; 72 N. Y. Supp. 421.

c. **Probate refused.**—Where a testatrix aged eighty-two years had, one week before the execution of her will, been duly found incompetent to manage herself or her affairs and the minutes of her testimony in the lunacy proceeding indicated to the surrogate that her memory was then greatly weakened by age, probate was refused: Matter of Widmayer, 34 Misc. 439, 69 N. Y. Supp. 1014.

d. **Agreement.**—An agreement by a husband with his wife not to alter a will may be enforced in equity as a resulting trust, although a new will was made and was offered for probate without the objection of the wife: Kine v. Farrell, 71 App. Div. 219; 79 N. Y. Supp. 542.

e. **Jury.**—When a decree admitting a will to probate should be reversed and the question of the testatrix's competency to make the will be tried before a jury, considered: Matter of Goodwin, 95 App. Div. 183; 88 N. Y. Supp. 734.

f. **Competency.**—It must be shown that the testator was in all things competent to make a will and not under restraint: Matter of Elster, 39 Misc. 63; 78 N. Y. Supp. 871.

§ 2624. Validity and construction of testamentary provisions.

See § 2694, post, Testamentary dispositions; what law governs.

g. This section is not mandatory and does not require the surrogate to consider and determine every question which may be raised by any of the parties as to the construction or validity of the will; the surrogate may, in his discretion, properly reserve or postpone the consideration of such questions until they actually arise or their determination becomes necessary to a proper disposition of the estate: Matter of Mount, 185 N. Y. 162; aff'g 107 App. Div. 1; 95 N. Y. Supp. 490.

h. **Surrogate.**—While a surrogate has no power under § 2624 to pass upon the validity of any will as to its disposition of real property, yet where the testator attempts to create a trust in which the real and personal estate are not separated, the surrogate has jurisdiction to construe a clause and declare the trust invalid and void in so far as it affects the personal property: Matter of Trotter, 182 N. Y. 465, aff'g 104 App. Div. 188; 93 N. Y. Supp. 404; 182 N. Y. 467.

i. **Foreign administrator.**—A foreign administrator of the estate of a decedent, although he may, upon his own application, be made a party to a proceeding for the probate of the decedent's will in a surrogate's court in the state of New York, has no such interest as will enable him to ask for a construction of the provisions of the will under § 2624: Matter of Davis, 105 App. Div. 221; 93 N. Y. Supp. 1004, aff'd 182 N. Y. 468.

j. **Infants.**—Construction of clause of will in regard to accumulation of rents and profits during the minorities of certain children: Matter of Howland, 37 Misc. 114; 74 N. Y. Supp. 950.

§ 2626. Probate; how far conclusive as to personalty.

See § 2647 et seq., post, Proceedings to revoke the probate of a will.

k. When a will and codicil have been admitted to probate the validity of said will, so far as it relates to personal property, cannot be attacked collaterally in a proceeding to contest the validity of payments made to legatees therein; such probate is conclusive so far as it relates to personal property until reversed on appeal, or revoked by the surrogate on the petition of an interested person within one year after probate, or opened, vacated, modified or set aside by the surrogate under like conditions as in a court of record, or unless an action is brought in the supreme court to determine its validity within two years: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367, aff'd 184 N. Y. 578.

§ 2628. When purchaser from heir protected, notwithstanding a devise.

l. The provisions of this section that the limitation does not begin to run until after the expiration of one year from the removal of the disability, has no application to children not born until after the testator's death: Fox v. Fee, 167 N. Y. 44, aff'g 33 App. Div. 627; 53 N. Y. Supp. 1103.

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The concealment of a will which prevents the running of a four-year limitation provided by this section is not shown by proof that after the death of one of the heirs it was found among valueless papers in his house, and that after the death of the testator all the heirs knew of its existence and contents, since the concealment intended is such as leaves the devisees ignorant of their rights under the law and deprives them of knowledge of its existence. Id.

§ 2629. Will certified, or record thereof, may be read in evidence.

See § 2509, ante, Power of clerk of surrogate's court to certify copy of will.

§ 2632. Records of certain wills heretofore proved, when evidence.

a. Exemplification of a record of a will of probate court of Philadelphia may be offered in evidence under § 2632, as amended by chap. 540 of 1901: Meiggs v. Hoagland, 41 Misc. 4; 83 N. Y. Supp. 603.

§ 2633. Id.; as to wills of real property.

b. Application of § 2632 to wills proved previous to the time it was enacted: Wilson v. Van Epps, 38 Misc. 486; 77 N. Y. Supp. 980.

§ 2635. Wills to be returned after probate.

c. Where wills cannot be removed from the probate office, the original probate cannot be had, since the will itself cannot be produced before our courts and be filed and remain in the surrogate's office for one year: Matter of Nash, 37 Misc. 706; 76 N. Y. Supp. 453.

§ 2636. When letters testamentary may be issued.

See § 2612, ante, Persons incompetent to serve as executors.

d. **Security.**—Although a will relieves an executor from giving a bond, yet the surrogate is authorized, on account of the non-residence of the executors, to require security to be given, where there is reason to believe that the rights of any person will not be protected: People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339; 76 N. Y. Supp. 865.

§ 2637. Surrogate to inquire into objections.

e. Although a will relieves an executor from giving a bond, yet the surrogate is authorized, on account of the non-residence of the executors, to require security to be given, where there is reason to believe that the rights of any person will not be protected: People ex rel. Patrick v. Fitzgerald, 73 App. Div. 339; 76 N. Y. Supp. 865.

§ 2638. Bond; where required.

See § 810 et seq., ante, General provisions relating to bonds and undertakings.
See rule 4 (Sup. Ct.), Undertaking must be filed.
See rule 5 (Sup. Ct.), Justification of sureties.

f. Although a will relieves an executor from giving a bond, yet the surrogate is authorized, on account of the non-residence of the executors to require security to be given, where there is reason to believe that the rights of any person will not be protected: People ex rel. Patrick v. Fitzgerald; 73 App. Div. 339; 76 N. Y. Supp. 865.

g. **Revocation of letters.**—Upon an application for the revocation of letters testamentary to an executor who was not required to give the bond provided for in § 2638, the surrogate's court has power, under § 2481, subds. 6 and 11, as a condition of denying the application, to require the executor to give a bond: Matter of Wischmann, 80 App. Div. 520.

§ 2639. Renunciation; retraction thereof.

h. When two executors named in a will renounce their appointment and refuse to act, notwithstanding the fact that the will read "and any two of them," under § 2642 a single executor who qualifies can exercise the power of sale conferred by the will: Draper v. Montgomery, 108 App. Div. 63.

i. The renunciation of a right to administer with the will annexed may be

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withdrawn by permission of the court before it has been used, and letters should not be revoked merely because prior to the appointment such a renunciation had been executed by the appointee: Matter of Treadwell, 37 Misc. 584; 75 N. Y. Supp. 1058, rev'g 77 App. Div. 155.

a. **The testator must be presumed to have conferred powers with knowledge that they should not be exercised until the executor qualified and that any of the executors might decline to serve: Matter of Wilkin, 90 App. Div. 324; 86 N. Y. Supp. 360.**

§ 2642. Executor failing to qualify or renounce; how excluded.

b. No one can take out letters of administration in this state after a foreign probate, except by or through the consent of the foreign executor: Baldwin v. Rice, 44 Misc. 64; 89 N. Y. Supp. 743.

c. **Trust.**—Where the beneficiary and a third person are appointed trustees and the latter refuses to qualify, the former is incompetent to execute a trust or a power of sale: Haendle v. Stewart, 84 App. Div. 274; 82 N. Y. Supp. 823.

d. When two executors named in a will renounce their appointment and refuse to act, notwithstanding the fact that the will read "and any two of them," under § 2642 a single executor who qualifies can exercise the power of sale conferred by the will: Draper v. Montgomery, 108 App. Div. 63.

§ 2643. Letters of administration with will annexed; when and to whom.

e. The priority of right to letters of administration with the will annexed, established by § 2643 in favor of those in one of the classes enumerated in that section over those in a subsequent class, is absolute and controlling upon the court; but the preferences among those belonging in the same class, arising from nearness of kin, are not absolute but only controlling where other things are equal: Matter of Davis, 48 Misc. 489.

f. There is a marked distinction between wills admitted to probate in the state of New York and wills filed or recorded in this state upon an exemplification of the record of probate in another state; the surrogate's jurisdiction to issue letters in the latter class is limited to the issue of ancillary letters testamentary or ancillary letters of administration with the will annexed: Baldwin v. Rice, 44 Misc. 64; 89 N. Y. Supp. 743.

g. **Ancillary letters.**—Ancillary letters of administration with the will annexed should not be granted on the solvent estate of a non-resident upon the application of a creditor residing in the state of the decedent's residence, to which place all personal property in the state of New York at the decedent's death was removed: Matter of Gennert, 96 App. Div 8; 89 N. Y. Supp. 37.

h. **Interest.**—§ 2643, relative to the issue of letters of administration with the will annexed in a case where there is no executor qualified to act, is based upon the principle that he who has the interest in the estate most needing protection from waste, extravagance and incompetency shall have the first right to administer; a sole legatee of an estate is entitled to take all that could be taken by a residuary, a principal or a specified legatee and his executor is entitled, under § 2660, subd. 9, when read in connection with said § 2643, to letters of administration with the will annexed in preference to any other person: Matter of Goggin, 43 Misc. 233.

i. **Fraud.**—Under a will appointing no executor, the sole legatee, primarily entitled to administration with the will annexed. cannot withdraw a renunciation of that right without the permission of the surrogate, and the surrogate has discretionary power to permit retraction of a renunciation procured by fraud: Matter of Clute, 37 Misc. 710.

j. **Legatee.**—A person whose share in the residuum of an estate is directed by a will to be held in trust for him during his life is not entitled to a preference in administration of the estate with the will annexed as being a residuary legatee, and this because he is only the beneficiary of a trust, and such a beneficiary is not a "legatee" within the meaning of § 2643: Matter of Ferguson, 41 Misc. 465.

k. **Petition.**—A petition for the appointment of an administrator with the will annexed was made upon the ground that one executor had died and the other had been removed. The petition did not show what relationship the person nominated bore to the estate of the deceased or that there was no other person entitled to letters as of prior right who were cited or had renounced. No action having been taken on the objections filed, the petitioner, without permission of court or further citation filed another petition asking the appointment of an administrator with the will annexed; held, that the second petition was not an amendment of the original petition and had no place in the proceeding: Matter of Sheldon, 118 App. Div. 488.

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§ 2644. Id.; renunciation or exclusion of persons having prior right.

See § 2667, post, When authority of county treasurer superseded.

See § 2815, post, Petition for security from testamentary trustee.

See § 2816, post, Security; how given.

a. A renunciation of a right to administer with the will annexed may be withdrawn by permission of the court before it has been used, and letters should not be revoked merely because prior to appointment such a renunciation had been executed by the appointee: Matter of Treadwell, 37 Misc. 584; 75 N. Y. Supp. 1058.

b. A petition for the appointment of an administrator with the will annexed was made upon the ground that one executor had died and the other had been removed. The petition did not show what relationship the person nominated bore to the estate of the deceased or that there was no other person entitled to letters as of prior right who were cited or had renounced. No action having been taken on the objections filed, the petitioner, without permission of court or further citation filed another petition asking the appointment of an administrator with the will annexed; *held*, that the second petition was not an amendment of the original petition and had no place in the proceeding: Matter of Sheldon, 118 App. Div. 488.

§ 2645. Executor or administrator to qualify.

See rule 4 (Sup. Ct.), Bond must be filed.

See rule 5 (Sup. Ct.), Justification of sureties.

See § 810 et seq., ante, General provisions relating to bonds and undertakings.

See § 2664, post, Administrator's bond.

See § 2667, post, Authority of county treasurer superseded upon qualification of executor.

See § 2815, post, Petition for security from testamentary trustee.

See § 2816, post, Security; how given by testamentary trustee.

§ 2647. Persons interested may apply to revoke probate.

c. Although a will has not been admitted to probate, an action in equity will lie to set it aside on the ground of lack of testamentary capacity and undue influence exercised upon the testator, if the defendant has not alleged that the plaintiff has an adequate remedy at law: Irving v. Bruen, 110 App. Div. 558; 97 N. Y. Supp. 180.

d. When a will and codicil have been admitted to probate, the validity of said will, so far as it relates to personal property, cannot be attacked collaterally in a proceeding to contest the validity of payments made to legatees therein; such probate is conclusive so far as it relates to personal property until reversed on appeal, or revoked by the surrogate on the petition of an interested person within one year after probate, or opened, vacated, modified or set aside by the surrogate under like conditions as in a court of record, or unless an action is brought in the supreme court to determine its validity within two years: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367, aff'd 184 N. Y. 578.

e. A proceeding to revoke the probate of the will of an unmarried woman which makes provision for her intended husband, whom she marries, is maintainable under § 2647, although the will relates to both real and personal property: Matter of Mann, 51 Misc. 315.

§ 2648. When application must be made.

f. When a will and codicil have been admitted to probate, the validity of said will, so far as it relates to personal property, cannot be attacked collaterally in a proceeding to contest the validity of payments made to legatees therein; such probate is conclusive so far as it relates to personal property until reversed on appeal, or revoked by the surrogate on the petition of an interested person within one year after probate, or opened, vacated, modified or set aside by the surrogate under like conditions as in a court of record, or unless an action is brought in the supreme court to determine its validity within two years: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367, aff'd 184 N. Y. 578.

g. Although a will has not been admitted to probate, an action in equity will lie to set it aside on the ground of lack of testamentary capacity and undue influence exercised upon the testator, if the defendant has not alleged that the plaintiff has an adequate remedy at law: Irving v. Bruen, 110 App. Div. 558; 97 N. Y. Supp. 180, aff'd 186 N. Y. 605.

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§ 2649. Citation thereupon.

See § 2515 et seq., ante, General provisions relating to citations and service thereof.

a. **Burden of proof.**—The burden is on the plaintiff, in an action brought under § 2653a of the Code to set aside the probate of a will, to establish that the instrument was not the last will of the decedent, and if the evidence will not establish an affirmative verdict against the will it is the duty of the court to direct the jury to find a verdict sustaining the will: Hagan v. Sone, 68 App. Div. 60; 74 N. Y. Supp. 109; 32 Civ. Pro. R. 288.

b. In an action brought under § 2653a to determine the validity of a will, the decree admitting the will to probate is *prima facie* evidence of its due attestation, execution and validity, and the burden of overcoming such presumption is upon the party asserting its invalidity, and the presumption in favor of the validity of a will is not affected by the fact that the testator gave all of his property to his widow, who was his second wife, and his children by his second marriage, to the exclusion of a child by the first marriage: Heath v. Kock, 74 App. Div. 338; 77 N. Y. Supp. 513.

c. In an action brought under § 2653a to determine the validity or invalidity of the probate of a will, the onus of impeaching the validity of the will is upon the party asserting its invalidity, and it must be an extreme case which will justify the trial court in directing a verdict or granting a new trial where a verdict has been rendered against the party attacking the validity of the will: Mock v. Garson, 84 App. Div. 65; 82 N. Y. Supp. 310.

d. **Verdict directed.**—Where, in an action to set aside the probate of a will, a verdict is directed for the defendant, all contested facts are to be treated as established in the plaintiff's favor: Ivison v. Ivison, 80 App. Div. 599; 80 N. Y. Supp 1011.

e. In an action under § 2653a to set aside a will on the grounds of undue influence and lack of testamentary capacity, and there was nothing from which the jury could infer either of these grounds, the court possessed the power and it was its duty to direct a verdict for the defendants, and further had power to award extra allowances to the several defendants: Haughian v. Conlan, 86 App. Div. 290.

f. **Next of kin.**—§ 2653a, authorizing the next of kin to maintain an action to test the validity of a will applies to such next of kin as have a right to participate in the distribution of the testator's personal estate in case the will is set aside: Miller v. Maujer, 82 App. Div. 419; 81 N. Y. Supp. 575.

g. **Appeal.**—Under the provisions of § 2653a, a party has all the relief which may be granted on an appeal: Matter of Brand, 68 App. Div. 225; 73 N. Y. Supp. 1073.

h. **Questions of fact.**—Questions of fact arising in an action to determine the validity of a will must be determined as in other actions, not by the court, but by the jury, and, when the evidence given is of such a character that different inferences may fairly and reasonably be drawn from it, the direction of a verdict constitutes reversible error: Hagan v. Sone, 174 N. Y. 317.

i. **Weight of evidence.**—A finding by a jury that a testatrix was incompetent to make a will or was subject to undue influence, held to be against the weight of evidence: Dunham v. Dunham, 63 App. Div. 264; 71 N. Y. Supp. 330.

j. **Default.**—Where heirs-at-law bring an action under § 2653a to have the probate of a will set aside and the defendant interposes a general denial, an affirmative defense and a prayer for judgment, such defendant is entitled, upon failure of plaintiffs to appear, to give proof and obtain a judgment thereon, and the plaintiffs, having made default, have no standing to appeal from the judgment: Delmar v. Delmar, 65 App. Div. 582; 72 N. Y. Supp. 959.

k. **Verdict.**—Where an action is brought under § 2653a to determine the validity of a will on three grounds, a general verdict of a jury in favor of the plaintiff will not be permitted to stand if either of those grounds was insufficient to nullify that instrument: Buchanan v. Belsey, 65 App. Div. 58; 72 N. Y. Supp. 601.

l. **Presumption.**—In an action under § 2653a to determine the validity of the probate of a will plaintiff's only show to support his allegation that the testator was mentally incompetent when he executed the will, the testimony of three physicians, one of whom had attended the testator and the other two whose testimony was based on hypothetical questions. *Held*, that the plaintiff's evidence did not destroy the presumption of the testator's mental capacity nor the presumption which the Code of Civil Procedure provides shall follow the probate of a will: Philips v. Philips, 77 App. Div. 113; 78 N. Y. Supp. 1001.

m. **Costs.**—An action brought under § 2653a is, notwithstanding the injunctive relief granted in case the plaintiff succeeds an action at law, and the successful party is alone entitled to costs or an extra allowance: Carola v. O'Donnell, 105 App. Div. 577; 94 N. Y. Supp. 171; 109 App. Div. 700.

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a. **Incompetency.**—In an action under § 2653a to set aside the probate of a will which disinherited the testator's children on the ground that in making such will the testator was controlled by an insane delusion, the children are incompetent, under § 829, to testify to their father's wild and excited actions and speech, and the widow is also incompetent to testify that she executed a mortgage which resulted in the separation agreement between herself and her husband: Holland v. Holland, 98 App. Div. 366.

§ 2653a. Determining validity of probate by action in the supreme court.

b. **Parties.**—In an action under this section a person named as executor, but who has not qualified as such, is not a necessary or proper party and does not become such in consequence of being charged in the complaint individually with being instrumental in bringing about the alleged fraudulent will: Simpson v. Lorsch, 50 Misc. 398.

c. **§ 829.**—Where, in an action under § 2653a, the interests of certain defendants and the plaintiff are precisely the same so far as they can be affected by the action, the plaintiff is as incompetent, under § 829, to testify in their behalf in reference to any personal transaction between herself and the decedent as she is to give such testimony in her own behalf: Pringle v. Burroughs, 185 N. Y. 375, aff'd 100 App. Div. 366; 91 N. Y. Supp. 750.

d. **Non-resident.**—A daughter of a testator who is and has been at all times since the admission of her father's will to probate the wife of a British subject and a permanent non-resident in a foreign country, is not "absent from the state," within the meaning of § 2653a: Bell v. Villard, 48 Misc. 587; 97 N. Y. Supp. 244, aff'g 110 App. Div. 916.

e. **Conclusive.**—When a will and codicil have been admitted to probate, the validity of said will, so far as it relates to personal property, cannot be attacked collaterally in a proceeding to contest the validity of payments made to legatees therein; such probate is conclusive so far as it relates to personal property until reversed on appeal, or revoked by the surrogate on the petition of an interested person within one year after probate, or opened, vacated, modified or set aside by the surrogate under like conditions as in a court of record, or unless an action is brought in the supreme court to determine its validity within two years: Matter of Wohlgemuth, 110 App. Div. 644; 97 N. Y. Supp. 367, aff'd 184 N. Y. 578.

f. **Equity.**—Although a will has not been admitted to probate, an action in equity will lie to set it aside on the ground of lack of testamentary capacity and undue influence exercised upon the testator, if the defendant has not alleged that the plaintiff has an adequate remedy at law: Irving v. Bruen, 110 App. Div. 558; 97 N. Y. Supp. 180, aff'd 186 N. Y. 605.

g. **Weight of evidence.**—When verdict setting aside a will for want of testamentary capacity was against weight of evidence: Heyzer v. Morris, 110 App. Div. 313.

h. A plaintiff bringing an action under this section to have the will declared null and void on the ground of lack of testamentary capacity is under the burden of overcoming the presumption of the validity of the will as this section raises a presumption of capacity: McGown v. Underhill, 115 App. Div. 638.

i. When the physician of the testatrix testified that the testatrix was suffering from physical ailments which would affect her mentally, and other experts, basing their evidence on his testimony, swore that she had not sufficient mental capacity to make a will, a direction for a verdict under § 2653a adjudging the instrument in question, the will of the testatrix was an error: Bryne v. Bryne, 109 App. Div. 476.

j. **Costs.**—In an action under § 2653a, brought to establish the invalidity of a will, the court, in its discretion, may award costs out of the estate to unsuccessful contestants of the will; in such action the costs are governed by § 3230 and are discretionary; they are not governed by § 3228: Larkin v. McNamee, 109 App. Div. 884; 96 N. Y. Supp. 827, aff'd 188 N. Y. 558.

k. When the appellate division has reversed an order allowing costs out of the estate to unsuccessful contestants of a will in an action under this section, such costs should be stricken out of the judgment on a subsequent motion therefor; striking out such costs is not an amendment or correction of the judgment in a material matter which can only be affected by appeal: Carolan v. O'Donnell, 109 App. Div. 700.

l. **Nonsuit.**—A plaintiff who has complied with the provisions of § 2653a by filing the summons cannot be nonsuited in an action to determine the validity of a probate of a will brought under said action on the ground that the surrogate has failed to transmit the record to the supreme court as required by statute; when the pleadings of both parties allege the admission of the will to probate, and the decree entered hereon, the trial court has jurisdiction, and it devolves upon the defendant to "offer the will

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in probate" and rest, and the plaintiff shall then offer his evidence: Smith v. Holden, 116 App. Div. 867.

a. **Abatement of action.**—After letters of administration were issued an alleged will was discovered and subsequently admitted to probate, the decree revoking the prior letters of administration. Thereafter, in an action under § 2653a, the will was declared not to be the will of the decedent, and the probate was adjudged invalid. The prior administrator on his appointment had brought action to reach property alleged to belong to the estate; *held*, that the action abated on the revocation of the letters of administration and could only be revived by the reappointment of an administrator in a new proceeding; that the fact that the decree admitting the will to probate was vacated did not reinstate the former administrator: Belden v. Belden, 118 App. Div. 296.

§ 2655. Citation; appearance of persons interested.

See § 2519, ante, Contents of citation.

See § 2523, ante, Service of citation upon persons unknown.

See § 2616, ante, Contents of citation.

See § 2617, ante, Persons not cited may appear.

§ 2660. Who entitled to letters of administration.

b. No administrator can be appointed unless the person dies intestate: Matter of Ogden, 41 Misc. 158; 83 N. Y. Supp. 977.

c. The provisions of § 2660, in regard to the order, in which persons entitled to letters of administration must be preferred, do not mean that if both claimants belong to the same class that men of the class are to be preferred to women of the class, but intend that where members of the class are of different degrees of kindred the nearest shall be preferred: Matter of Hawley, 37 Misc. 667; 76 N. Y. Supp. 461.

d. **Contingently.**—The word "contingently" as used in § 2662 means a person to whom, at the time the petition is filed, letters would issue if persons entitled thereto in priority, under § 2660, did not take: Matter of Ferrigan, 92 App. Div. 376; 87 N. Y. Supp. 16.

e. **Nearest friend.**—Where it was desired to bring an action, under § 1902, for causing the death of the decedent by negligence, and it appeared that his widow and children, his next of kin, were all in Italy, and the latter minors, the court granted administration to a person described in the petition thereof as the nearest friend of the decedent: Matter of Paola, 36 Misc. 514; 73 N. Y. Supp. 1062.

f. **Presumption of death.**—For the purposes of a contest relative to the right to administer upon the estate of an intestate, a person, who might be entitled, must be presumed to be dead where he, then a small boy, was sent in 1868 from an institution to the west and has never since been heard from despite efforts made by counsel in that behalf: Matter of Barr, 38 Misc. 355; 77 N. Y. Supp. 935.

g. **Sole legatee.**—A sole legatee of an estate is entitled to take all that could be taken by a residuary, a principle, or a specified legatee and his executor is entitled under § 2660, subd. 9, when read in connection with said § 2643 to letters of administration with the will annexed in preference to any other person: Matter of Goggin, 43 Misc. 233.

h. **Public administrator.**—The public administrator of Kings county has no statutory right to administer upon the estate of a decedent who left a son over fourteen years of age, for, although the minor is incompetent to serve because of his minority his general guardian is entitled to administer in his right, before the public administrator: Matter of Hudson, 37 Misc. 539; 75 N. Y. Supp. 1053.

i. The public administrator of the city of New York is absolutely or contingently entitled to letters, under § 2660, upon a petition filed by him, and unless the next of kin see fit to make an application, letters can be issued to him: Matter of Flynn, 92 App. Div. 379.

j. **Crime.**—An objection to granting letters to a son, otherwise entitled to receive them, upon his father's estate, on the ground that he failed in business conducted in his own name, involving his father somewhat, and that afterwards the father paid the son's obligations and took the business and permitted the son to use his name, and that then other losses occurred, does not present a case of improvidence; nor is the conviction of the son of a misdemeanor in the United States court, for which he was fined fifty dollars, a conviction of an infamous crime within the meaning of § 2661: Matter of Greene, 48 Misc. 31.

k. **Petition.**—A petition signed by the widow and daughter-in-law is sufficient, though the widow's name be omitted at the beginning of the verification and the singular number is used in the petition and affidavit, the latter being signed and sworn to by both; and a decree awarding letters in accordance with the petition will be upheld when the daughter-in-law only qualifies: Matter of Ireland, 47 Misc. 545.

l. **Attorney.**—Appointment of attorney as administrator of client's deceased

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wife: Matter of Holland, 110 App. Div. 799.

a. **Disappearance.**—When a person disappeared under circumstances showing an intention to commit suicide and is not heard of for seven years, he is presumed to be dead, and in the absence of a specific decree setting the death at an intermediate date, the death dates from the time of a decree adjudging the person dead; where the decedent left no debts and the next of kin have distributed his property by consent, there is not necessity for administration and letters are properly refused: Matter of Losee, 119 App. Div. 107.

§ 2661. Persons incompetent to receive letters.

b. **Alien.**—An action to recover damages resulting from the death of an alien, who was a resident of the state at the time of his death and also a subject of a foreign country, may be maintained under § 1902 though the next of kin are non-resident aliens; under § 2661 a resident of the state of New York may, although not a citizen of the United States, be appointed administrator of a decedent: Tanas v. Municipal Gas Co., 88 App. Div. 251; 84 N. Y. Supp. 1053.

c. Where the widow and children of a decedent are aliens and non-residents of the state, they are incompetent to receive letters: Matter of Paola, 36 Misc. 514; 73 N. Y. Supp. 1062.

d. **Intoxication.**—A surviving wife, primarily entitled to administer upon the assets of her intestate husband, is not debarred from receiving letters by the fact that she has been occasionally addicted for some years to the use of intoxicating liquors, as the intoxication which disqualifies must be habitual, and such as presently to render the applicant incompetent to execute the duties of the trust: Matter of Reichert, 34 Misc. 288; 69 N. Y. Supp. 644.

e. **Improvidence.**—Letters of administration should be refused a person for "improvidence," under § 2661, who has not been able to make a success of his business or support his children and has from time to time borrowed money from others: Matter of Ferguson, 41 Misc. 465.

f. **Failure in business.**—An objection to granting letters to a son, otherwise entitled to receive them, upon his father's estate, on the ground that he failed in business conducted in his own name, involving his father somewhat, and that afterwards the father paid the son's obligations and took the business and permitted the son to use his name, and that then other losses occurred, does not present a case of improvidence within the meaning of this section; nor is the conviction of the son of a misdemeanor in the United States court, for which he was fined fifty dollars, a conviction of an infamous crime within the meaning of this section: Matter of Greene, 48 Misc. 31.

§ 2662. Application for letters.

g. **Hearsay.**—A memorandum by a surrogate's clerk upon the back of a petition in an application for letters testamentary is hearsay evidence and properly excluded: Twaddell v. Weidler, 109 App. Div. 444; 96 N. Y. Supp. 90, aff'd 186 N. Y. 601.

h. **Name.**—A petition signed by the widow and daughter-in-law is sufficient, though the widow's name be omitted at the beginning of the verification and the singular number is used in the petition and affidavit, the latter being signed and sworn to by both; and a decree awarding letters in accordance with the petition will be upheld when the daughter-in-law only qualifies: Matter of Ireland, 47 Misc. 545.

i. After letters of administration were issued an alleged will was discovered and subsequently admitted to probate, the decree revoking the prior letters of administration. Thereafter, in an action under § 2653a, the will was declared not to be the will of the decedent, and the probate was adjudged invalid. The prior administrator on his appointment had brought action to reach property alleged to belong to the estate; held, that the action abated on the revocation of the letters of administration and could only be revived by the reappointment of an administrator in a new proceeding; that the fact that the decree admitting the will to probate was vacated did not reinstate the former administrator: Belden v. Belden, 118 App. Div. 296.

j. The public administrator of the city of New York is absolutely or contingently entitled to letters under § 2660, and upon a petition filed by him, unless the next of kin see fit to make an application, letters can be issued to him: Matter of Flynn, 92 App. Div. 379.

k. The word "contingently," as used in § 2662, means a person to whom, at the time the petition is filed, letters would issue, if persons entitled thereto in priority, under § 2660, did not take: Matter of Ferrigan, 92 App. Div. 376; 87 N. Y. Supp. 16.

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§ 2663. Citations; proceedings upon return thereof.

a. A party having a prior right to letters of administration upon the estate of a decedent, who renounces such right in favor of a person having a subsequent right, where such renunciation is not evidenced or filed as required by § 2663, may be permitted by the surrogate to retract such renunciation: Matter of Sandford, 10 App. Div. 479.

§ 2664. Administrator's bond.

See § 810 et seq., ante, General provisions relating to bonds and undertakings.

See § 2595, ante, Deposit of securities to reduce penalty of bond.

See § 2597, ante, In certain cases new bond or new sureties may be required.

See § 2600, ante, Application of sureties to be released.

b. A petition signed by the widow and daughter-in-law is sufficient, though the widow's name be omitted at the beginning of the verification and the singular number is used in the petition and affidavit, the latter being signed and sworn to by both; and a decree awarding letters in accordance with the petition will be upheld when the daughter-in-law only qualifies: Matter of Ireland, 47 Misc. 545.

c. Limited letters of administration do not restrict the person to whom they are granted to the prosecution of any person for causing the death of the intestate, though the petition undertakes to specify the person through whose negligence it happened, but the administratrix may prosecute her action against any person liable: Matter of Halligan, 50 Misc. 481.

§ 2669. Public administrator of Kings county.

The surrogate of the county of Kings and the county judges of such county shall, on or before the twenty-seventh day of April, 1904, and every five years thereafter—except as hereinafter provided—appoint a public administrator of said county to hold office for the term of five years beginning on said date, unless sooner removed for cause. In case of a vacancy in said office by reason of death, resignation or otherwise said surrogate and county judges shall fill the same by appointing a public administrator for the full term of five years from the date of such appointment. Before entering upon the performance of the duties of his office the person so appointed must take and subscribe before the county clerk or one of the county judges of the county, or a justice of the supreme court, the constitutional oath of office, and execute a bond with sureties to be approved by a justice of the supreme court, or such county judge, to the county of Kings, in a penal sum of fifty thousand dollars, conditioned for the faithful discharge of all the duties of his office, and that he will fully and correctly account for and pay over all moneys and property that may come into his hands as such public administrator, according to law, which bond must be filed with the clerk of the county. He shall be entitled to retain from all moneys or property of any intestate that come into his hands after deducting all actual and necessary expenses the same commissions as are now allowed by law to executors or administrators, but he shall receive no salary for his services. He shall have the prior right and authority to collect, take charge of and administer upon the goods, chattels, personal property and debts of persons dying intestate, and for that purpose to maintain suits as such public administrator, as any executor or administrator might by law in the following cases:

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1. Whenever such person dies leaving any assets or effects in the county of Kings, and there is no widow, husband or next of kin entitled to a distributive share in the estate of such intestate, resident in the state, entitled, competent or willing to take out letters of administration on such estate.

2. Whenever assets or effects of any person dying intestate, after his death, come into the county of Kings and there is no such person entitled, competent or willing to take administration of the estate. In such cases intestacy is presumed until a will is proved and letters testamentary issued thereon. All provisions of law conferring jurisdiction, authority or power on, or otherwise relating to, the office of public administrator of the city of New York and to the office of public administrator in the several counties of the state, so far as applicable, apply to and are conferred on the office hereby created. The surrogate of the county of Kings, in cases where now authorized by law to issue letters of temporary administration, may in his discretion issue letters of temporary administration to such administrator without further security than required by this section.

Added by chap. 686 of 1893.
Amended by chap. 357 of 1904.

a. The public administrator of Kings county has no statutory right to administer upon the estate of a decedent who left a son over fourteen years of age, for, although the minor is incompetent to serve because of his minority, his general guardian is entitled to administer in his right before the public administrator: Matter of Hudson, 37 Misc. 539; 75 N. Y. Supp. 1053.

b. In Kings county the public administrator is by statute preferred in administration to the brother of a decedent who left a father in Ireland but no wife, issue or descendants, and this because the brother, not being entitled to a distributive share in the estate, cannot be entitled to administration: Matter of Gilchrist, 37 Misc. 543; 75 N. Y. Supp. 1055.

§ 2670. When and how temporary administrators may be appointed.

c. The authority given by § 2670, subd. 1, to a surrogate to issue, in his discretion, letters of temporary administration where for any cause delay necessarily occurs in the granting of letters of administration or in probating a will, can be exercised by him only where some proceeding for probate of the will of the decedent or for issue of letters of administration in chief upon his estate is pending in his county: Matter of Hill, 43 Misc. 583.

d. **Court of appeals.**—After reversal by the court of appeals of a decree for the probate of a will, although letters testamentary had been issued at the time of probate, the surrogate has jurisdiction, under § 2670, to appoint a temporary administrator: Matter of Hopkins, 41 Misc. 83; 83 N. Y. Supp. 890.

e. **Appointment.**—A temporary administrator, whose function is only to collect and preserve the estate, may be appointed upon much weaker proof, raising a presumption of the death of the intestate, than a permanent administrator: Czech v. Bean, 35 Misc. 729; 72 N. Y. Supp. 402.

f. A permanent administrator appointed before the discovery of a will is not like a temporary administrator entitled to full commissions: Matter of Hurst, 111 App. Div. 460.

g. Notice of the application for a temporary administrator is required to be given only to each party who has appeared: Matter of Ashmore, 48 Misc. 312.

h. **Accounting.**—An executor, upon an accounting, should be charged with the value of property as shown in his inventory on his appointment as permanent executor, and not as shown on a prior inventory as temporary administrator: Matter of Tisdale, 110 App. Div. 857.

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§ 2672. General powers, etc., of temporary administrator.

a. **Accounting.**—An executor, upon an accounting, should be charged with the value of property as shown in his inventory on his appointment as permanent executor, and not as shown on a prior inventory as temporary administrator: Matter of Tisdale, 110 App. Div. 857.

b. **Interest.**—The appointment as temporary administrator of the executors named in the will, who are otherwise interested in the estate, is not improper, and their interest is not sufficient ground for the revocation of their letters: Matter of Ashmore, 48 Misc. 312.

c. Where the effect of an action, brought in the supreme court by the son of a decedent to revoke probate of his father's will, would, if the son succeeds, be to increase, as next of kin, the interest which he presently has under the will in the income of the estate as legatee or as beneficiary of a trust, the pendency of the action does not bar the surrogate from presently directing payment, or the executor from paying, to the son, for his support, a balance of income confessedly due him under the will: Matter of Hughes, 41 Misc. 75; 83 N. Y. Supp. 646.

d. **Foreclosure.**—A temporary administrator may maintain an action to foreclose a mortgage when duly appointed as such administrator by the surrogate's court: Czech v. Bean, 35 Misc. 729; 72 N. Y. Supp. 402.

§ 2675. Id.; as to real property.

e. In view of § 2675, empowering the surrogate to confer upon a temporary administrator, authority to do any act in regard to the real property of his decedent necessary to its preservation, or benefit, the supreme court will not appoint a temporary receiver in an action brought to partition the real property of the decedent where it appears that the surrogate has already appointed a temporary administrator of his personalty: Weiher v. Simon, 41 Misc. 202.

f. **Account.**—The appointment of an administrator with the will annexed terminates the authority of a temporary administrator and the latter must account in the surrogate's court on the petition of the new administrator and will be compelled to turn over personal property in his possession; but he cannot be compelled by the new administrator to turn over the rents and profits of real estate which he was authorized to collect pursuant to the provisions of § 2675; such proceeds he should be required to pay into court, leaving the question as to who is entitled thereto in abeyance. He cannot attack the validity of provisions of the will disposing of realty or bring action for that purpose: Matter of Goetz, 120 App. Div. 10.

§ 2678. Deposit of money by temporary administrator.

g. The depositary provided for in § 2678 becomes *pro hac vice* an officer of the court, and the surrogate has power, on an accounting by sureties of a temporary administrator, who is imprisoned for a felony, to bring in such depositary, shown to have paid out moneys without order, to establish the legality of such payments and to defend the same: Matter of Rothschild, 109 App. Div. 546; 96 N. Y. Supp. 372.

§ 2680. Money deposited; how withdrawn.

h. The depositary provided for in § 2678 becomes *pro hac vice* an officer of the court, and the surrogate has power, on an accounting by sureties of a temporary administrator, who is imprisoned for a felony, to bring in such depositary, shown to have paid out moneys without order, to establish the legality of such payments and defend the same: Matter of Rothschild, 109 App. Div. 546; 96 N. Y. Supp. 372.

§ 2684. Revocation of letters, upon proof of will, or revocation of probate, etc.

i. A permanent administrator appointed before the discovery of a will, and acting in good faith, is entitled to commissions on being superseded by an executor thereafter appointed, but he is only entitled to partial commissions for collecting without disbursing; payment to the executor is not disbursing; such superseded permanent administrator is not, like a temporary administrator, entitled to full commissions: Matter of Hurst, 111 App. Div. 460.

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§ 2685. Revocation of letters for disqualification, misconduct, etc.

a. Evidence upon a proceeding under subdivisions 2 and 5 of this section considered and held insufficient to revoke letters: Matter of Burr, 48 Misc. 56.

b. The mere fact that two executors refused to act with a co-executrix in the presence of her son, whose conduct was offensive, furnishes no ground for their removal from office under § 2685, when there was no refusal to act with the executrix except in the presence of her son: Matter of Waterman, 112 App. Div. 313; 98 N. Y. Supp. 583.

c. Where letters of administration were granted to a woman who claimed to be the widow of an intestate, but whose marriage to him was void for the reason that she had a husband living, and where it appears that the intestate, upon discovering that fact, refused to live any longer with her and subsequently married another woman, and the latter petitions to have such letters revoked and administration granted to her, such letters will be revoked: Matter of Ward, 50 Misc. 483.

d. Where a creditor, without notice to a non-resident brother of an intestate, procured letters of administration upon the estate, the surrogate, upon the brother's subsequent petition for letters revoked those of the creditor upon the ground that within § 2685, subd. 1, he had, since their issue to him, become disqualified by the application of a non-resident having a prior right: Matter o Tyers, 41 Misc. 378.

e. **Counsel fees.**—Where executors successfully resist a motion to remove them from office, a reasonable counsel fee is a proper charge of expenditure against the state: Matter of Boyer, 54 Misc. 182.

f. **Misconduct.**—In a proceeding under subd. 2 of § 2685 for the revocation of letters testamentary on the ground that the executor is guilty of misconduct, the petition should specifically set forth the charges of misconduct and a removal should not be based on matters outside of the issues presented, although an executor has invested portions of the estate in western mortgages and has loaned money upon a promissory note, it is not ground for revoking his letters when the estate has suffered no loss thereby and his accounts have been judicially settled: Matter of Burr, 118 App. Div. 482.

g. What constitutes a case where the letters were obtained by a false suggestion of a material fact: Matter of Rathyen, 115 App. Div. 644.

h. **Improvidence.**—The fact that a certain trust in real estate has, while in the hands of an administrator, greatly diminished in value and income, does not of itself show that he has a tendency to improvidence, within § 2685, subd. 2, relative to the acts and conduct which disqualify an administrator and cannot alone justify revocation of his letters: Matter of Treadwell, 37 Misc. 584; 75 N. Y. Supp. 1058.

i. The surrogate removed an administratrix for not trying to sell the fixtures and lease of a liquor store of her intestate husband, which had five months to run, for letting these fixtures be sold under a chattel mortgage and be bought in by her bartender, who gave a new chattel mortgage, and for assisting him in procuring a renewal of the lease in his name that he might continue the business in her interest—the surrogate deeming these acts breaches of the trust duties which she owed her husband's creditors: Matter of Heyen, 40 Misc. 511; 82 N. Y. Supp. 791.

j. **Prejudice.**—A surrogate will remove an executor where his constant dissensions with his co-executor, as well as his failure to do his part in the management of the estate, indicate that his continuance in office will prejudice the best interests of the trust: Matter of Wheaton, 37 Misc. 184; 74 N. Y. Supp. 938.

k. **Jurisdiction.**—In a proceeding to revoke letters testamentary it must be shown that the petitioner was, "a creditor or person interested in the estate of," the decedent, in order to give the surrogate jurisdiction: Sutherland v. St. Lawrence County, 42 Misc. 38; 85 N. Y. Supp. 696.

l. **Corporation.**—One to whom a claim against a decedent was assigned by a corporation after the issuing of letters of administration cannot apply, under § 2685, for a revocation of such letters: Matter of Ciotto, 105 App. Div. 143.

§ 2686. Petition; citation thereupon.

See § 2515 et seq., ante, Issuance of citation and service thereof.

§ 2687. Hearing; decree.

m. The temporary residence in New Jersey, because of ill-health, of an executor appointed in this state does not establish that such executor "has removed" from the state, within the meaning of § 2681, by which the surrogate is compelled to revoke the appointment of such executor: Matter of McKnight, 80 App. Div. 284; 80 N. Y. Supp. 251.

n. The continuous absence from the state of New York of an executrix during most of the year following the issue of

letters to her, although tending to delay creditors of the decedent, is not a ground for removing her where she is the sole beneficiary, has so far performed in time all the statutory duties of her trust and the said year has not yet expired: Matter of Magoun, 41 Misc. 352; 84 N. Y. Supp. 940.

§ 2691. In what cases letters may be revoked without a citation.

a. Where a creditor's petition to revoke letters testamentary granted to a husband alleges that the husband has absconded and is a fugitive from justice, the surrogate has power, under § 2691, subd. 2, to hear the matter and revoke the letters without issuing a citation: Sutherland v. St. Lawrence County, 42 Misc. 38; 85 N. Y. Supp. 696.

§ 2693. In other cases, successor to be appointed.

See § 2605, ante, Successor upon his appointment may compel accounting.

b. **Discovery of will.**—After letters of administration were issued an alleged will was discovered and subsequently admitted to probate, the decree revoking the prior letters of administration. Thereafter, in an action under § 2653a, the will was declared not to be the will of the decedent, and the probate was adjudged invalid. The prior administrator on his appointment had brought action to reach property alleged to belong to the estate; held, that the action abated on the revocation of the letters of administration and could only be revived by the reappointment of an administrator in a new proceeding; that the fact that the decree admitting the will to probate was vacated did not reinstate the former administrator: Belden v. Belden, 118 App. Div. 296.

§ 2694. Testamentary dispositions; what law governs.

See § 2611, ante, What wills may be proved; change of residence not to affect validity.

c. In the language of § 2694, the "force or effect" of an administrator disposing of personal property "are regulated by the laws of the state or country of which the decedent was a resident at the time of his death:" Matter of Cruger, 36 Misc. 477; 73 N. Y. Supp. 812.

d. **Personal property.**—§ 147 of the Real Property Law requires that the instrument shall be "executed as required by law," and as to the will of one disposing of personal property, the required law was that of his domicile: Ward v. Stanard, 82 App. Div. 386.

e. Distribution of personalty, whose situs at the time of his death was the state of New York, whether made to his heirs, distributees or legatees, is governed by the law of his domicile, and this principle is confirmed by § 2694: Matter of Barandon, 41 Misc. 380.

f. **Interest.**—Upon an accounting of an ancillary administrator, the question of interest on legacies is governed by the law of the decedent's last domicile; but questions of procedure in the proceeding are governed by the laws of this state: Matter of Kucielski, 49 Misc. 404.

§ 2695. Ancillary letters upon foreign probate.

g. A surrogate has no jurisdiction to issue ancillary letters of administration upon a will admitted to probate in a foreign state unless the petition is accompanied by a copy of the will and a copy of the foreign letters, if any were issued: Baldwin v. Rice, 183 N. Y. 55, aff'g 100 App. Div. 241; 89 N. Y. Supp. 738.

h. Under what circumstances a court of equity will assume jurisdiction of a fund in the state of New York as against foreign executors, considered: Montgomery v. Boyd, 78 App. Div. 64; 79 N. Y. Supp. 879.

i. **Jurisdiction.**—When this section is read in connection with other sections relating to ancillary letters it is clear that the surrogate's court can obtain jurisdiction only upon the petition of the person to whom letters of administration or letters testamentary have been issued in another state, territory or country, or else upon the petition of the creditor residing in this state; they cannot be granted upon the petition of the creditor residing in another state: Matter of Gennert, 96 App. Div. 8; 89 N. Y. Supp. 37.

§ 2697. To whom ancillary letters granted.

j. The surrogate's court has no power to issue letters of administration with the will annexed where the will of the decedent was probated in another state as its jurisdiction is limited to issuing ancillary letters testamentary with the will annexed; the court cannot, under § 2697, even issue such ancillary letters except to the foreign executor or such executor files his consent: Baldwin v.

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Rice, 100 App. Div. 241; 89 N. Y. Supp. 738; 91 N. Y. Supp. 1086, aff'd 183 N. Y. 55.

a. **Foreign executor.**—No one can take out letters of administration in this state after a foreign probate, except by or through the consent of the foreign executor: Baldwin v. Rice, 44 Misc. 64; 89 N. Y. Supp. 743.

b. Where letters testamentary have been issued in a foreign state to the executor named in the will, the surrogate has no jurisdiction to issue to another person ancillary letters unless he files with his petition an instrument executed by the executor authorizing the petitioner to receive such letters: Baldwin v. Rice, 183 N. Y. 55, aff'g 100 App. Div. 241; 89 N. Y. Supp. 738; 91 N. Y. Supp. 1086.

c. **Notice.**—Letters will not be granted without notice to next of kin, in an estate: Matter of Schmid, 116 App. Div. 706.

§ 2698. Petition; citation.

d. When this section is read in connection with other sections relating to ancillary letters it is clear that the surrogate's court can obtain jurisdiction only upon the petition of the person to whom letters of administration or letters testamentary have been issued in another state, territory or country, or else upon the petition of the creditor residing in this state; they cannot be granted upon the petition of the creditor residing in another state: Matter of Gennert, 96 App. Div. 8; 89 N. Y. Supp. 37.

§ 2699. Hearing; security.

e. The only authority which is expressly given to the surrogate to direct any other disposition of funds in the hands of one holding ancillary letters than the transmission of the same as prescribed by § 2700 to the state, where the letters were granted to be disposed of pursuant to law, is § 2701: Matter of Gennert, 96 App. Div. 8; 89 N. Y. Supp. 37.

f. §§ 2699-2701 provide for the issue of ancillary letters of administration in the case of a non-resident where letters have been issued at his domicile, and it is discretionary with the court whether to require the payment of local creditors or to require security to insure their payment by the foreign administrator: Maas v. German Savings Bank, 73 App. Div. 524, aff'd 176 N. Y. 377; 77 N. Y. Supp. 256.

§ 2700. Persons acting under ancillary letters must transmit assets.

g. The only authority which is expressly given to the surrogate to direct any other disposition of funds in the hands of one holding ancillary letters than the transmission of the same as prescribed by § 2700 to the state, where the letters were granted to be disposed of pursuant to law, is § 2701: Matter of Gennert, 96 App. Div. 8; 89 N. Y. Supp. 37.

h. §§ 2699-2701 provide for the issue of ancillary letters of administration in the case of a non-resident where letters have been issued at his domicile, and it is discretionary with the court whether to require the payment of local creditors or to require security to insure their payment by the foreign administrator: Maas v. German Savings Bank, 73 App. Div. 524, aff'd 176 N. Y. 377; 77 N. Y. Supp. 256.

§ 2701. Id.; when they may be directed to pay, etc., without transmission.

i. The only authority which is expressly given to the surrogate to direct any other disposition of funds in the hands of one holding ancillary letters than the transmission of the same as prescribed by § 2700 to the state, where the letters were granted to be disposed of pursuant to law, is § 2701: Matter of Gennert, 96 App. Div. 8; 89 N. Y. Supp. 37.

j. §§ 2699-2701 provide for the issue of ancillary letters of administration in the case of a non-resident where letters have been issued at his domicile, and it is discretionary with the court whether to require the payment of local creditors or to require security to insure their payment by the foreign administrator: Maas v. German Savings Bank, 73 App. Div. 524, aff'd 176 N. Y. 377; 77 N. Y. Supp. 256.

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§ 2702. Id.; general powers and duties.

a. **Ancillary administrator.**—The powers of an ancillary administrator are the same as a domestic administrator except as particularly excepted and specified in this section: Smith v. Second National Bank, 169 N. Y. 467; 33 Civ. Pro. R. 334, rev'g 52 App. Div. 631; 65 N. Y. Supp. 1146.

The exceptions specified in this section do not limit his title to the assets of an estate, but such title is co-extensive with that of a domestic administrator. Id.

§ 2703. Recording will proved in other states.

b. Under the provisions of §§ 2703 and 2704, a will should not be ordered to be recorded in a surrogate's office in this state where the proof rests on the testimony of one of two witnesses without any excuse for or explanation of the absence of the other; that the will has been executed in conformity with the laws of this state must be established in the manner pointed out by our law: Matter of Hagar, 48 Misc. 43.

c. **Real property.**—Under the provisions of §§ 2703, 2704, for recording foreign wills, where it appears by the petition that real property situated within this state was devised by a will which has been admitted to probate within another state where the testator resided, and where it appears that the will had been executed in conformity with the laws of this state, the will will be ordered to be recorded, although the proof of its execution rests upon the testimony of a single witness: Matter of Coope, 53 Misc. 512.

d. **Massachusetts.**—When a will executed in Massachusetts is not entitled, within the provisions of § 2703, to be recorded in the county of New York where real estate is situated which the will affects: Matter of Nash, 37 Misc. 706; 76 N. Y. Supp. 453.

e. Where the exemplified record of a foreign will is made in 1866, devising domestic real estate, does not show either in the attestation clause, or in the proofs, that, as required by our statute of wills, the attesting witnesses became such at the testator's request, it does not show title in the devisee: Meiggs v. Hoagland, 41 Misc. 4; 83 N. Y. Supp. 603.

§ 2704. Papers recorded, etc.; how authenticated.

To entitle a copy of a will admitted to probate or [of] letters testamentary or of letters of administration, granted in any other state or in any territory of the United States, and of the proofs or of any statement of the substance of the proofs of any such will, or of the record of any such will, letters, proofs or statement, to be recorded or used in this state as provided in this article, such copy must be authenticated by the seal of the court or officer by which or whom such will was admitted to probate or such letters were granted, or having the custody of the same or of the record thereof, and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer if any; and must be further authenticated by a certificate under the great or principal seal of such state or territory, and the signature of the officer who has the custody of such seal, to the effect that the court or officer by which or whom such will was admitted to probate or such letters were granted, was duly authorized by the laws of such state or territory to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; that the seal of such court or officer affixed to such copy is genuine, and that the officer making such certificate under such seal of such state or territory verily believes that each of the signatures attesting such copy is genuine; and to entitle any certificate concerning proofs accompanying the copy of the will or of the record so authenticated, to be recorded or used in this state, as

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provided in this article, such certificate must be under the seal of the court or officer by which or whom such will was admitted to probate, or having the custody of such will or record, and the signature of a judge or the clerk of such court, or the signature of such officer, authenticated by a certificate under such great or principal seal of such state or territory, and the signature of the officer having the custody thereof, to the effect that the seal of the court or officer affixed to such certificate concerning proofs is genuine, and that such officer making such certificate under such seal of such state or territory, verily believes that the signature to such certificate concerning proofs is genuine. To entitle a copy of a will admitted to probate or of letters testamentary or of letters of administration granted in a foreign country, and of the proofs or of any statement of the substance of the proofs of any such will or of the record of any such will, letters, proofs or statement to be recorded or used in this state, as provided in this article, such copy must be authenticated by the seal of the court or officer by which or by whom such will so admitted to probate or such letters were granted or having the custody of the same or of the record thereof and the signature of a judge of such court or the signature of such officer and of the clerk of such court or officer, if any; and must be further authenticated by a certificate of a judge of a court of record of such foreign country; to the effect that the court or officer by which or by whom such will was admitted to probate or such letters were granted was duly authorized by the laws of such foreign country to admit wills to probate or to grant letters testamentary or of administration and to keep the same and records thereof; and that the judge making such certificate verily believes that the seal and each of the signatures, attesting such copy is genuine, and the signature and official charter of such judge of a court of record shall be attested by a United States consul or vice-consul, and to entitle any certificate concerning proofs accompanying the copy of the will, or of the record so authenticated, to be recorded or used in this state, as provided in this article, such certificate concerning proofs must be similarly authenticated and attested.

New.

Amended by chap. 495 of 1888, chap. 603 of 1897, chap. 472 of 1903 and chap. 347 of 1905.

a. Under the provisions of §§ 2703 and 2704, a will should not be ordered to be recorded in a surrogate's office in this state where the proof rests on the testimony of one of two witnesses without any excuse for or explanation of the absence of the other; that the will has been executed in conformity with the laws of this state must be established in the manner pointed out by our law: Matter of Hagar, 48 Misc. 43.

b. Under the provisions of §§ 2703, 2704, for recording foreign wills, where it appears by the petition that real property situated within this state was devised by a will which has been admitted to probate within another state where the testator resided, and where it appears that the will had been executed in conformity with the laws of this state, the will will be ordered to be recorded, although the proof of its execution rests upon the testimony of a single witness: Matter of Coope, 53 Misc. 509.

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§ 2706. Liability of persons unauthorized to act as executors or administrators.

a. Right of consul of an alien Italian intestate to administer his estate and thereafter send the surplus to the next of kin in Italy, considered: Matter of Lobrasciano, 38 Misc. 415; 77 N. Y. Supp. 1040.

§ 2707. Proceedings to discover property withheld, etc.

An executor or administrator may present to the surrogate's court, from which letters were issued to him, a written petition duly verified setting forth, on knowledge, or information and belief, any facts tending to show that money or other personal property which should be delivered to the petitioner, or included in an inventory or appraisal, is in the possession, under the control or within the knowledge or information of a person who withholds the same from him; or who refuses to impart knowledge or information he may have concerning the same, or to disclose any other fact which will aid such executor or administrator in making discovery of such property, so that it cannot be inventoried or appraised; and praying an inquiry respecting it, and that the person complained of may be cited to attend the inquiry and be examined accordingly, and to deliver the property if in his control. The petition may be accompanied by an affidavit or other evidence, written or oral, tending to support the allegations thereof. If the surrogate is satisfied, on the papers so presented, that there are reasonable grounds for the inquiry, he must issue a citation accordingly; which may be made returnable forthwith, or at a future time fixed by the surrogate, and may be served at any time before the hearing. Where the person or any of the persons, to be cited, does not reside, or is not within the county of the surrogate, the citation, in the surrogate's discretion, may require him to appear at a specified time and place within the county where he resides or is served before the surrogate of that county.

Former §§ 2706, 2707 of this Code, consolidated by L. 1893, c. 686. From L. 1870, c. 394, § 1; Id., c. 359, § 7; L. 1886, c. 308.

Amended by chap. 526 of 1903.

b. **Discovery.**—A proceeding for discovery made under §§ 2707-2710 against one claiming as a foreign temporary administrator of a decedent, cannot be wholly defeated by an answer of the foreign administrator that he is not in possession of the assets in this state and that, as to the assets in the foreign state, he is entitled to possession by virtue of a special lien, unless he states the nature and extent of his special title or describes the property to which the proceeding might be dismissed: Matter of O'Brien, 34 Misc. 436; 32 Civ. Pro. R. 239; 69 N. Y. Supp. 1022.

c. **Lien.**—Assuming, without deciding, that an administratrix may, under § 2707 et seq., compel the delivery to her of papers belonging to the decedent, including deeds of real property in which the decedent is named as one of the grantees, it is the duty of the surrogate, under § 2710, to dismiss the proceeding, where the person having possession of such papers claims a lien thereon for services rendered by him as an attorney at law: Matter of McGuire, 106 App. Div. 131; 94 N. Y. Supp. 97.

d. **Appeal.**—An order punishing a witness for contempt in refusing to disclose information which was not privileged is a final order reviewable by the court of appeals; information or knowledge alleged to have been derived by an attorney from a deceased client, but which in fact was obtained from other sources, is not privileged under § 835 of the Code of Civil Procedure: Matter of King v. Ashley, 179 N. Y. 281.

e. **Insufficient facts.**—When facts insufficient to warrant the summary order for delivery of property under this sec-

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tion: Matter of Hanlman, 50 Misc. 245.

a. **Executor.**—An executor or administrator who presents a petition pursuant to this section is entitled to an order permitting him to examine the person alleged to be withholding assets, and the person sought to be examined cannot defeat the examination by an answer alleging that he has no property belonging to the estate in his possession and that he is the absolute owner of the property described in the petition: Matter of Krisfeldt, 49 Misc. 32; 98 N. Y. Supp. 299, aff'g 113 App. Div. 16.

b. **Title.**—Since the amendment made in 1903 to §§ 2707-2710, the surrogate has power to proceed with the examination of one charged with having property belonging to an estate, although the answer of such person puts the question of title in issue: Matter of Gick, 113 App. Div. 16.

c. **Surrogate.**—The surrogate may examine a person who is alleged to have in her possession property belonging to the estate of a deceased person, notwithstanding the person sought to be examined claims, in a verified answer to the petition, the ownership of the property involved in the application: Matter of Packard, 53 Misc. 163.

d. **Debt.**—A proceeding under § 2707 et seq., to compel the delivery of property belonging to an estate withheld by another, cannot be used as a means of collecting a debt; thus, a bank, holding moneys deposited by a decedent cannot be required to pay the same over to an administrator by such summary proceeding, the position of the bank being merely that of a debtor: Matter of White, 119 App. Div. 140.

§ 2708. Order; service of citation and order.

The surrogate must annex to or endorse upon the citation an order requiring the party cited to attend personally, at the time and place therein specified. The citation and order must be personally served, and service thereof is ineffectual, unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness who is subpœnaed to attend a trial in the supreme court.

L. 1870, c. 394, §§ 1, 2, 3.

Amended by chap. 686 of 1893, chap. 946 of 1895 and chap. 526 of 1903.

§ 2709. Examination.

On the attendance of a person to whom a citation is issued, as prescribed in this article, he may submit an answer duly verified showing cause why the examination should not proceed. The surrogate may then dismiss the proceeding or direct the examination to proceed. In the latter case he must be sworn to answer truly all questions put to him, touching the inquiry prayed for in the petition; and he may be examined fully and at large respecting property of the decedent, or of which the decedent had possession at the time of or within two years before his death. A refusal to attend or be sworn, or to answer a question which the surrogate determines to be proper, is punishable in the same manner as a like refusal by a witness subpœnaed to attend a hearing before the surrogate. The extent of the examination shall be in the discretion of the surrogate. If the witness is examined concerning any personal communication or transaction between himself and the decedent, all objection under section 829 to his testimony as to the same in future litigation is waived. Either party may produce further evidence, in like manner and with like effect as on a trial.

Former §§ 2710, 2711 of this Code, consolidated by L. 1893, c. 686. From L. 1870, c. 394, §§ 3, 4, 5, as amended by L. 1881, c. 535.

Amended by chap. 526 of 1903.

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a. § 2709 authorizes the examination, upon the application of an executor or administrator, of a person having knowledge of a decedent's property, in order to enable the administrator to secure information as to property which the administrator is required to inventory or appraise, although the present situation of the property is such that it would be impracticable to order its delivery to the administrator: Matter of O'Brien v. Baker, 65 App. Div. 282; 72 N. Y. Supp. 1001.

b. The fact that a person has testified under the provisions of § 2709 does not permit such person to testify under § 829: Matter of Killian, 47 Misc. 511; 195 N. Y. Supp. 969; 114 App. Div. 412.

c. **Title.**—Since the amendment made in 1903 to §§ 2707-2710, the surrogate has power to proceed with the examination of one charged with having property belonging to an estate, although the answer of the person puts the question of title in issue: Matter of Gick, 113 App. Div. 16.

d. **Waiver.**—When, in a proceeding by a representative to discover the property of an estate alleged to be withheld, the person is examined concerning personal communications or transactions with the deceased, all the objections under § 829 to his testimony to the same in future litigation is waived by virtue of the provisions of § 2709: Killian v. Heinzerling, 114 App. Div. 410.

§ 2710. Decree.

If the facts admitted by the witness show that he is in the control of property to whose immediate possession the petitioner is entitled, the surrogate may decree that it be delivered to the petitioner. If the witness admits having the control of the property, but the facts as to the petitioner's right are in dispute, the proceeding shall end, unless the parties consent to its determination by the surrogate, in which case it shall be so determined.

Added by chap. 526 of 1903.

See § 1389 et seq., ante, Exemptions under an execution.

e. **Attorney.**—Assuming, without deciding, that an administratrix may, under § 2707 et seq., compel the delivery to her of papers belonging to the decedent, including deeds of real property in which the decedent is named as one of the grantees, it is the duty of the surrogate, under § 2710, to dismiss the proceeding, where the person having possession of such papers claims a lien thereon for services rendered by him as an attorney at law: Matter of McGuide, 106 App. Div. 131; 94 N. Y. Supp. 97.

f. **Discovery.**—A proceeding for discovery, made under §§ 2707-2710, against one, claiming as a foreign temporary administrator of a decedent, cannot be wholly defeated by an answer of the foreign administrator that he is not in possession of the assets in this state and that, as to the assets in the foreign state, he is entitled to possession by virtue of a special lien, unless he states the nature and extent of his special title or describes the property to which the proceeding might be dismissed: Matter of O'Brien, 34 Misc. 436; 32 Civ. Pro. R. 239; 69 N. Y. Supp. 1022.

g. **Dispute.**—The provision for termination of the proceeding where a dispute arises as to the ownership of the property, refers to a dispute developed upon the examination of the claimant, and not a dispute which he creates by allegations in an answer to the petition for his examination: Matter of Krisfeldt, 49 Misc. 32; 98 N. Y. Supp. 299, aff'g 113 App. Div. 16.

§ 2711. Appointment of appraisers and appraisal.

h. An executor, upon an accounting, should be charged with the value of property as shown in his inventory on his appointment as permanent executor and not as shown on a prior inventory as temporary administrator: Matter of Tisdale, 110 App. Div. 857.

§ 2712. What shall be deemed assets.

i. All personal property, including leaseholds, must pass through the medium of administration, and such leaseholds are subject to the collateral inheritance tax; the term "real property" is now commonly employed in statutes instead of lands, tenements and hereditaments, and the term "personal property" is now used to designate chattels and every species of property which is not real estate: Matter of Althause, 63 App. Div. 252; 32 Civ. Pro. R. 158.

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a. **Rent.**—An undivided interest in house rent, due at the time of the death of the intestate, is an asset of his administration: Matter of Foulds, 35 Misc. 171; 71 N. Y. Supp. 473.

b. **Contract.**—Moneys unpaid on a contract for the sale of real property is properly inventoried as part of the personal estate: Murdock v. Kelly, 62 App. Div. 562; 71 N. Y. Supp. 152.

c. **Deceased heir.**—The interest of a deceased heir in an estate should be paid to his administrator, as against a brotner and next of kin, who should make his claim in administration: Berkeley v. Kennedy, 62 App. Div. 609; 70 N. Y. Supp. 762.

d. **Trust company.**—The assets of a trust should remain in the custody of the trustee until the final decree, when the proper procedure may be had as to the distribution of any specific property remaining in his hands belonging to the trust: Matter of Hunt, 110 App. Div. 533.

e. The phrase "property alleged to belong to the estate," as used in § 2731, means property which is "deemed assets," as defined by § 2712, and which may be inventoried under § 2714: Matter of Thompson, 184 N. Y. 36, rev'g 102 App. Div. 617; 92 N. Y. Supp. 1147.

f. **Executor.**—When instead of disposing of lands with due diligence and dividing the proceeds among those entitled thereto, executors trade the property for other property, they become personally responsible for the value of the land at the time of the exchange, unless it were made with the consent of the persons entitled to the estate or were subsequently ratified by them: Hine v. Hine, 118 App. Div. 585.

g. **Debt.**—When a member of a firm is appointed administrator of an estate to which the firm is indebted, he is chargeable with the indebtedness; and notes and checks which represent the debt will be treated as so much money in his hands for the usual purpose of administration: Matter of Ablowich, 118 App. Div. 626.

§ 2713. Exemption for widow and children.

h. A sum of money equivalent in value to the articles mentioned in subdivisions 1, 2, 3 and 4 of this section cannot be set off as exempt instead of such articles: Matter of Campbell, 48 Misc. 278.

i. An allowance to the widow for necessary provisions for sixty days after the death of the husband, should be made and should not be limited to what she might personally consume, but should include what might be consumed by the family of the deceased as constituted at the time of the husband's death; no allowance should be made in lieu of articles enumerated in subd. 4 where no such articles belonged to the decedent and those in use in the household belong to the widow; the widow is not entitled to have the wearing apparel and ornaments of her husband set off as exempt: Matter of Griffith, 49 Misc. 405.

j. **Rent.**—A widow, who is also the administratrix of her deceased husband, is not chargeable with rent for remaining in a house leased by him, when it is shown that she used every effort to sublet it for the benefit of the estate, but was unable to do so: Matter of Schroeder, No. 1, 113 App. Div. 204; 99 N. Y. Supp. 176.

k. The legislature did not intend to give a widow the value in money of any of the articles mentioned and described in § 2713, subds. 1, 2, 3, 4, as exempt, and unless her husband owned those articles at his death she gets nothing under those subdivisions: Matter of Perry, 38 Misc. 167; 77 N. Y. Supp. 271.

l. **Construction.**—The construction of § 2713, exempting certain articles, where a man dies leaving a widow or minor children is that, with the exception of subd. 5 where $150 may be set aside, and the provision of subd. 3 for the supplying of the necessary provisions and fuel for the widow and her family for sixty days, that as to all other property mentioned in that section the exemption is limited to such of the specific articles and property as the deceased person possessed at the time of his death: Matter of Sprague, 41 Misc. 608; 85 N. Y. Supp. 303.

m. **Dower.**—Where a testator dies leaving a widow and adult children and devises to the widow certain real estate in place of dower and "all statutory allowances," if she elects to take under the will she is not entitled to dower and her quarantine and the exemptions under § 2713, but need not waive her distributive share in the personalty; where the testator directs the balance of his property to vest in "the persons" entitled thereto by the laws of New York, the widow is entitled, under § 2732, to one-third of the personalty: Matter of Mersereau, 38 Misc. 208; 77 N. Y. Supp. 329.

n. **Piano.**—A piano is "household furniture" within the meaning of § 2713, subd. 4, relating to the exemption for the widow and children: Matter of Allen, 36 Misc. 398; 73 N. Y. Supp. 750.

o. **Conversion.**—Under § 2713 certain specified property of an intestate leaving no minor children vests absolutely in the widow and the right of possession follows the legal title; if the administrator fails to surrender such property she may maintain an action of conversion against him: Crawford v. Nassoy, 173 N. Y. 163, rev'g 55 App. Div. 433; 67 N. Y. Supp. 108.

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a. **Appraisers.**—Where a man dies leaving a widow but none of the articles specified in § 2713, subd. 4, she is entitled to $150 in lieu thereof, and this, although the appraisers have allowed her $200 under subd. 3 of said section and $150 under subd. 5, because there were no such articles as are enumerated in these latter subdivisions: Matter of Hembury, 37 Misc. 454; 75 N. Y. Supp. 933.

b. In setting off household furniture, not exceeding $150 in value, to a widow, under subd. 4 of § 2713, the appraisers, when the total value of the household furniture is less than that sum, cannot make up the balance by giving her farm animals and other property: Matter of Griffin, 118 App. Div. 515.

c. **Assets.**—In view of the declaration of § 2713, that if a man having a family dies leaving a widow and no minor child, the articles enumerated in said section "shall not be deemed assets" but shall belong to her, they form no part of his estate and are not subject to the transfer tax, whether or not they were actually set apart to her by the appraisers and whether or not he died intestate: Matter of Page, 39 Misc. 220.

d. **Discretion of appraisers.**—The provisions of § 2713 requiring appraisers to set aside for a widow "other necessary household furniture," are mandatory and the appraisers have no discretion except as to the nature of the property to be set aside; if the appraisers have not set aside this property the widow is entitled to its cash value, $150: Matter of Bidgood, 36 Misc. 516; 73 N. Y. Supp. 1061.

e. **Tax Law.**—If a decedent was not possessed of the articles specified in § 2713, subd. 3, the husband of the decedent is not entitled to have the cash value of such articles set aside, and such sum should not be deducted from the value of the assets of the decedent's estate in determining the transfer tax under the provisions of the Tax Law: Matter of Libolt, 102 App. Div. 29.

f. **Allowance.**—Where the estate of a decedent has not the specific articles enumerated in subd. 3 of § 2713, the court may properly make a money allowance to the widow, equivalent to the value of such articles: Matter of Williams, 31 App. Div. 617; 52 N. Y. Supp. 700.

g. Where payments to a widow of $400 for mourning apparel and sustenance, and $150, under subd. 5 of § 2713, have been credited to the executor in his accounts, the payment of $300 to her in lieu of articles specified in subds. 3 and 4 of said section will be disallowed: Matter of Weaver, 53 Misc. 244.

h. **Inventory.**—Where the inventory and appraisal returned and filed by the surviving husband and executor of a testatrix show that none of the articles enumerated in § 2713, subd. 3, were in existence at the time of her death, the husband cannot be allowed in money the value of said articles: Matter of Keough, 42 Misc. 387; 86 N. Y. Supp. 807.

i. **Waiver.**—Where the articles exempted by § 2713, subds. 1, 2, 3, 4, are not in existence when a decedent dies, his widow will be allowed in money their value, and where she has died before accounting as one of the administrators, her administratrix will, in the vested right of the widow, be made the same allowance, and the widow's right to such an allowance is not waived by the silence of her inventory of the estate of her decedent as to her claim for the exempt articles: Matter of Hulse, 41 Misc. 307; 84 N. Y. Supp. 220.

§ 2714. Contents of inventory.

j. The provision of this section requiring an executor to include in his inventory any just claim in favor of the deceased against him is equally applicable to the case of an administrator: Matter of Griffith, 49 Misc. 405.

k. The phrase "property alleged to belong to the estate," as used in § 2731, means property which is "deemed assets," as defined in § 2712, and which may be inventoried under § 2714: Matter of Thompson, 184 N. Y. 36, rev'g 102 App. Div. 617; 92 N. Y. Supp. 1147.

l. A decree that an executor owes a debt to an estate and directing him to pay the same is, by virtue of §§ 2714 and 2552 conclusive that he has money in his hands, and, on his refusal to pay, payment may be compelled by contempt proceedings under § 2555; if the executor is insolvent he may be relieved from imprisonment under § 2286: Matter of Strong, 111 App. Div. 281; 97 N. Y. Supp. 459, aff'd 186 N. Y. 584.

m. It is the duty of an executor, indebted to his testator when he died, if solvent at any time before his final accounting, to pay, as an individual, the debt to himself as executor: Matter of David, 44 Misc. 337; 80 N. Y. Supp. 220.

n. **Interest.**—Where an administrator was indebted to his father of whose estate he was appointed administrator, he cannot, under § 2714, charge the principal of the debt with interest only to date of his appointment against his own distributive share: Matter of Davis, 37 Misc. 326; 75 N. Y. Supp. 493.

o. **Non-resident.**—Where it has been decided, or has been conceded, that a defendant was at the time of his death a non-resident of the state of New York, an executor of his will is guilty of contempt in refusing to answer, at an appraisal, to fix the transfer tax upon his estate, questions as to the assets thereof which would be taxable if he died a resident of this state but which would otherwise not be taxable: Matter of Bishop, 40 Misc. 64; 81 N. Y. Supp. 250.

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§ 2716. Return of inventory; how compelled.

a. § 2716, in giving a remedy to compel a filing of an inventory, leaves a person having a claim with a full legal remedy for the enforcement thereof without standing in a court of equity or any forum where the law should be administered under the rules of equity: Matter of Campbell, 96 App. Div. 561; 89 N. Y. Supp. 569.

b. Only a creditor of, or a person interested in, the estate of a decedent can compel his executors to file an inventory: Matter of Huntington, 39 Misc. 477; 80 N. Y. Supp. 220.

§ 2717. Sale of personal property.

c. **Choses in action.**—It is within the powers of executors to sell choses in action belonging to their testator's estate, and they are not compelled to resort to § 2717 for such authority: Huck v. Kraus, 50 Misc. 528.

d. **Equity.**—An action in equity to have a legacy declared to be a charge on land is not a suitable and appropriate proceeding for ascertaining who are creditors and the amount of their claims or to close up the estate without administration or resort to the proceeding prescribed by §§ 2717 and 2749 for the proof of debts and the payment thereof from the personalty or, if insufficient, the sale of the realty for that purpose: Hallock v. Hallock, 79 App. Div. 508; 80 N. Y. Supp. 61.

§ 2718. Ascertainment of debts.

See § 1814 et seq., ante, Actions by and against executors and administrators.

e. **Services.**—A claim for services presented against an estate which covers a long period of time and is unsupported by written evidence, should be carefully scrutinized and should only be allowed when established by satisfactory evidence relating both to the extent and value of the services: Matter of Hart v. Tuite, 75 App. Div. 323; 78 N. Y. Supp. 154.

f. The fact that a claim, presented against a decedent's estate for services, alleged to have been rendered by the claimant to the deceased during his lifetime, was not presented to the decedent in his lifetime, in itself casts suspicion on the validity of the claim, and the court will not sanction its payment except upon satisfactory proof of its validity: Maisenhelder v. Crispell, 105 App. Div. 219.

g. **Funeral expenses.**—A claim for funeral expenses is not the subject of a reference under § 2718: Genet v. Willock, 93 App. Div. 588.

h. When the will of a deceased wife provides that all her just debts and funeral expenses be paid, and her husband, who survived her but a short time, has paid such funeral expenses, the husband's executor is entitled to recover the same from the estate of the wife in the absence of proof showing an intent by the husband to make a gift of such moneys to his wife's estate or an actual release of his claim: Matter of Stadmuller, 110 App. Div. 76.

i. **Judgment.**—When the creditor is entitled to compel the payment of a judgment, although the estate has been distributed: Matter of Blum, 83 App. Div. 161; 87 N. Y. Supp. 491.

j. A judgment docketed against an intestate in his lifetime, cannot be rejected and referred under §§ 1822 and 2718, as it is a debt which has been established by a court of competent jurisdiction, and the surrogate's court may determine to whom it is payable: Matter of Browne, 35 Misc. 362; 71 N. Y. Supp. 1034.

k. A judgment is not such a claim as can be rejected and referred within the contemplation of §§ 1822 and 2718 any more than can a judgment against an administrator: Matter of Wait, 39 Misc. 74; 78 N. Y. Supp. 869.

l. A judgment entered in the report of a referee appointed under § 2718, should not be vacated and set aside unless it is made to appear that the judgment was obtained by fraudulent connivance between the claimant and the administrator: Riley v. Ryan, 103 App. Div. 176.

m. **Commission.**—A commission to take testimony upon oral questions may issue, by consent of parties or by order of the court in a reference to determine a disputed claim against an estate, pursuant to § 2718; an application to examine foreign witnesses upon oral questions or for an open commission which neither names nor limits the number of witnesses will be closely scrutinized in order that the place of trial be not changed to another forum, and in order that the adverse party be not put to expense or inconvenience: Deery v. Bryne, 120 App. Div. 6.

n. **No debts.**—It is not necessary to publish for claims against an estate, and the fact that there are no debts may be proved by common-law evidence: Dickinson v. Hoes, 84 N. Y. Supp. 152; 33 Civ. Pro. R. 101.

o. **Evidence.**—Considerations of public policy require that claims against estates of deceased persons be established by very satisfactory evidence: Linden v. Thiemot, 105 App. Div. 405.

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a. **Statute of limitations.**—Under this section where a disputed claim against an estate is referred, it is not necessary that there should be pleadings and the statute of limitations, as a defense, may be urged to defeat the claim; in disposing of the case the referee may consider every defense which the proof establishes: Simons v. Steele, 82 App. Div. 202; 81 N. Y. Supp. 737.

b. **Reference.**—Under § 2718, relative to the reference of disputed claims against a decedent's estate, which provides that on the entry of the order of reference "the proceeding shall become an action in the supreme court," the right of a third party to intervene upon such a reference is governed by § 452; where the subject-matter of the reference is a mere money demand, a third party will not be allowed to intervene, as the supreme court has no power, under § 452, to compel the plaintiff in an action in which a money judgment only is sought and in which title to no real, specific or tangible personal property is involved, to bring in as a defendant a third party on the latter's application: Honigbaum v. Jackson, 97 App. Div. 527.

c. **Funds exhausted.**—Where, before the expiration of six months in which an executrix advertised for claims, the executrix exhausted the funds of the estate by the payment of creditors, knowing of another claim which was not presented until after the expiration of six months, the executrix is not protected by the last clause of § 2718, as that relates to assets paid out by executors after the expiration of the statutory period of six months: Matter of Gill, 42 Misc. 457; 87 N. Y. Supp. 252, aff'g 101 App. Div. 607.

d. **Judicial settlement.**—Prior to the amendment to § 1822, permitting rejected claims to be heard before a surrogate on the judicial settlement of an account of an executor when consents were filed to that effect, the claimant had two remedies to enforce the rejected claim, one by action and the other by reference under § 2718; in either case the costs were regulated by §§ 1835 and 1836: Matter of Coonley, 38 Misc. 219; 77 N. Y. Supp. 269.

e. **Surrogate.**—§ 2718 prohibits the surrogate from adjudicating upon a disputed claim, but does not, either expressly, or by implication, deprive him of the right to decide whether or not a claim has been properly rejected or allowed, and where he decides that it was properly admitted and allowed he may direct its payment: Matter of Miles, 170 N. Y. 75.

f. **Counterclaims.**—The requirement that a claim against a decedent's estate be supported by an affidavit "that no payments have been made therein and that there are no offsets," does not establish that the amount of the claim is the sum remaining unpaid after deducting the counterclaims: Osborne v. Parker, 66 App. Div. 277; 72 N. Y. Supp. 894.

§ 2718a. Claims against executor or administrator.

Upon the petition of an executor or administrator, after notice of publication to creditors to present claims has been completed, a citation may be issued against any claimant directing him to present his claim to the surrogate for determination at a date not less than three months from the service of the citation upon him. If he shall not have commenced an action against the petitioner upon his claim prior to the return day, the claim shall be deemed forever barred unless on the return day he shall consent to its determination by the surrogate, in which case it shall be so determined. The word claimant within the meaning of this section shall be deemed to include every person claiming to be a creditor of the estate or claiming a right in or lien upon any personal property in the custody of the petitioner or any claim against the petitioner by reason of any act of his in the administration of the estate, or in his representative capacity.

Added by chap. 386 of 1904.

§ 2719. Payment of debts.

g. **Taxes.**—This section in terms applies only to debts of decedents and to taxes which are such debts, and collectible by distraint of the debtor's chattels by the tax collector, or by other proceedings; the Code only covers taxes not

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levied on land but against the owner personally: Lauby v. Gill, 42 Misc. 334; 86 N. Y. Supp. 718.

a. Where a resident of the city of New York dies after the completion of the annual record of the assessed valuations of real and personal property, but before the assessment-rolls are delivered, the taxes imposed upon his realty and personalty are debts of his estate under § 2719, subd. 2, and the executors must be allowed a deduction for them upon a transfer tax appraisal of the estate: Matter of Hoffman, 42 Misc. 90.

b. Taxes in New York city being a lien upon the particular property, an executor cannot in that city pay taxes which accrued before his testator died on the ground that they are the "taxes assessed on the property of the deceased previous to his death," under the provisions of § 2719, subd. 2: Matter of Hewitt, 40 Misc. 322; 81 N. Y. Supp. 1030.

c. **Compromise.**—Under § 2719, which gives the surrogate power to "authorize an executor to compromise a debt," the surrogate has power, in his discretion, to approve of a settlement between the administrator and the next of kin by which property is to be distributed in certain proportions: Matter of Gilman, 82 App. Div. 186.

d. § 2719, as amended by chap. 686 of 1893 in regard to the power of the surrogate to authorize an executor or administrator to compromise a debt, confers on the surrogate the power to permit an executor or administrator to compromise and compound a claim against the estate; circumstances which would justify a surrogate in authorizing an administrator to compromise for $60,000 a claim of $2,000,000 against an estate, considered: Matter of Gilman, 92 App. Div. 462; 87 N. Y. Supp. 128.

e. **Costs.**—A judgment for costs against an administratrix in an action brought by her as such administratrix is not a "debt" of the intestate nor is the judgment creditor a "creditor" of the estate within §§ 2719 and 2722: Matter of Mahoney, 37 Misc. 472.

f. **Preference.**—The recovery of a judgment against administrators will not entitle a debt to preference in payment over others of the same class, but will have the effect of constituting it a liquidated debt against the estate: Matter of Miner, 39 Misc. 605; 80 N. Y. Supp. 603.

g. What constitutes a preferred claim: Matter of Stanton, 41 Misc. 278; 84 N. Y. Supp. 46.

h. **Trust fund.**—A judgment creditor of a decedent may sue the trustee to have his claim made a lien on a trust fund, created by the beneficiaries of a testator: City of New York v. U. S. Trust Co., 78 App. Div. 366, aff'd 178 N. Y. 551; 79 N. Y. Supp. 1010.

i. **Statute of limitations.**—An executor or administrator has no authority to allow or pay a claim barred by the statute of limitations, nor will a partial payment by an executor or administrator on a claim so barred revive the demand against the estate: Hamlin v. Smith, 72 App. Div. 601; 76 N. Y. Supp. 258.

j. Payment by an executor of a claim presented by his co-executor amounting to $38,485.96, which had not been proved to and allowed by the surrogate, under § 2719, and which it was his duty to oppose, because the greater portion was barred by the statute of limitations, was unwarranted and without authority: Matter of Burr, 48 Misc. 56.

k. **Attorney.**—Services of an attorney, when necessary, are chargeable upon an estate, although executors are primarily personally liable for such services: Matter of Smith, 111 App. Div. 23.

l. **Funeral expenses.**—When the will of a deceased wife provides that all her just debts and funeral expenses be paid, and her husband, who survived her but a short time, has paid such funeral expenses, the husband's executor is entitled to recover the same from the estate of the wife in the absence of proof showing an intent by the husband to make a gift of such moneys to his wife's estate or an actual release of his claim: Matter of Stadtmuller, 110 App. Div. 76.

m. **Interest.**—Where executors who, at all times after entering upon their duties, had in their hands personal property of their testator sufficient for the payment of two interest bearing notes executed by the testator, postpone the payment of one of such notes for more than two years after the testator's death, and postpone the payment of the other note for more than six years after testator's death, such executors are properly disallowed credit for the interest which accrued upon the notes after one year from the time the letters testamentary were issued to them: Matter of Hawley, 108 App. Div. 185; 96 N. Y. Supp. 61, aff'd 185 N. Y. 566.

§ 2720. Apportionment of rents, annuities and dividends.

n. Where a decedent, during his lifetime, assigned shares of stock to his daughter and reserved to himself all dividends declared upon said stock during his life, the decedent's estate is not entitled, under § 2720, to a portion of a dividend declared nine days after his death: Matter of Kane, 64 App. Div. 566.

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§ 2721. Payment of legacies.

a. Legacies are not payable until the end of a year under the provisions of § 2721: Matter of Stanton, 41 Misc. 278; 84 N. Y. Supp. 46.

b. **Preference.**—A legacy given by the final clause of a will and directed to be paid before the division of the estate, as set forth in the immediately preceding residuary clause, is not entitled to any preference in payment over other legacies given by clauses preceding the residuary clause: Lyons v. Steinhardt, 37 Misc. 628; 76 N. Y. Supp. 241.

c. **Corporation.**—A legacy to a corporation exempt from taxation is subject to a tax while in the hands of the executor: People ex rel. Crook v. Wells, 93 App. Div. 500; 87 N. Y. Supp. 826.

d. **Lapsed legacy.**—Neither the consent of an infant beneficiary, nor that of the guardian, can protect an executor in paying a lapsed legacy: Matter of Tatum, 34 Misc. 25, aff'd 61 App. Div. 513; 70 N. Y. Supp. 634.

e. **Policy.**—When the amount of an insurance policy passes to the legatee named in the will of the assured, it may be recovered by such legatee in an action which, if brought within one year, is not premature: Leonard v. Harney, 63 App. Div. 294; 71 N. Y. Supp. 546.

f. **Counterclaim.**—In an action against an executor to compel the payment of a general legacy, he may not plead as a counterclaim that, after he had reduced the assets of the estate to possession, plaintiff's assignor forcibly took and converted a portion thereof: Lehleuter v. Schano, 49 Misc. 99; 63 N. Y. Supp. 531.

g. **Annuity.**—In an action to have a legacy charged upon real estate, the will construed as not disclosing an intention to charge an annuity upon testator's real estate: Robinson v. Kelso, 53 Misc. 89.

§ 2722. Petition to compel payment; hearing; decree.

h. A judgment against the executor of an estate cannot be enforced by a receiver appointed in proceedings supplementary to execution; such a judgment against a decedent's estate must be enforced in appropriate proceedings in the surrogate's court: Jones v. Arkenburgh, 112 App. Div. 483; 98 N. Y. Supp. 532.

i. A surrogate has power under § 2725 to require an executor to render an immediate account on the petition of a widow who is entitled to a pecuniary provision in lieu of dower under the will: Matter of Tisdale, 110 App. Div. 857.

j. This section prohibits the surrogate from adjudicating upon a disputed claim, but does not either expressly or by implication deprive him of the right to decide whether or not a claim has been rejected or allowed, and where he decides, after hearing the evidence, that it was admitted and allowed, he has power to direct payment thereof: Matter of Miles, 170 N. Y. 75, rev'g 61 App. Div. 562; 71 N. Y. Supp. 71.

k. **Appeal.**—Where an appeal is taken from a decree reciting that the possession of funds was proof to the satisfaction of the surrogate, and upon such appeal it was admitted that no proof as to such possession of funds had been made and that the surrogate had made no decision in writing and no findings, and that there had been no settlement of the case on appeal, the appellate division should reverse the decree and the proceedings should be remitted to the surrogate's court for trial and decision: Matter of Sherwood, 75 App. Div. 342.

l. **Costs.**—A judgment for costs against an administratrix in an action brought by her as such administratrix is not a "debt" of the intestate nor is the judgment creditor a "creditor" of the estate within §§ 2719 and 2722: Matter of Mahoney, 37 Misc. 472.

m. **Assignee.**—A person claiming the entire residuary estate of a decedent as mesne assignee of the sole heir and of his executor cannot maintain, under §§ 2722 and 2723 a proceeding to compel the personal representative of the decedent to execute to the said assignee an assignment of all the property constituting the said residuary estate: Matter of Wood, 38 Misc. 64.

n. **Creditors.**—A surrogate has power under §§ 2472 and 2722 upon the petition of numerous creditors to direct the administrators to make a partial payment upon the petitioners' claims and may provide in his decree that the administrators may apply to have the decree modified if it appear that the estate was insufficient to pay the petitioning creditors: Matter of Miner, 39 Misc. 605.

o. **Equity.**—Where the personal estate of a decedent is insufficient to satisfy his debts, a creditor may maintain an action in equity to establish his claim and to compel an executor having a testamentary power to sell designated real estate "for the purpose of paying debts," to sell the same and apply the proceeds to the extinguishment of the debt: Holly v. Gibbons, 176 N. Y. 520.

p. **Consent of parties.**—A surrogate has no jurisdiction to decree the payment of a non-liquidated claim, except as provided by § 1822 upon the consent of all the parties, and has no power under § 2722: Matter of Walker, 70 App. Div. 263.

q. **Annuity.**—When on an application under § 2722, requiring representa-

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tives to pay the petitioner's claim founded upon a written agreement by the testatrix to pay the petitioner an annuity, which contract was confirmed by the will, the answer of the executors merely alleges that the agreement was without consideration, and that the petitioner had failed to perform conditions precedent, and that the funds of the estate were insufficient, without stating any facts to establish these conclusions, the surrogate may direct the payment of the claim: Matter of De Forest, 119 App. Div. 782.

§ 2723. Decree for payment of legacy, etc., on giving security.

a. A person claiming the entire residuary estate of a decedent as mesne assignee of the sole heir and of his executor cannot maintain, under §§ 2722 and 2723 a proceeding to compel the personal representative of the decedent to execute to the said assignee an assignment of all the property constituting the said residuary estate: Matter of Wood, 38 Misc. 64.

§ 2724. Proceedings for neglect to set apart exempt property; proceedings upon judicial settlement.

b. This section does not change the nature of a proceeding to obtain the statutory exemptions from that of a quasi-legal proceeding to an equitable proceeding governed by the ten years' statute of limitations: Matter of Campbell, 96 App. Div. 561.

c. **Waiver.**—The widow's right to such an allowance is not waived by the silence of her inventory of the estate of her decedent as to her claim for the exempt articles: Matter of Hulse, 41 Misc. 307; 84 N. Y. Supp. 220.

d. **Trustees.**—Decrees settling former accounts in which it appeared that the expense of carrying foreclosed properties was charged by the trustees to principal, while justifying them in continuing to carry the properties in the principal account do not estop the life beneficiaries from insisting, when distribution is for the first time to be made, that a part of the proceeds of the sale belongs to income: Matter of Marshall, 43 Misc. 238; 88 N. Y. Supp. 550.

§ 2725. Intermediate accounting.

e. The surrogate will not direct an intermediate accounting to determine the proper amount of an execution, where the petitioning creditor fails to allege that there are assets in the hands of the intestate's administrator: Matter of Thurber, 37 Misc. 155; 74 N. Y. Supp. 949.

f. The question as to whether certain funds were part of the assets of the estate or a mere gratuity by the United States government to the testator's next of kin should not be determined on affidavits, but on an accounting had pursuant to § 2725, subd. 1: Matter of Warren, 105 App. Div. 582.

g. A surrogate has power under this section to require an executor to render an immediate account on the petition of a widow who is entitled to a pecuniary provision in lieu of dower under the will: Matter of Tisdale, 110 App. Div. 857.

§ 2726. When surrogate may require judicial settlement of accounting.

h. Upon a proceeding for the judicial settlement of the account of the executors and trustees, after the death of the testator's wife and the distribution of the estate, the surrogate's court has jurisdiction to determine whether, upon a proper construction of testator's will, there is found an intention to equitably convert the realty into personalty: Matter of Faile, 51 Misc. 166.

i. It is the absolute right of an unpaid creditor to institute a proceeding for an accounting when an executrix pays out to various creditors the entire estate: Matter of Gill, 183 N. Y. 347, rev'g 101 App. Div. 607.

j. Where a claimant against an estate, whose claim has been rejected, and who by agreement with the executors has filed a consent that the claim be determined on the final accounting of the executors, cannot maintain an action at law on such claim after the six months' statute of limitations has run; if the executors unreasonably neglect to account, such claimant may compel an accounting under § 2727, or the surrogate may compel one under this section: Clark v. Scovill, 111 App. Div. 35; 97 N. Y. Supp. 1117; appeal dis. 185 N. Y. 541.

k. An accounting cannot be required until one year after the issuing of letters testamentary: Matter of Irvin, 68 App. Div. 158; 74 N. Y. Supp. 443.

l. An unknown brother of an intestate not cited or appearing at a judicial settlement of the estate may institute proceedings for a new accounting under the provisions of §§ 2726, subd. 1, and 2627, upon notice to parties interested and proof of his relationship, and may further obtain an order that a commission issue

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with interrogatories for the examination of himself and his witnesses who reside in a foreign country; it is error to dismiss the petition of the brother praying for such remedies and to remit the petitioner to a motion to open the decree in such judicial settlement: Matter of Killan, 172 N. Y. 547; 33 Civ. Pro. R. 241, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

a. **Concurrent jurisdiction.**—The supreme court and the surrogate's court have concurrent jurisdiction to require the personal representatives of deceased executors, and trustees to account for property which came into their hands. Ordinarily the supreme court will refuse to exercise its jurisdiction unless the jurisdiction of the surrogate's court be insufficient to determine all the questions involved; the surrogate's court having a limited jurisdiction and being without power to try title to real estate, should refuse to require the representative of a deceased trustee to account, when a question involving the title to real estate must be decided as a prerequisite to the accounting: Matter of Forgarty, 117 App. Div. 583.

§ 2727. Citation; order to account and proceedings thereon.

b. When a claimant against an estate, whose claim has been rejected, and who, by agreement with the executors, has filed a consent that the claim be determined on the final accounting of the executors, cannot maintain an action at law on such claim after the six months' statute of limitations has run; if the executors unreasonably neglect to account, such claimant may compel an accounting under this section or the surrogate may under § 2726: Clark v. Scovill, 111 App. Div. 35; 97 N. Y. Supp. 1117; appeal dis. 185 N. Y. 541.

c. An unknown brother of an intestate not cited or appearing at a judicial settlement of the estate may institute proceedings for a new accounting, under the provisions of §§ 2726, subd. 1, and 2627, upon notice to parties interested and proof of his relationship, and may further obtain an order that a commission issue with interrogatories for the examination of himself and his witnesses who reside in a foreign country; it is error to dismiss the petition of the brother praying for such remedies and to remit the petitioner to a motion to open the decree in such judicial settlement: Matter of Killan, 172 N. Y. 547, rev'g 66 App. Div. 312; 72 N. Y. Supp. 714.

d. **Supreme court.**—In the second judicial department, unless the surrogate's court has already taken jurisdiction of the accounting of an executor, the supreme court must do so where its equitable powers in that behalf are invoked: Meeks v. Meeks, 34 Misc. 465; 69 N. Y. Supp. 737.

e. **Voluntary accounting.**—If the executor apprehends that there may be a necessity for two trials of the same issues contested in regard to his account, he may apply voluntarily to account and have the latter proceeding consolidated with the compulsory one: Matter of Rainforth, 37 Misc. 660.

f. **Petitioner.**—When the petition for an accounting under § 2727 of the Code shows that the petitioner is one of the children of a deceased grandchild of the testator, the said grandchild takes a vested interest in the estate, and the answer to the petition does not challenge his right based upon such relation, such petitioner is within the purview of the said § 2727: Matter of Watts, 68 App. Div. 357; 74 N. Y. Supp. 75.

g. **Petition.**—Parties instituting a proceeding to compel an executor to account have, under § 2727, sufficient standing to enable them to maintain the proceeding where the petition shows that they are children of the testator, although such petition does not set forth the testator's will nor set out the particular interests of the petitioners in and to the property devised or bequeathed thereby: Matter of Meyer, 98 App. Div. 7; 90 N. Y. Supp. 185, aff'd 181 N. Y. 553.

h. **Statute of limitations.**—A motion to compel the executor of a trustee to account to his successor that the latter be paid a judgment, which he recovered as trustee against the executrix for an accounting of the estate, is a proceeding to recover a demand that was due, and as such is not governed by the ten years' statute of limitations, but is barred by the lapse of six years: Matter of Cruikshank, 40 Misc. 325.

i. **Assignee.**—Under subd. 5, § 20 of the Assignment Act, as amended by chap. 318 of 1878, the court has power on a proceeding for an accounting under the act, to require the assignee to render and file an account of his proceedings and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with the surrogate's order for an account: Matter of Farmer, 35 Misc. 150; 71 N. Y. Supp. 462.

j. An assignee of a legatee of a chattel is not entitled, under § 2727, to maintain a proceeding to compel the executrix who is sole legatee of the remainder of the property, to render an account where it appears that there are no outstanding debts; in such a case the remedy of the assignee is to bring an action against the executrix under § 1819 of the Code to recover the chattel in question: Matter of Egan, 89 App. Div. 565; 85 N. Y. Supp. 663.

k. **Creditor.**—When a creditor is entitled to compel an accounting by an administratrix, although the estate had been

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distributed: Matter of Blum, 83 App. Div. 161; 82 N. Y. Supp. 491.

a. **Issue.**—The surrogate has no power to decide an issue between an executrix and a creditor raised by the filing of a claim and its rejection, but can try the issue whether the executrix received a written claim and by her acts promised to pay, thereby establishing it as valid: Matter of Reinach, 41 Misc. 78; 83 N. Y. Supp. 651.

b. **Residuary legatee.**—Right of a residuary legatee to require a supplemental account: Matter of Hunt, 84 App. Div. 159; 82 N. Y. Supp. 538.

c. **Stipulation.**—Where the parties have stipulated that one administrator shall account in a proceeding brought for that purpose by the other, the surrogate will carry out the stipulation, consolidate the proceedings and direct distribution to be made by both administrators: Matter of Smith, 40 Misc. 331; 81 N. Y. Supp. 1035.

§ 2728. Executors, etc., may petition for judicial settlement; citation thereupon.

d. The provisions of § 2728, subd. 2, relative to the judicial settlement of the account of an executor or administrator, declaring that "a person interested in the estate, although not cited, is entitled to appear on the hearing, and thus make himself a party to the proceeding," do not apply to descendants and representatives of deceased uncles and aunts of a decedent who left nephews and a niece: Matter of Thompson, 41 Misc. 223; 83 N. Y. Supp. 983.

e. **Creditors.**—Although proof is made that all the legatees under a will have been paid and that a notice to creditors has been duly published, the executors of the will, although one is sole residuary legatee, are not entitled to a voluntary judicial settlement of their accounts and to a decree of distribution where they have neither cited, nor procured waivers of citation, from any of the legatees, heirs-at-law and next of kin of the testator, shown by the petition for probate and to be in existence, and where one year has not elapsed since the issuance of letters: Matter of Lawson, 36 Misc. 96; 72 N. Y. Supp. 645.

f. Although an executor has duly advertised for creditors he cannot procure a judicial settlement of his accounts until one year has elapsed from the issue to him of letters testamentary: Matter of Lansing, 37 Misc. 177; 74 N. Y. Supp. 945.

g. **Party.**—Where an executrix is accounting in her husband's estate and he and she have been successively the legal representatives of another estate, a person interested in that estate is a proper party to her accounting and may file objections to her account: Matter of Walton, 38 Misc. 723; 78 N. Y. Supp. 296.

h. §§ 2722 and 2723 were purposely framed to preclude the obtaining of a decree requiring payment of a legacy or distributive share, in a proceeding to which the legatee or next of kin was not a party, and this view is strengthened by the fact that, by § 2728, next of kin and legatees must be cited to attend an accounting by an executor even though they have assigned their interests: Matter of Wood, 38 Misc. 64; 76 N. Y. Supp. 967.

i. Where a proposed judicial settlement of the accounts of executors had not been commenced either actually or constructively at the time when a person who would be a necessary party to such a proceeding duly executed a waiver of the issue and service of a citation therein, and also consented to a decree of settlement, the surrogate held that no jurisdiction over the said party was thereby acquired or conferred: Matter of Graham, 39 Misc. 226; 79 N. Y. Supp. 573.

j. **Voluntary accounting.**—If the executor apprehends that there may be a necessity for two trials of the same issues contested, in regard to his account, he may apply voluntarily to account and have the latter proceeding consolidated with the compulsory one: Matter of Rainforth, 37 Misc. 660.

k. **Assets.**—Executors must account for all the property of their testator, and the surrogate has power to declare that property, acquired by them either with or without assertion of their authority, is equitable assets for distribution: Matter of Schaefer, 34 Misc. 34, aff'd 171 N. Y. 686; 69 N. Y. Supp. 489.

l. **Assignment.**—Under subd. 5, § 20 of the Assignment Act, as amended by chap. 318 of 1878, the court has power on a proceeding for an accounting under the act, to require the assignee to render and file an account of his proceedings and to enforce the same in the manner provided by law for compelling an executor or administrator to comply with the surrogate's order for an account: Matter of Farmer, 35 Misc. 150; 71 N. Y. Supp. 462.

m. **Sureties.**—§ 2728, providing that the sureties upon the official bond of an executor or administrator may be cited to attend a settlement of his accounts, only applies to a voluntary accounting by the executor or administrator; the surrogate, under § 2605, has authority at the instance of a substituted trustee to require the removed trustee to render an account, even though there had been no express order revoking the letters issued to the removed trustee: Matter of Storm, 84 App. Div. 552.

n. **Referee.**—Where, on the proceeding for the judicial settlement of an ex-

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ecutor's accounts, a person, not cited, whose interest is dependent upon the question as to the survivorship of three persons, makes application, under § 2728, for permission to appear, the surrogate should not determine the question of survivorship and deny his application to appear, but should grant the application, so that the question may be determined, and should examine the question himself or send it to a referee: Matter of St. John, 104 App. Div. 460; 93 N. Y. Supp. 836.

a. Persons who were sureties upon the bond of an administrator with the will annexed and trustee, although duly discharged from his subsequent defaults and after a new bond is given, are necessary parties to his subsequent voluntary accounting as administrator and trustee, and are entitled to file objections to his account and have them heard: Matter of Sill, 41 Misc. 270; 84 N. Y. Supp. 213.

§ 2729. Affidavit to account; vouchers; examination of accounting party; payment of funeral expenses.

b. Where the will of a testator makes no provision for a person whom he promised to make his sole beneficiary in consideration of certain services to him, such person is entitled to recover the reasonable value of such services, and the statute of limitations does not begin to run until the death of the testator: Matter of Funk, 49 Misc. 199.

c. **Funeral expenses.**—When the will of a deceased wife provides that all her just debts and funeral expenses be paid, and her husband, who survived her but a short time, has paid such funeral expenses, the husband's executor is entitled to recover the same from the estate of the wife in the absence of proof showing an intent by the husband to make a gift of such moneys to his wife's estate or an actual release of his claim: Matter of Stadtmuller, 110 App. Div. 76.

d. An executor should not be allowed $329.50 for the funeral expenses of his testatrix, whose whole estate did not exceed $500; in such a case $150 is a reasonable allowance; if the executor desires a greater ostentation and display than the estate can reasonably afford, he should pay for it himself: Matter of Primer, 49 Misc. 413.

e. Subd. 3 of § 2729, which was added by chap. 293 of 1901, relating to the collection of a claim for the funeral expenses of a decedent, was a mere regulation of procedure and applies to a claim which accrued before the amendment went into effect; the constitutionality of such a statute cannot be raised for the first time on appeal: Matter of Kipp, 70 App. Div. 567; 75 N. Y. Supp. 589.

f. Where those in charge of the burial of a deceased person, in consequence of her expressed wish to be buried in her "best dress," selected one of her gowns for the purpose, and it was discovered after her interment that the gown selected had been specifically bequeathed by the decedent to the wife of her executor, it was held that its value should be paid to the legatee out of the estate as an item of the funeral expenses: Matter of Pullen, 52 Misc. 75.

g. A father who orders the materials furnished and services rendered in connection with the burial of his son by an undertaker is liable therefor; and payment to the undertaker from the estate of the amount the surrogate deemed the reasonable funeral expenses in view of the condition and state in life of the decedent, does not affect the right of the undertaker to recover from the father upon his express contract the difference between such payment and the market price of the services and materials: Ruggiero v. Tufani, 54 Misc. 497.

h. **Set aside.**—When an accounting by an attorney as administrator of his client's deceased wife will be set aside: Matter of Holland, 110 App. Div. 799.

i. **Legal services.**—Where items in an administrator's account for moneys claimed to have been paid by him for legal services are objected to, the burden rests upon him to prove the necessity for such services and their value: Matter of O'Hara, 50 Misc. 495.

j. **Bank deposit.**—An administrator may be compelled to account for a bank deposit of intestate "in trust" for a deceased person on whose estate he also holds letters of administration: Matter of Dwyer, 112 App. Div. 195.

k. **Mortgage.**—An executor should not be credited with an alleged balance due on a mortgage executed by his testator in the absence of any evidence that he has paid the balance; an executor should be charged with the value of property as shown in his inventory on his appointment as permanent executor and not as shown on a prior inventory made as temporary administrator: Matter of Tisdale, 110 App. Div. 857.

l. **Inheritance tax.**—The account of an executrix should be surcharged with the payment of the federal inheritance tax after the act had been repealed although the testator died previous to the repeal thereof: Matter of Marx, 49 Misc. 280.

m. **Counsel.**—Neither the services rendered by counsel in aiding the administrator to establish his individual claim against the estate nor the disbursements incurred in the same effort may be paid for out of the assets; but costs payable out of the estate may be allowed to those who, in effect, represented the estate upon the questions litigated upon the

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accounting: Matter of Seigler, 49 Misc. 189.

a. **Judgment by confession.**—Upon the judicial settlement of the account of an administratrix of her husband's estate, she must be charged with a judgment by confession entered against her in favor of her husband in the supreme court; the surrogate's court cannot adjudicate upon the validity of such judgment on the ground that it was confessed at the husband's request and without consideration; nor can the surrogate's court omit to charge the administratrix with the judgment on the ground that she has no property with which to pay it: Matter of Griffith, 49 Misc. 405.

b. **Presumption.**—The silence of an executor during the period intervening between the filing of a claim against an estate and the filing of the accounts is not conclusive as to its allowance, where, in fact, the executor has scheduled the claim as disputed and has offered in court to test its validity in legal proceedings: Matter of Jacobs, 109 App. Div. 293.

c. **Ownership.**—Upon an accounting by an executor the surrogate's court may determine whether property transferred to him by the testatrix, his mother, shortly before her death belonged to the estate or to his executor: Matter of Archer, 51 Misc. 260.

d. **Surrogate.**—Upon the judicial settlement of the accounts of an executor or trustee the surrogate has full power to pass upon all questions necessarily involved in such accounting, whether they refer to real estate or are simply confined to personalty: Matter of Bruchaeser, 49 Misc. 194.

e. A surrogate should not set aside a stipulation settling controversies as to executors' accounts: Matter of Richardson, 118 App. Div. 164.

f. **Physician.**—When the estate consists of several millions, a payment by the executors of a bill of $4,000 to a physician who devoted all his time to the testator in his last illness should be allowed in full: Matter of Title Guarantee and Trust Co., 114 App. Div. 778; 100 N. Y. Supp. 243.

g. **Interest.**—Where executors who, at all times after entering upon their duties, had in their hands personal property of their testator sufficient for the payment of two interest bearing notes executed by the testator, postpone the payment of one of such notes for more than two years after the testator's death, and postpone the payment of the other note for more than six years after the testator's death, such executors are properly disallowed credit for the interest which accrued upon the notes after one year from the time the letters testamentary were issued to them: Matter of Hawley, 108 App. Div. 185; 96 N. Y. Supp. 61, aff'd 185 N. Y. 566.

h. An executor will be surcharged with items where he fails to produce vouchers therefor: Matter of Woodward, 69 App. Div. 286; 74 N. Y. Supp. 755.

i. **Contract.**—Executors or testamentary trustees cannot, by their executory contracts, although made in the interest and for the benefit of the estate they represent, if made upon a new and independent consideration, bind the estate and thus create a liability not founded upon a contract or obligation of the testator: O'Brien v. Jackson, 167 N. Y. 31.

j. **Vouchers not filed.**—A decree finally settling the accounts of an executor will be set aside, where it appears that no vouchers whatever have been filed in the proceeding, notwithstanding that the executors claim that the reason for the failure to file the vouchers was that they were very numerous and that they were afraid of losing them, and they had been deposited in a box in the office of the attorney for the executors and were open to inspection by all parties interested in the estate: Matter of Wicke, 74 App. Div. 221; 77 N. Y. Supp. 558.

k. **Personal accounts.**—Subd. 3 of § 2729, added by chap. 293 of 1901, does not apply to a case where an administrator, prior to the taking effect of the amendment, expended under the then existing statute, all the moneys of the decedent's estate except expenses of administration in payment of personal accounts of the intestate rather than the funeral expenses: Matter of Kalbfleisch, 78 App. Div. 464.

l. **Committee of lunatic.**—§ 2729, providing that, on an accounting by an executor or administrator in the surrogate's court, items of expenditure may be allowed without vouchers when the item does not exceed $20, and the whole amount of such items so allowed does not exceed, in the aggregate, $500, applies to an accounting in the supreme court by the committee of a lunatic: Matter of Nutting, 74 App. Div. 468; 33 Civ. Pro. R. 145.

m. **Allowance.**—The failure of the executor to set forth in his accounts the items of the necessary expenses actually paid by him for the benefit of the estate does not deprive him of the right to an allowance therefor under § 2730: Matter of Kane, 64 App. Div. 566; 72 N. Y. Supp. 333.

n. **Decrease of estate.**—When an administrator will be allowed for the unavoidable decrease of the estate: Matter of Thompson, 41 Misc. 420, aff'd 87 App. Div. 609; 84 N. Y. Supp. 1111.

o. Where executors and trustees are given the broadest discretion in making investments and the will does not impose upon them the duty of providing a sinking fund to reimburse principal for premiums paid for securities purchased by them, they will not be charged with any loss incurred by reason of the shrinkage

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in value of any such securities: Matter of Hawk, 54 Misc. 187.

a. An executrix who is given the income from personal property for life with "the right to use the principal if she may need it," may apply the principal to her own use, and her accounting showing such application is not open to attack by residuary legatees: Matter of Trelease, 115 App. Div. 654.

b. **Negligence.**—Where an owner of real property dies intestate, the right of action to recover damages for a negligent injury to such real estate, committed twelve years after his death, vests in his heirs and cannot be maintained by his administratrix: Reilly v. Erie Railroad Co., 63 App. Div. 415; 71 N. Y. Supp. 551.

c. **Rents.**—Where a lessor dies intestate, the right to rents vests in his heirs-at-law, and his administrator, as such, has no interest therein: Priester v. Hohloch, 70 App. Div. 256; 75 N. Y. Supp. 405.

d. **Lien of attorney.**—Equitable lien of attorney as against an administratrix, considered: Kennedy v. Steele, 35 Misc. 105; 71 N. Y. Supp. 237.

e. Services of an attorney, when necessary, are chargeable as a lien upon the estate, although executors are primarily personally liable therefor: Matter of Smith, 111 App. Div. 23.

f. **Assets.**—Executors must account for all the property of their testator, and the surrogate has power to declare that property acquired by them, either with or without assertion of their authority, is equitable assets for distribution: Matter of Schaefer, 34 Misc. 34, aff'd 171 N. Y. 686; 69 N. Y. Supp. 489.

g. **Taxes.**—An executrix should not be charged with the payment of a tax recoverable from the government, where such tax was not properly chargeable to the estate: Matter of Marx, 117 App. Div. 890.

h. **Concurrent jurisdiction.**—Although the supreme court and the surrogate's court have concurrent jurisdiction to entertain an accounting by an executor, the supreme court will not act when complete relief can be obtained in the surrogate's court; to obtain an accounting in the supreme court the executor must show that complete relief cannot be had before the surrogate; such special fact is not shown by an allegation that by reason of the stringent rules under § 2729, governing the admission of evidence as to payments where no vouchers can be produced, he would be unable to testify to payments and introduce all his evidence thereof, thereby working great hardship and injustice. The provisions of said section are applicable to accountings in the supreme court, as well as to accountings in the surrogate's court: Matter of Smith, 120 App. Div. 199.

i. **Release.**—Where all persons having vested interests sign a paper in the nature of a protection to executors for the payment of certain claims and release the executors from any responsibility therefor, they may not afterward question the propriety of such payments; and where there is nothing to show that the claims were not just and proper, their propriety will not be questioned by the surrogate upon the settlement of the executors' accounts because, under the provisions of the will, some other persons may become entitled to a contingent remainder: Matter of Robinson, 53 Misc. 205.

§ 2730. Allowances by surrogate, amount and apportionment of.

On the settlement of the account of an executor or administrator, the surrogate must allow to him for his services, and if there be more than one, apportion among them according to the services rendered by them respectively, over and above his or their expenses:

For receiving and paying out all sums of money not exceeding one thousand dollars, at the rate of five per centum.

For receiving and paying out any additional sums not amounting to more than ten thousand dollars, at the rate of two and one-half per centum.

For all sums above eleven thousand dollars, at the rate of one per centum.

In all cases such allowance must be made for their necessary expenses actually paid by them as appears just and reasonable. If the gross value of the personal property of the decedent amounts to one hundred thousand dollars or more, each executor or administrator is entitled to the full compensation on principal and income allowed herein to a sole executor

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or administrator, unless there are more than three, in which case the compensation to which three would be entitled must be apportioned among them according to the services rendered by them, respectively, and a like apportionment shall be made in all cases where there shall be more than one executor or administrator.

Where the will provides a specific compensation to an executor or administrator he is not entitled to any allowance for his services, unless by a written instrument filed with the surrogate, he renounces the specific compensation.

Where successive or different letters are issued to the same person on the estate of the same decedent, including a case where letters testamentary, or letters of general administration, are issued to a person who has been previously appointed a temporary administrator, he is entitled to compensation in one capacity only, at his election, except that where he has received compensation in one capacity he is entitled to the excess, if any, of the compensation allowed by law, above the sum which he has already received in the other capacity.

Former §§ 2736, 2737, 2738 of this Code, consolidated by L. 1893, c. 686. From 2 R. S. 93, §§ 58, 59; L. 1863, c. 362; L. 1881, c. 535; L. 1892, c. 636.

Amended by chap. 595 of 1895 and chap. 328 of 1905.

a. **Attorney's services.**—An administratrix, of the next of kin but not entitled to the whole estate, may be allowed as an expense of administration a reasonable sum for the services of an attorney rendered in discovering an asset of the estate which had existed for forty-three years without being known to the parties entitled: Matter of Pond, 42 Misc. 165; 85 N. Y. Supp. 1080.

b. Counsel fees paid by the executor to collect moneys from his co-executor are properly chargeable to the estate, being paid out solely for the benefit of the estate: Matter of Edie, 117 App. Div. 310.

c. An executor will not be allowed extra compensation for his services in serving citations in the proceeding for the probate of the will; and, where, being a lawyer, he attends to all the business of conducting such proceeding, an allowance will not be made to his brother-in-law, also a lawyer, for such services where the latter went to the surrogate's office at the executor's request and "simply staid until it was over," the executor thinking there might be some opposition; and where in the defense of a small claim the executor incurred unnecessary and unreasonable expense, his allowance therefor will be limited to the amount of taxable costs and disbursements: Matter of Wick, 53 Misc. 211.

d. **Incomplete execution.**—Where an executor is discharged, upon his own motion, before the complete execution of his trust, the surrogate may, in his discretion, allow him one-half of the regular commissions: Matter of Douglas, 60 App. Div. 64; 69 N. Y. Supp. 687.

e. Where the survivor of two original trustees named in a will dies, leaving the trust unexecuted, his estate is entitled at most to but one-half of the fees: Matter of Todd, 64 App. Div. 435; 72 N. Y. Supp. 277.

f. **Determination of commissions.**—Commissions of an executor is a matter to be determined by a surrogate, and an executor has no power to pay or reserve to himself any sums as commissions until the amount thereof have been ascertained and allowed as prescribed by statute, and then, under § 2730, only upon the settlement of the estate: Matter of Furniss, 86 App. Div. 96; 83 N. Y. Supp. 530.

g. **Will.**—Where a will directs that an executor shall receive, in addition to the charges, commissions, etc., allowed him by law, a certain sum per annum so long as he continues to act, the executor is entitled to both, and § 2730 does not apply: Matter of Sprague, 46 Misc. 216.

h. **Services.**—An executor of an estate, who, of his own motion, and not because he is required to do so by the will, continues the testator's business for about a year before selling the same and succeeds in making a profit therein, must account to the beneficiaries of the estate for all the profits which he makes, and cannot retain any portion of such profits as compensation for his own services: Matter of Peck, 79 App. Div. 296; 80 N. Y. Supp. 76.

i. An executor who renders his estate valuable services, not strictly execu-

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torial in their character, may entitle himself to compensation beyond his commissions: Russell v. Hilton, 37 Misc. 642; 76 N. Y. Supp. 233.

a. **Four executors.**—Apportionment of three full commissions among four executors: Matter of Meyer, 95 App. Div. 443; 88 N. Y. Supp. 798.

b. **Realty.**—Executors and trustees of real and personal estate, having as trustees separable duties but no express or implied mandatory power to sell the realty, are not entitled when accounting as executors to have the value of the realty in their hands unsold considered in determining their commissions: Matter of McGlynn, 41 Misc. 156; 83 N. Y. Supp. 925.

c. **One commission.**—Unless a trust estate's annual income amounts to $100,000, the trustees, however numerous, are together entitled to only one commission on the income: Matter of Holbrook, 39 Misc. 139; 78 N. Y. Supp. 972.

d. **Misconduct of executor.**—A surrogate may, in his discretion, upon the settlement of the accounts of an executor or administrator, deny him the statutory commissions, if such executor or administrator has been guilty of misconduct, notwithstanding the requirement of § 2730, that upon the settlement of the account of an executor or administrator, the surrogate must allow him for his services the commissions fixed by law; the exercise of this discretion is reviewable by the appellate division: Matter of Gall, 107 App. Div. 310.

e. **Estate not closed up.**—Where an executrix does not close up the estate of her testator, she is not entitled to commissions for merely receiving its moneys, unless she has also paid them out: Matter of Bidgood, 36 Misc. 516; 73 N. Y. Supp. 1061.

f. **Discretionary.**—The number of executors to whom commissions can be allowed, under § 2730, is measured by the number in office at the time of awarding such commissions, and not by the number who may have acted from time to time, etc.; upon the judicial settlement of the accounts of a surviving executor, the executor of his deceased co-executor is not before the surrogate in his official capacity, and whatever allowance may be made to the executor of the deceased co-executor is measured, not by § 2730 of the Code, but rests in the discretion of the surrogate: Matter of McCormick, 46 Misc. 386.

g. **Trust.**—Where the corpus of a testamentary trust in personalty exceeds $100,000 the trustees, not exceeding three, are each entitled to executors' commissions on the annual income, received and disbursed by them, as fixed by § 2730: Matter of Hunt, 41 Misc. 72; 83 N. Y. Supp. 652.

h. **Specific legacy.**—Executors are not entitled to commissions on a specific legacy of shares of stock: Matter of Whipple, 81 App. Div. 589; 81 N. Y. Supp. 393.

i. Commissions are not allowed on a specific legacy: Matter of Evans, 37 Misc. 336; 75 N. Y. Supp. 491.

j. **Trust fund.**—Where executors who are also trustees, have set apart a trust fund, paid out of its income, and the principal is presently distributable, they are entitled to commissions on the principal in both capacities; but where the beneficiary dies before they have set apart his fund they are entitled to commissions on the principal as executors only: Matter of Lawrence, 37 Misc. 702; 76 N. Y. Supp. 653.

k. **Commissions.**—Although each of three executors and trustees of an estate, the value of which amounted to over $100,000 over all the debts of decedent, are entitled to full commissions under § 2730, they are not each entitled as trustees to one-half of full commissions upon the principal of trust created for the benefit of certain *cestuis que trust* for receiving the same as trustees from themselves as executors; nor to full commissions upon the amount of each year's income received and paid out by them under each of the trusts held by them, where none of such trusts amounted to $100,000; but only to one-third of such commissions, since under §§ 2730 and 2810, each trust constitutes an estate by itself; the basis upon which their commissons should be computed is the value of the property and income of each trust, separately considered without reference to the property of the other trusts, or that of the original estate from which they sprang; the statute does not mean that the value of the original estate should follow each of the trusts springing therefrom, but that each of the latter should stand by itself and the commission of the trustees thereof be allowed according to the value of the assets belonging exclusively thereto: Matter of Johnson, 170 N. Y. 139; 32 Civ. Pro. R. 381, mod'y 57 App. Div. 494; 67 N. Y. Supp. 1004.

l. The commissions of a deceased administratrix should be determined on an accounting brought by her executor to ascertain the liability of her estate to the estate for which she acted and should not be allowed on the accounting of an administrator *de bonis non* thereafter appointed. When a mortgage had been erroneously inventoried by a deceased administratrix, the error may be corrected in the accounting of a subsequent administrator *de bonis non* without requiring the formalities of proof of a claim against the estate: Matter of Hallenbeck, 119 App. Div. 757.

m. **Account.**—The failure of an executor to set forth in his account the items of the necesary expenses paid by him

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for the benefit of the estate, does not deprive him of the right to an allowance therefor under § 2730: Matter of Kane, 64 App. Div. 566; 73 N. Y. Supp. 333.

a. **Limitation.**—The statute fixing the commissions of an administrator limits his compensation for all the services he renders in the management of the estate to such commissions and he can receive no more, however meritorious or extraordinary his services may be: Matter of Krisfeldt, 49 Misc. 26.

b. **Permanent administrator.**—A permanent administrator appointed before the discovery of a will, and acting in good faith, is entitled to commissions on being superseded by an executor thereafter appointed, but he is only entitled to partial commissions for collecting without disbursing; payment to the executor is not disbursing; such superseded permanent administrator is not like a temporary administrator entitled to full commissions: Matter of Hurst, 111 App. Div. 460.

c. **Testamentary trustees.**—Where a large portion of the assets of an estate consists of various kinds of property which have not been converted into cash, and the testator's intention was that the estate was to be managed, in the first instance, by the executors, and then turned over to themselves, as trustees, for their management during the life of the trust, the executors are entitled to full commissions upon the value of the property to be turned over to them as testamentary trustees: Matter of Freel, 49 Misc. 386.

d. **Principal.**—The value of unsold real estate held by trustees of an express trust cannot be considered in determining whether the principal of the estate amounts to $100,000, so as to entitle each of two trustees to full commissions under § 3320, as amended by chap. 755 of 1904, or under § 2730, for the word " principal " as used in said sections means principal consisting of personal property, or its equivalent in securities, only: Chisolm v. Hamersley, 114 App. Div. 565.

e. **Annuity.**—When, in lieu of the income from a stated amount of money left to a widow by will the heirs have agreed that she shall be paid a fixed sum out of the estate as an annuity, the executors' commissions on the annuity should be charged to the estate, and not deducted from the sum due the widow: Van Sise v. Van Sise, 113 App. Div. 691.

f. **Full compensation.**—The commissions of an administrator are full compensation for looking after the personal property of the estate and for loss of time from his usual occupation, and an item for such services will be disallowed: Matter of Seigler, 49 Misc. 189.

g. Where a testatrix provides for continuing her business, an arrangement between her executrix and executor by which the latter should continue to manage the business as he had done in the lifetime of the testatrix and be paid the same compensation therefor, under which arrangement he continued to manage the business with skill and to the advantage of the estate, will be upheld: Matter of Kempf, 53 Misc. 200.

h. **Release.**—Where all persons having vested interests sign a paper in the nature of a protection to executors for the payment of certain claims and release the executors from any responsibility therefor, they may not afterward question the propriety of such payments; and where there is nothing to show that the claims were not just and proper, their propriety will not be questioned by the surrogate upon the settlement of the executors' accounts, because, under the provisions of the will, some other persons may become entitled to a contingent remainder: Matter of Robinson, 53 Misc. 205.

§ 2731. Determination of claims by surrogate; suspension of statute of limitations in certain cases.

i. **Consent to be filed.**—While a surrogate may, upon a judicial settlement, hear a disputed claim of an executrix against her testator's estate, he cannot then hear an ordinary disputed claim unless a consent is filed: Matter of Warner, 39 Misc. 432; 79 N. Y. Supp. 363.

j. **Bar to subsequent action.**—The decision of the surrogate's court against a claim made by an executor is a bar to a subsequent action in the supreme court to enforce the claim: Sexton v. Sexton, 64 App. Div. 385; 72 N. Y. Supp. 213.

k. **Claim not allowed.**—A claim against the estate of a testator presented by his executor should not be allowed where the sole proof in support thereof is a copy of such claim verified by the executor: Matter of Smith, 75 App. Div. 339; 78 N. Y. Supp. 130.

l. **Partition.**—In an action for partition, a defendant cannot set up as a defense that the plaintiff's ancestor had more personal property than he was entitled from the common estate, as a claim for such personalty must be enforced by or against the personal representatives: Skillin v. Central Trust Co., 80 App. Div. 206; 80 N. Y. Supp. 188.

m. **Issue of ownership.**—An issue of ownership between an executor claiming as an individual and his co-executors may be determined by a surrogate: Matter of Freligh, 42 Misc. 11; 85 N. Y. Supp. 830.

n. **Directors.**—The surrogate's court has not jurisdiction to decide whether

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executors as directors of a corporation have been guilty of an abuse of power in paying to themselves extra compensation to which they were not entitled: Matter of Schaefer, 65 App. Div. 378; 73 N. Y. Supp. 57.

a. **Testimony.**—An administrator claiming as a creditor of his intestate cannot testify in regard to payments made him by the intestate upon the claim: Matter of Neil, 35 Misc. 254; 71 N. Y. Supp. 840.

b. **Costs.**—Where an account as settled shows that the estate owes the executor more than he has been surcharged, as a result of a contest, the contestants should not have costs as they have not rendered the estate any material benefit: Matter of Eadie, 39 Misc. 117; 78 N. Y. Supp. 967.

c. **Lien.**—An executor cannot be allowed water-meter charges which were a lien upon property of his testator at the time when the latter conveyed it to him, as the executor in paying these charges after the testator's death was, in effect, paying charges on his own property: Matter of Mertens, 39 Misc. 512; 80 N. Y. Supp. 376.

d. **Attorney.**—Neither the services rendered by counsel in aiding the administrator to establish his individual claim against the estate nor the disbursements incurred in the same effort may be paid for out of the assets; but costs payable out of the estate may be allowed to those who, in effect, represented the estate upon the questions litigated upon the accounting: Matter of Seigler, 49 Misc. 189.

e. **General guardian.**—This section is not applicable to the claim of a general guardian: Matter of Tyndall, 48 Misc. 39.

f. **Bank deposit.**—An administrator may be compelled to account for a bank deposit of intestate "in trust" for a deceased person on whose estate he also holds letters of administration: Matter of Dwyer, 112 App. Div. 195.

g. **Inventory.**—The phrase, "property alleged to belong to the estate," as used in § 2731, means property which is "deemed assets," as defined in § 2712, and which may be inventoried under § 2714: Matter of Thompson, 184 N. Y. 36, rev'g 102 App. Div. 617; 92 N. Y. Supp. 1147.

§ 2732. Order of distribution.

If the deceased died intestate, the surplus of his personal property after payment of debts; and if he left a will, such surplus, after the payment of debts and legacies, if not bequeathed, must be distributed to his widow, children, or next of kin, in manner following:

1. One-third part to the widow, and the residue in equal portions among the children, and such persons as legally represent the children if any of them have died before the deceased.

2. If there be no children, nor any legal representatives of them, then one-half of the whole surplus shall be allotted to the widow, and the other half distributed to the next of kin of the deceased, entitled under the provisions of this section.

3. If the deceased leaves a widow, and no descendant, parent, brother or sister, nephew or niece, the widow shall be entitled to the whole surplus; but if there be a brother or sister, nephew or niece, and no descendant or parent, the widow shall be entitled to one-half of the surplus as above provided, and to the whole of the residue if it does not exceed two thousand dollars; if the residue exceeds that sum, she shall receive in addition to the one-half, two thousand dollars; and the remainder shall be distributed to the brothers and sisters and their representatives.

4. If there be no widow, the whole surplus shall be distributed equally to and among the children, and such as legally represent them.

5. If there be no widow, and no children, and no representatives of a child, the whole surplus shall be distributed to the next of kin, in equal degree to the deceased, and their legal representatives; and if all the

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brothers and sisters of the intestate be living, the whole surplus shall be distributed to them; if any of them be living and any be dead, to the brothers and sisters living, and the descendants in whatever degree of those dead; so that to each living brother or sister shall be distributed such share as would have been distributed to him or her if all the brothers and sisters of the intestate who shall have died leaving issue had been living, and so that there shall be distributed to such descendants in whatever degree, collectively, the share which their parent would have received if living; and the same rule shall prevail as to all direct lineal descendants of every brother and sister of the intestate whenever such descendants are of unequal degrees.

6. If the deceased leave no children and no representatives of them, and no father, and leave a widow and a mother, the half not distributed to the widow shall be distributed in equal shares to his mother and brothers and sisters, or the representatives of such brothers and sisters; and if there be no widow, the whole surplus shall be distributed in like manner to the mother, and to the brothers and sisters, or the representatives of such brothers and sisters.

7. If the deceased leave a father and no child or descendant, the father shall take one-half if there be a widow, and the whole, if there be no widow.

8. If the deceased leave a mother, and no child, descendant, father, brother, sister, or representative of a brother or sister, the mother, if there be a widow, shall take one-half; and the whole, if there be no widow.

9. If the deceased was illegitimate and leave a mother, and no child, or descendant, or widow, such mother shall take the whole and shall be entitled to letters of administration in exclusion of all other persons. If the mother of such deceased be dead, the relatives of the deceased on the part of the mother shall take in the same manner as if the deceased had been legitimate, and be entitled to letters of administration in the same order.

10. Where the descendants, or next of kin of the deceased, entitled to share in his estate, are all in equal degree to the deceased, their shares shall be equal.

11. When such descendants or next of kin are of unequal degrees of kindred, the surplus shall be apportioned among those entitled thereto, according to their respective stocks; so that those who take in their own right shall receive equal shares, and those who take by representation shall receive the share to which the parent whom they represent, if living, would have been entitled.

12. No representation shall be admitted among collaterals after brothers' and sisters' descendants.

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13. Relatives of the half-blood shall take equally with those of the whole blood in the same degree; and the representatives of such relatives shall take in the same manner as the representatives of the whole blood.

14. Descendants and next of kin of the deceased, begotten before his death, but born thereafter, shall take in the same manner as if they had been born in the life-time of the deceased, and had survived him.

15. If a woman die, leaving illegitimate children, and no lawful issue, such children inherit her personal property as if legitimate.

16. If there be no husband or wife surviving and no children, and no representatives of a child, and no next of kin, then the whole surplus shall be distributed equally to and among the next of kin of the husband or wife of the deceased, as the case may be, and such next of kin shall be deemed next of kin of the deceased for all the purposes specified in this chapter; but such surplus shall not, and shall not be construed to, embrace any personal property except such as was received by the deceased from such husband or wife, as the case may be, by will or by virtue of the laws relating to the distribution of the personal property of the deceased person.

Added by chap. 686 of 1893.

From 2 R. S. 96 (Part 2, c. 6, tit. 3), § 75; L. 1845, c. 236.

Amended by chap. 37 of 1897, chap. 319 of 1898, chap. 410 of 1901, chap. 367 of 1903 and chap. 539 of 1905.

a. **Widow.**—Where an intestate dies leaving a widow but no descendant, or parent, or brother or sister, or nephew, or niece, the widow under § 2732, subd. 3, takes the entire personal estate; § 2732, subd. 12, as amended by chap. 319 of 1898, does not apply to such a case, and hence if the decedent not only left a widow but an aunt, the latter is not entitled to any part of such personal estate, and subd. 12, of the said section is to be construed in connection with subds. 5 and 10, and the rule of representation prescribed by subd. 12, is not effective where the next of kin are of the same degree of relationship; the section as amended makes changes among collaterals but does not affect distribution as between a collateral and a distributee: Matter of Hardin, 97 App. Div. 493; 89 N. Y. Supp. 978; 181 N. Y. 513.

b. **Source of property.**—Under § 2732, subd. 5, directing distribution to be made "to the next of kin in equal degree to the deceased and their legal representatives," the court, upon the question as to the relative interests of the cousins on the father's side and the cousins on the mother's side, may not consider the sources from which the personal property came to the decedent: Matter of N. Y. Security & Trust Co., 46 Misc. 224; 94 N. Y. Supp. 93.

c. **Trust fund.**—Where a testator, whose only heirs are his widow and daughter, creates a trust fund for the benefit of his wife, but makes no disposition of the remainder, he dies intestate as to such remainder and it passes to them as undisposed of property, and upon the death of the daughter without issue her interest passes to the widow: (§ 2732, subd. 8.) Pomroy v. Hincks, 180 N. Y. 73.

d. **Illegitimate.**—Where an illegitimate dies intestate after his mother and leaves him surviving no father, widow, descendants or brother and leaves an illegitimate sister of the full blood, she takes, under § 2732, subd. 9, in right of their mother, the whole estate as well as the administration of it: Matter of Lutz, 43 Misc. 230.

e. **Purpose of amendment.**—The only purpose of the amendment to § 2732, subd. 12, by chap. 319 of 1898, was to remove the limitation prescribed by the former restriction forbidding representation after brothers and sisters' children: Matter of Davenport, 36 Misc. 475; 32 Civ. Pro. R. 327.

f. **Grandnephews.**—Where a testator, whose personal estate is to be distributed as if he had died intestate, leaves surviving him nephews, a niece, and grandnephews, the latter being the sons of deceased nephews and nieces, the grandnephews, under § 2732, subd. 12, as amended by chap. 319 of 1898, are entitled to distributive shares in the testator's personal estate: Matter of De Voe, 107 App. Div. 245; 94 N. Y. Supp. 1129, aff'd 185 N. Y. 536.

g. **Uncles and aunts.**—Subd. 12, of § 2732, as amended by chap. 319 of 1898, in regard to the distribution of personal

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property of decedents must be read with and construed with subds. 5 and 10, of such section, and where an intestate left personal property only and was survived by a nephew and niece, two uncles, two aunts and many descendants of deceased uncles and aunts, the nephew and niece, the two uncles and two aunts are all of the third degree of kinship and take equal parts of such estate: Matter of Davenport, 172 N. Y. 454; 33 Civ. Pro. R. 211, aff'g 67 App. Div. 191; 73 N. Y. Supp. 653.

a. Under § 2732, subd. 12, as amended by chap. 319 of 1898, personal property passes to a nephew and niece and uncle and aunt, but not to descendants of deceased uncles and aunts: Matter of Davenport, 67 App. Div. 191; 73 N. Y. Supp. 653.

b. **Construction of will.**—*Held*, that the residuary legatee took at the time designated for distribution and not at the time of actual distribution or when it was required by law: Matter of Coolridge, 85 App. Div. 295; 83 N. Y. Supp. 299.

c. **Collaterals.**—Under § 2732, as amended by chap. 319 of 1898, providing "representation shall be admitted among collaterals in the same manner as allowed by law in reference to real estate," where an intestate is survived by a nephew and nieces and by grandnephews who are the children of a deceased nephew and niece, all of such persons having sprung from the intestate's deceased brother, the grandnephews are entitled to receive their parent's share of the personal estate: Matter of Ebbets, 43 Misc. 575; 89 N. Y. Supp. 544, aff'g 107 App. Div. 245.

d. A collateral heir or next of kin who seeks to invalidate a will as making an excessive bequest to charitable corporations in violation of chap. 360 of 1860, must set out his pedigree showing that there are no persons having a prior right to take the estate under the statutes of descent and distribution: Moser v. Talman, 114 App. Div. 850.

e. **Dower.**—Where a testator dies leaving a widow and adult children and devises to the widow certain real estate in place of dower and "all statutory allowances," if she elects to take under the will she is not entitled to dower and her quarantine and the exemptions under § 2713, but need not waive her distributive share in the personalty; where the testator directs the balance of his property to vest in "the persons" entitled thereto by the laws of New York, the widow is entitled, under § 2732, to one-third of the personalty: Matter of Mersereau, 38 Misc. 208; 77 N. Y. Supp. 329.

f. **Nephews.**—Where three nephews and the child of a deceased nephew constitute the sole next of kin of an intestate, each is entitled to one-quarter of the estate: Matter of Prote, 54 Misc. 495.

g. **Husband.**—Under the provisions of §§ 2732 and 2734, relating to the distribution of unbequeathed personal property, as interpreted by the courts, when a married woman possessed of a separate personal estate dies without descendants and without having made any disposition of it during her lifetime or by way of testamentary appointment, the title thereto vests in the surviving husband: Austin v. Metropolitan Street Ry. Co., 108 App. Div. 249.

h. **Assignee.**—When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except on appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

i. **Per stirpes.**—In the distribution of a decedent's estate, where the nearest kin were two aunts and where there were also five cousins, the children of the deceased uncles and aunts, held, that the five cousins were entitled to take *per stirpes*, by representation, the shares their parents would have taken respectively, had they survived the intestate: Matter of Dunning, 48 Misc. 482.

j. Where the only next of kin of a testator whose will contained no residuary clause, are nephews and nieces of deceased nephews and nieces, the grandnephews and grandnieces take by representation the shares of the testator's personal estate, undisposed of by will, which their respective parents would take if living; where the only next of kin of an intestate are first cousins, second cousins and third cousins, the second and third cousins share *per stirpes* in the personal estate: Matter of Fleming, 48 Misc. 589.

k. **Descendants of brothers and sisters.**—By virtue of the amendment to § 2732, made by chap. 319 of 1898, the descendants of brothers and sisters are entitled absolutely to all the personal estate of the intestate who leaves no widow or descendants to the exclusion of the descendants of uncles and aunts; when the descendants of uncles and aunts have by error in the construction of said section been allowed to share in the estate, the surrogate has power to correct his decree so far as it affects the shares of those collateral relatives who have not appeared and taken the benefits of the decree: Matter of Hoes, 119 App. Div. 288.

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§ 2733. Advancements.

a. **Satisfaction.**—Whenever a parent gives a legacy to a child without stating any particular object for which it is given, the legacy is to be deemed a portion but if the parent afterwards makes a settlement upon the child by way of a portion or pays him a sum of money by way thereof or makes an advancement to him, such payment amounts to a satisfaction: Matter of Weiss, 39 Misc. 71; 78 N. Y. Supp. 877.

b. **Promissory note.**—A provision that money or property received by a legatee from his testator should be treated as an absolute gift does not apply to moneys loaned to the legatee and evidenced by a promissory note: Matter of Cramer, 43 Misc. 494; 89 N. Y. Supp. 469.

c. **Trustees.**—§ 2733, since the amendment by chap. 686 of 1893, relates to advancements with which trustees have nothing to do and which is something to be wholly disposed of before the trustees as such take possession of an estate: Matter of Holbrook, 39 Misc. 139; 78 N. Y. Supp. 972.

§ 2734. Estates of married women.

d. Under the provisions of §§ 2732 and 2734, relating to the distribution of unbequeathed personal property, as interpreted by the courts, when a married woman possessed of a separate personal estate dies without descendants and without having made any disposition of it during her lifetime or by way of testamentary appointment, the title thereto vests in the surviving husband: Austin v. Metropolitan Street Ry. Co., 108 App. Div. 249.

§ 2742. Effect of judicial settlement of account.

e. A surrogate has power, under § 66, upon petition, to determine the value of services rendered by an attorney to executors and to charge the same as a lien upon the estate: Matter of Smith, 111 App. Div. 23.

f. When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except on appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

g. The judicial settlement of the accounts of an administrator is void as against persons interested in the estate, within the meaning of § 2514, subd. 11, whether known or unknown, who were not duly cited to appear, etc., since §§ 2518-2523 provide ample protection to the administrator by permitting him to sue out a citation running against persons unknown: Matter of Kilian, 172 N. Y. 547.

h. **Liability.**—When executors, in obedience to a surrogate's decree rendered upon their accounting, turn over to themselves as trustees under their testator's will the balance of the estate found to be in their hands, they are discharged from liability as executors with respect to the property turned over, but continue as executors with respect to assets not turned over: Willets v. Haines, 96 App. Div. 5; 88 N. Y. Supp. 1018.

i. **Creditors.**—A decree passing the accounts of executors is effective to discharge the executors from liability with respect to the property turned over to creditors and beneficiaries thereunder: Rosen v. Ward, 96 App. Div. 262; 89 N. Y. Supp. 148.

j. **Erroneous decree.**—The fact that a surrogate's decree as to certain matters and questions was erroneous does not thereby create a binding precedent or require a repetition of such errors in subsequent accountings as to the same estate; the effect of a surrogate's decree on matters not litigated is not precisely the same as a judgment of the court of general jurisdiction: Matter of Hunt, 41 Misc. 72; 83 N. Y. Supp. 652.

k. **Decree binding.**—A decree of a surrogate rendered on an accounting by one as an administrator with the will annexed is binding on the parties as to an adjudication that there had been no over-payment by the administrator: Skillin v. Central Trust Co., 80 App. Div. 206; 80 N. Y. Supp. 188.

§ 2743. Decree for payment and distribution.

Where an account is judicially settled, as prescribed in this article, and any part of the estate remains and is ready to be distributed to the creditors, legatees, next of kin, husband or wife of the decedent, or their assigns, the

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decree must direct the payment and distribution thereof to the persons so entitled, according to their respective rights. In case of whole or partial intestacy the decree must direct immediate payment and distribution to creditors, next of kin, husband or wife of the decedent, or their assigns, where the executor or administrator has petitioned voluntarily for judicial settlement of his account as, and in the case provided in subdivision two of section twenty-seven hundred and twenty-eight of this article; but such decree shall not direct the payment of any legacy prior to the expiration of one year after the granting of letters upon such estate, unless the will otherwise directs. If any person, who is a necessary party for that purpose, has not been cited or has not appeared, a supplemental citation must be issued, as prescribed in section twenty-seven hundred and twenty-seven of this act. Where the validity of the debt, claim or distributive share is admitted or has been established upon the accounting or other proceeding in the surrogate's court or other court of competent jurisdiction, the decree must determine to whom it is payable, the sum to be paid by reason thereof and all other questions concerning the same. With respect to the matters enumerated in this section the decree is conclusive as a judgment upon each party to the special proceeding who was duly cited or appeared, and upon every person deriving title from such party.

2 R. S. 94, § 71.

Amended by chap. 595 of 1895, chap. 565 of 1898 and chap. 515 of 1906.

a. When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except upon appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

b. When a claimant has by agreement with the executors filed a consent that a claim which he holds, which has been rejected by the executors, be determined by the surrogate upon the final accounting pursuant to § 1822, such claimant cannot maintain an action at law upon the claim after the six months' statute of limitations has run: Clark v. Scovill, 111 App. Div. 35; 97 N. Y. Supp. 1117, appeal dis. 185 N. Y. 541.

c. When party to final accounting is estopped from questioning previous distribution of estate: Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425; mod'g 94 App. Div. 612; 88 N. Y. Supp. 1094.

d. The words "distributive share" were inadvertently inserted in § 2473: Matter of Thompson, 41 Misc. 223; 83 N. Y. Supp. 983.

e. Distinction between executors and administrators as to permissible time of distribution, considered: Matter of Lawson, 39 Misc. 96; 72 N. Y. Supp. 645.

f. **Negligence.**—If a claim be established on an accounting before a surrogate where interested parties are heard, or if an action be brought, or a reference had of the claim, which becomes an action, and the claim be established by the evidence of an executor which is then competent, he cannot be charged with negligence, and the claim cannot be disallowed on the accounting even though, because established by judgment, he has become an interested party and an incompetent witness: Matter of Watson, 101 App. Div. 550; 34 Civ. Pro. R. 150.

g. **Written consent.**—Where parties consent in writing that the surrogate may hear a disputed claim upon the judicial settlement of the accounts of the executor or administrator, the surrogate has power to inquire into and pass upon the payments made and may determine the amount due and the person entitled to it: Matter of Browne, 35 Misc. 366; 71 N. Y. Supp. 1037.

h. The filed written consent as specified in § 1822 is necessary to give the surrogate jurisdiction to hear a disputed claim; the oral consent of all the parties

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is insufficient: Matter of Kirby, 36 Misc. 312; 73 N. Y. Supp. 509.

a. Under §§ 1822 and 2743, as amended, the surrogate may only decide disputed claims upon the final accounting when the respective parties file written consents with the surrogate: Matter of Clark v. Hyland, 88 App. Div. 392; 84 N. Y. Supp. 640.

b. **Cestui que trust.**—The jurisdiction of the surrogate's court on an accounting by a testamentary trustee is co-extensive with its jurisdiction over accountings by executors and administrators and it has no power to determine the validity of a release executed by a *cestui que trust*, the purpose of which was to destroy the trust created by the will: Matter of United States Trust Co., 80 App. Div. 77; 80 N. Y. Supp. 475.

c. **Validity of account.**—In a proceeding by an administrator with the will annexed to compel the representatives of a deceased executor to account, the surrogate should determine, not only the validity of the executor's account and the various items thereof, but also matters which are necessarily related thereto: Matter of Richmond, 63 App. Div. 488; 71 N. Y. Supp. 795.

d. **County treasurer.**—The administrator is the person directed by statute to make distribution except that § 2748 provides that such decree must direct that the distributive share be paid to the county treasurer if not paid to the persons entitled thereto, and if so paid can only be paid out by special direction of the surrogate; payment to the surrogate cannot discharge the administrator: Matter of Sackett, 38 Misc. 463; 77 N. Y. Supp. 1030.

e. **Stocks.**—Distribution may be in kind, viz., by turning over stocks and bonds where the bulk of the estate consists of such property: Matter of Thompson, 41 Misc. 420; 84 N. Y. Supp. 1111.

f. **Judgment.**—A judgment docketed against the estate of a decedent in his lifetime cannot be rejected and referred under §§ 1822 and 2718, as it is a debt which has been established by a court of competent jurisdiction, and the surrogate's court may determine to whom it is payable: Matter of Browne, 35 Misc. 362; 71 N. Y. Supp. 1034.

g. **Equity.**—The construction of § 2743, is that in directing "the payment and distribution to the persons so entitled" and in determining to whom a debt, claim or distributive share "is payable and the sum to be paid and all other questions concerning the same," the court will not recognize claimants other than those having legal titles, but will remit parties claiming adversely to such titles, on grounds of equity, to other tribunals, as not itself having any power to nullify and set aside the deeds of the parties for fraud, or on other equitable considerations: Matter of Lattan, 42 Misc. 467.

h. **Decree conclusive.**—In the absence of fraud or irregularity, a decree passing the accounts of executors directed by the will to hold and invest the assets of an estate, is under § 2743 "conclusive as a judgment upon each party to the special proceeding who was duly cited:" Matter of Halsted, 41 Misc. 606.

i. **Widow.**—Where a widow presents, as a claim against her husband's estate, a decree of a surrogate made twenty years before directing her husband to pay her a certain sum from her father's estate, the surrogate will determine the issues in regard to the claim under such authority as is conferred on him by § 2743: Matter of Wait, 39 Misc. 74; 78 N. Y. Supp. 869.

§ 2744. Id.; when specific property may be delivered.

j. A surrogate has no power, in a proceeding by a testamentary trustee for a final accounting, to order a transfer of specific bonds to a legatee who contests the account, with a provision that the trustee be credited therewith at a value thereafter to be determined by the court; such bonds must be reduced to cash before distribution, unless the case is brought within this section: Matter of Hunt, 110 App. Div. 533.

k. Right of beneficiary to elect to take stocks instead of proceeds thereof: Lane v. Albertson, 78 App. Div. 607; 79 N. Y. Supp. 947.

§ 2745. Id.; when money may be retained.

l. Where executors have recovered judgment against a woman, now objecting to their accounts as an alleged creditor, and the judgment has been paid by her and affirmed by the appellate division and no appeal has been taken by her to the court of appeals, the surrogate will not, although the time to take the latter appeal has not expired, postpone the judicial settlement of the executors and permit her to review in his court the validity of the judgment against her, and the surrogate has no power under § 2745 to adjudicate that she is entitled to the money she paid or to direct the executors to pay it back to her: Matter of Truslow, 37 Misc. 189.

m. **Claim of lessees.**—A covenant under which a lessor, since deceased, agreed to pay her lessees, in a certain manner does not make them her creditors to any extent until the term has

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actually expired, and therefore where she dies before that time, the court has no authority upon the judicial settlement of the account of her executrix to direct the latter to retain in her hands the probable amount of the claim of the lessees: Matter of Henshaw, 37 Misc. 536.

§ 2746. Id.; share of infant.

a. **Non-resident.**—When a non-resident dies, owning stock of several domestic corporations whose principal places of business are in different counties, such stock is, within § 2476, subd. 3, property within the county where the corporation has its principal place of business, and if a petition for letters testamentary or of administration has not been filed in any other county, the surrogate of such county has jurisdiction to assess a transfer tax on the stock situated in all the counties under § 229 of the Tax Law and § 2477 of the Code of Civil Procedure: Matter of Arnold, 114 App. Div. 244.

b. The court has power under §§ 2348, 2360, 2361 and General Rule of Practice 59, in its discretion, to make an order directing payment to the guardian of the proceeds of real estate sold for the support of the ward without requiring additional security: Allen v. Kelly, 171 N. Y. 1, rev'g 66 App. Div. 623; 73 N. Y. Supp. 1129.

c. **Guardian.**—The mother of an infant is not its "guardian" within the meaning of § 2746, and is not a person authorized to receive payment of the distributive share to which the infant is entitled upon the accounting of its father's estate: Matter of Schuler, 46 Misc. 373.

d. **Sureties.**—After a general guardian of an infant had obtained a decree in the surrogate's court adjudging that a certain sum was due the infant and a certified copy of such decree was served on the administrator of said deceased guardian and payment demanded, and payment was not paid, *Held*, that the general guardian may maintain an action against sureties on the bond of the deceased guardian for the amount due the infant; that it was not necessary that the general guardian be appointed a guardian *ad litem* or that the execution be first issued upon the surrogate's decree and returned unsatisfied under § 2607 since that section must be read with § 2606, and that the recovery in such a case cannot be defeated by an attack upon the sufficiency of the bond of the general guardian, as under § 2746 the amount and sufficiency of such bond is within the discretion of the surrogate, and if insufficient it was his duty to require an additional bond, but that such additional bond is not a condition precedent to the bringing of the action: Van Zandt v. Grant, 175 N. Y. 151, aff'g 67 App. Div. 70; 73 N. Y. Supp. 600.

§ 2747. Legacy, etc., to unknown person to be paid into state treasury.

e. The word "surrogate" used in § 2747, refers to the judicial officer who has general jurisdiction over an estate, its representatives, its management and disposition: Matter of Kinneally v. People, 98 App. Div. 192.

§ 2748. When legacy, etc., to be paid to county treasurer.

f. The administrator is the person directed by statute to make the distribution except that § 2748 provides that such decree must direct that the distributive share be paid to the county treasurer, if not paid to the persons entitled thereto, and if so paid can only be paid out by special direction of the surrogate; payment to the surrogate cannot discharge the administrator: Matter of Sackett, 38 Misc. 463; 77 N. Y. Supp. 1030.

§ 2749. What property subject to this title.

g. **Equity.**—An action in equity to have a legacy declared to be a charge on land is not a suitable and appropriate proceeding for ascertaining who are creditors and the amount of their claims or to close up an estate without administration or resort to the procedure prescribed by §§ 2717 and 2749 for the proof of debts and the payment thereof from the personalty, or, if insufficient, the sale of the realty for that purpose: Hallock v. Hallock, 79 App. Div. 508; 80 N. Y. Supp. 61.

h. **Creditors.**—This section does not limit the power of the surrogate's court to order the sale in behalf of creditors whose claims have not been charged specifically by devise upon any part of the real estate, since general creditors are entitled to have it sold and distributed where the personal property has been exhausted: Matter of Richmond, 168 N. Y. 385; 32 Civ. Pro. R. 213, aff'g 62 App. Div. 624; 71 N. Y. Supp. 1147.

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a. Creditors of a decedent may be made parties to a proceeding for the sale of decedent's real estate for the sole purpose of presenting and proving their debts and contesting other claims, and cannot be allowed to interpose an answer and file objections for the purpose of contesting the necessity of the proceedings or making a defense to them: Matter of Campbell, 66 App. Div. 478; 73 N. Y. Supp. 290.

b. **Mortgage.**—A mortgage given by a devisee pending proceedings for the sale of decedent's real estate, to which he, but not the mortgagee, is a party, is cut off by the sale under such proceedings: Richmond v. Freeman's Nat. Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

c. **Intent.**—Insufficiency of the personal property to pay the debts, when sufficient evidence of intent to charge such debts upon the real estate: Turuer v. Mather, 86 App. Div. 172; 83 N. Y. Supp. 1013.

d. **Monument.**—Where the will of a decedent, whose entire estate amounted to $2,410, authorized his executor to purchase and erect in the testator's burial plot a monument of New England granite of sufficient size to cut thereon a dozen names mentioned in the will, with dates of birth and death, and also to erect a suitable fence around the plot with granite posts, an expenditure of $1,050 by the executor for this purpose will not be sustained: Matter of Smith, 75 App. Div. 339; 78 N. Y. Supp. 130.

e. **Devise.**—A surrogate's decree directing the sale of decedent's real estate is proper, notwithstanding a devise charging the property with decedent's debts or a power of sale therefor: Matter of Wood, 70 App. Div. 231; 75 N. Y. Supp. 272.

f. **Expenses.**—A freeholder appointed to sell real estate may, under § 2563 and former § 2786 (now repealed), be allowed his expenses, counsel fees, etc., by the surrogate upon rendering his account of the sale, and is not obliged to pay over to the county treasurer the gross proceeds of the sale and wait for such payments until the final distribution under § 2793: Matter of McGee, 65 App. Div. 460; 73 N. Y. Supp. 64.

g. **Pension moneys.**—Property purchased by pension moneys by one who dies intestate leaving a widow and several minor children, is subject to be sold for the payment of his debts pursuant to title 5 of chap. 18 of the Code of Civil Procedure, as the exemption of such property under an execution conferred by § 1393 is personal to the pensioner and does not extend beyond his lifetime or to his family: Smith v. Blood, 106 App. Div. 317.

h. **Evidence.**—In a proceeding to sell a decedent's real estate for the payment of debts and in which the issue involved was whether the decedent did business in one name or another, it is improper for the surrogate to refuse to allow a witness to answer questions as to what persons constituted a firm and whether the decedent was a member of such firm: Matter of Dusenbery, 106 App. Div. 235.

§ 2750. Petition, when and by whom presented.

i. **Contract creditor.**—A simple contract creditor of a decedent is entitled, under § 2750, to petition for a decree directing the disposition of the real property for the payment of debts: Powell v. Harrison, 88 App. Div. 228; 85 N. Y. Supp. 452.

j. **Creditor.**—Where the personal estate of a decedent is insufficient to satisfy his debts, a creditor may maintain an action in equity to establish his claim and to compel an executor, having testamentary power to sell designated real estate "for the purpose of paying debts," to sell the same and apply the proceeds to the extinguishment of the debt: Holly v. Gibbons, 176 N. Y. 520.

k. **Will.**—A creditor cannot be deprived of his statutory remedy against the real estate unless the will of the debtor has provided a remedy as efficient and as expeditious: Parker v. Beer, 65 App. Div. 598; 72 N. Y. Supp. 955.

l. **Three years.**—Creditors have three years following the issuing of letters testamentary in which to present a petition for the disposition of real estate for the payment of debts: Richmond v. Freeman's Nat. Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

m. Proceedings for the sale of real property for the payment of debts must be had within three years after the letters were issued: Hughes v. Golden, 44 Misc. 128; 88 N. Y. Supp. 1036.

n. An omission to name in a petition for the disposition of real property of a decedent for the payment of debts, and to cite one claiming an interest in such real property under the heirs of the decedent is not fatal to the proceeding; but the petition may be amended or a supplemental citation issued upon the proper affidavits at any time prior to an order affecting the sale of the premises themselves: Matter of Wheeler, 48 Misc. 323.

o. Who are creditors within the meaning of this section: Matter of Lowerre, 48 Misc. 317.

p. An action brought by one of the heirs-at-law to partition the real property inherited by them may proceed, although proceedings are pending for the disposition of the real property of the ancestor for the payment of his debts: Reubel v. Reubel, 47 Misc. 474.

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§ 2751. Creditor's time to apply extended in certain cases.

a. Application of § 2751, considered: Matter of McGee, 65 App. Div. 460; 73 N. Y. Supp. 64.

b. Title.—Executors cannot, while the debts of a testator remain unpaid, convey a clear and marketable title to real estate of which the testator died seized: Parker v. Beer, 65 App. Div. 598; 72 N. Y. Supp. 955.

§ 2752. Contents of petition.

The petition must set forth the following matters, as nearly as the petitioner can, upon diligent inquiry, ascertain them:

1. The amount of the unpaid debts and funeral expenses of the decedent and that the personal estate is inadequate for the payment thereof.

2. A general description of all the decedent's real property, and interest in real property, within the state, which may be disposed of as prescribed in this title; a statement of the value of each distinct parcel; whether it is improved or not; whether it is occupied or not; and, if occupied, the name of each occupant; whether it is incumbered by a mortgage lien or liens together with a statement of the amount due or claimed to be due thereon. Where the petition describes an interest in real property, specified in section 2749 of this act, the value of the interest must be stated, and also the value of, and the other particulars, specified in this section, relating to the real property to which the interest attaches.

3. The names of the husband or wife, and of all the heirs and devisees of the decedent, and also every other person claiming under them, or either of them, stating who, if any, are infants; the age of each infant, and the name of his general guardian, if any; and also, if the petition is presented by a creditor or judgment lienor, the name of each executor or administrator.

4. If the petition is presented by an executor or administrator, the amount of personal property which has come to his hands, and those of his co-executors or co-administrators, if any; the application thereof, and the amount which may yet be realized therefrom.

2 R. S. 100, § 2.

Amended by chap. 735 of 1894 and chap. 750 of 1904.

See § 2518, ante, Persons constituting a class; when to be cited; citation when some are unknown.

See § 2615, ante, Who to be cited thereupon.

c. Sufficiency of petition, considered: Matter of Wood, 70 App. Div. 321; 75 N. Y. Supp. 272.

d. Heirs.—§ 2752 does not in terms require that the petition should aver that all the heirs are named but only that all the heirs should be named: Hagan v. Drucker, 90 App. Div. 28; 85 N. Y. Supp. 601.

e. Lienor.—A person holding a chose in action which has not ripened into a lien is not a person who may bring a proceeding to sell real property for the payment of debts: Richmond v. Freeman's Nat. Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

f. Personal property.—The petition in such a proceeding is required to state the amount of the personal property which has come into the hands of the executor or administrator and the disposition made of the same: Matter of Goetz, 71 App. Div. 272; 75 N. Y. Supp. 750.

g. Value of parcels.—In a proceeding to sell real estate of a decedent to pay his debts, the petition need not state separately the value of each parcel where the parcels lie together: Matter of Georgi, 35 Misc. 685; 72 N. Y. Supp. 431.

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a. **Names.**—In a proceeding for the sale of real estate of a deceased person for the payment of debts and funeral expenses an allegation in the petition, that the names and number of the heirs-at-law of the deceased are unknown to the petitioner and she does not know of any persons claiming to be such, is insufficient to enable the court to dispense with a citation to such heirs by name and to issue a citation to them as a class; diligent inquiry to discover them should be shown: Matter of O'Neill, 49 Misc. 285.

b. An omission to name in a petition for the disposition of real property of a decedent for the payment of debts and to cite one claiming an interest in such real property under the heirs of the decedent is not fatal to the proceeding; but the petition may be amended or a supplemental citation issued upon proper affidavits at any time prior to an order affecting the sale of the premises themselves: Matter of Wheeler, 48 Misc. 323.

§ 2753. Proceedings where some of the facts are unknown.

c. The inquiry provided for by § 2753 conforms to that authorized by § 2518; the inquiry precedes the issuance of the citation: Richmond v. Freemans Nat. Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

d. An allegation in the petition, that the names and number of the heirs-at-law of the deceased are unknown to the petitioner, and she does not know of any persons claiming to be such, is insufficient to enable the court to dispense with a citation to such heirs by name and to issue a citation to them as a class; diligent inquiry to discover them should be shown: Matter of O'Neill, 49 Misc. 285.

§ 2754. Citation thereupon.

See § 2515 et seq., ante, Issuance of citation and service thereof.

See § 2526, ante, Service upon a corporation, infant, lunatic, etc.

e. An allegation in the petition, that the names and number of the heirs-at-law of the deceased are unknown to the petitioner, and she does not know of any persons claiming to be such, is insufficient to enable the court to dispense with a citation to such heirs by name and to issue a citation to them as a class; diligent inquiry to discover them should be shown: Matter of O'Neill, 49 Misc. 285.

f. An omission to name in a petition for the disposition of real property of a decedent for the payment of debts and to cite one claiming an interest in such real property under the heirs of the decedent is not fatal to the proceeding; but the petition may be amended or a supplemental citation issued upon the proper affidavits at any time prior to an order affecting the sale of the premises themselves: Matter of Wheeler, 48 Misc. 323.

§ 2755. Hearing.

Upon the return of the citation the surrogate must proceed to hear the allegations and proofs of the parties. A creditor of the decedent, including one whose claim is not yet due, or a person having a claim for unpaid funeral expenses, although not named in the citation, may appear and make himself a party to the special proceeding. An heir or devisee, or a person claiming under an heir or devisee, of the property in question, although not named in the citation, may contest the necessity of applying the property to the payment of debts, judgment liens or funeral expenses, or the validity of a debt, due or unpaid, represented as existing against the decedent, or the reasonableness of the funeral expenses; may interpose any defense to the whole or any part thereof; and, for that purpose, may make himself a party to the special proceeding. The admission or allowance by the executor or administrator of a claim or debt of any creditor against the decedent shall, for the purpose of such proceeding, be deemed an establishment thereof, unless objection be made thereto by a party to the special proceeding. Where such a defense arises under the statute of limitation, an act or admission by the executor or adminis-

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trator does not prevent the running of the statute, or revive the debt, so as to affect, in any manner, the real property, or interest in real property in question, or to permit the creditor to participate in the fund arising therefrom.

2 R. S., 101, §§ 8, 10; L. 1850, c. 82, § 2.

Amended by chap. 147 of 1887, chap. 299 of 1893, chap. 735 of 1894 and chap. 750 of 1904.

a. In proceedings for the sale of a decedent's real property for the payment of debts, a party is bound by the decree where its lien was not created until after the special proceeding had commenced, and it did not intervene as it might have done under the provisions of § 2755: Richmond v. Freemans Nat. Bank, 86 App. Div. 152; 83 N. Y. Supp. 632.

b. **Creditor.**—While a creditor "may present and prove his lien and thus make himself a party to the special proceeding," this is the extent of his rights, and it is only the other persons named, other than creditors, who can interpose an answer and file objections for the purpose of contesting the necessity of the proceedings to sell decedent's real property: Matter of Campbell, 66 App. Div. 478; 73 N. Y. Supp. 632.

§ 2756. What proof necessary for a decree.

A decree directing the disposition of real property or of an interest in real property can be made only where after due examination the following facts have been established to the satisfaction of the surrogate:

1. That the proceedings have been in conformity to this title.

2. That the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses.

Former § 2759 of this Code, in part. From 2 R. S. 102, 103, §§ 14, 20; L. 1837, c. 460, § 41.

Amended by chap. 750 of 1904.

c. Under § 2759, as it existed prior to the amendment by chap. 750 of 1904 and now partly re-enacted in § 2756, which required that before a decree should be made for the disposition of the real property of a deceased person for the payment of his debts, it must be established to the satisfaction of the surrogate that the real estate was not subject to a valid power of sale, a power to an executor to sell and convey was sufficient: Matter of Rowley, 38 Misc. 622.

d. Where the decedent authorizes and empowers his executors to sell and convey any property which he may die seized of, the power of sale is discretionary, not imperative, and does not deprive a creditor of the right to a judicial sale of the real estate under this section for the payment of his debt: Parker v. Beer, 173 N. Y. 332, aff'g 65 App. Div. 598; 72 N. Y. Supp. 955.

§ 2757. Decree to mortgage, lease or sell.

If it shall appear to the satisfaction of the surrogate that the personal estate of the decedent is insufficient for the payment of his debts and funeral expenses, the surrogate shall make a decree empowering the executor or administrator to mortgage, lease or sell the whole or such part of the real property or interest of the decedent in real property as the surrogate shall deem necessary for the payment thereof. The surrogate may limit the amount to be sold and afterward extend the power to other parcels and direct the order of the sale of parcels and may direct whether the same be mortgaged, leased, or sold, for the purpose of preserving all the rights and equities of the parties and preventing any unnecessary

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disposition of such real property; and may limit the amount to be raised thereby. The decree must describe the property to be sold with common certainty. If it appears that one or more distinct parcel of which the decedent died seized has been devised by him or sold by his heirs the decree must provide that the several distinct parcels be sold in the following order:

1. Property which descended to the decedent's heirs and which has not been sold by them.

2. Property so descended which has been sold by them.

3. Property which has been devised which has not been sold by the devisee.

4. Property so devised which has been sold by the devisee.

Former §§ 2760-2763 of this Code, consolidated by chap. 750 of 1904. From 2 R. S. 103, §§ 15-20.

§ 2758. Duty of executor or administrator to execute decree after filing bond.

It shall be the duty of the executor or administrator to execute the power conferred upon him by a decree directing that property be mortgaged, leased or sold; but he must first execute and file with the surrogate his bond, with two or more sureties, to the people of the state in a penalty fixed by the surrogate not less than twice the sum to be raised, or the value of the real property, or interest in real property, directed to be sold. The bond must be conditioned for the faithful performance of the duties imposed upon the principal by the decree and for the accounting by the principal for all moneys received by him whenever he is required so to do by a court of competent jurisdiction.

Former §§ 2765, 2766 of this Code, consolidated by chap. 750 of 1904. From 2 R. S. 103, 104, §§ 21, 22; L. 1885, c. 213; L. 1894, c. 735.

§ 2759. Proceedings upon failure to execute decree or file bond.

Where there are two or more executors or administrators, if either of them fails, within such time as the surrogate deems reasonable, to give, or to join with his co-executors or co-administrators in giving, a bond as prescribed in the last section, the surrogate may direct those who have given the bond to proceed to execute the decree. But if a sole executor or administrator, or all the executors or administrators, so fail, such failure shall be deemed ground for the revocation of his or their letters and the surrogate shall, upon the application of any person interested, revoke such letters and grant administration to such person entitled as will execute such decree. He may revoke letters so granted from time to time, as the case requires, to obtain the proper execution of the decree. A person to whom letters are so granted shall have all the powers under

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the decree which were given to the executor or administrator at the time it was made; and must give the bond required by such decree, as well as the bond required to be given upon issuing letters to him.

Former § 2767 of this Code.
Amended by chap. 750 of 1904.

§ 2760. Execution of decree not affected by death, et cetera.

The death, removal or disqualification, before the complete execution of a decree, of all the executors or administrators does not suspend or affect the execution thereof; but the successor of the person who has died, been removed, or become disqualified, must proceed to complete all unfinished matters, as his predecessors might have completed the same; and he must give such security for the due performance of his duties as the surrogate prescribes.

Former § 2770 of this Code. From L. 1850, c. 162.
Amended by chap. 750 of 1904.

§ 2761. Effect of decree; manner of executing same, applying proceeds of sale and accounting for same.

The executor or administrator must proceed to execute the decree in the same manner, and the execution thereof shall have the same effect, as if he were acting as executor of the decedent under a like power contained in a will of said decedent duly executed and proved. He shall apply the proceeds of the real property mortgaged, leased or sold in the same manner as if he had acted under such a power of sale contained in a will and all persons interested in the execution of the decree shall have the same remedies for the enforcement of the decree and the application of the proceeds that they would have had if the executor or administrator were acting under such a power. The executor or administrator may account for such proceeds and may be compelled to account therefor and for his acts under such decree and shall be entitled to commissions upon the settlement of his accounts as if he had acted under such a power.

Substituted for former §§ 2772-2776 of this Code, by chap. 750 of 1904.

§ 2762. Decree to sell when title is in controversy.

Repealed by chap. 750 of 1904.

§ 2763. Purchaser's title not affected by certain irregularities.

The title of a purchaser in good faith at a sale pursuant to a decree made as prescribed in this title is not, nor is the validity of a mortgage or lease made as prescribed in this title, in any way affected, where a petition was presented and the proper persons were duly cited and a decree authorizing a mortgage, lease or sale was made as prescribed in this title, by any omission, error, defect or irregularity occurring between

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the return of the citation and the making of the decree, except so far as the same would affect the title of a purchaser at a sale made pursuant to the directions contained in a judgment rendered by the supreme court.

Former § 2784 of this Code,
Amended by chap. 750 of 1904.

§ 2764. Allowance on bid to creditor purchasing.

If a creditor of the decedent becomes the purchaser of any of the decedent's real property, the surrogate may, upon his application, direct the amount of his claim to be allowed, in the first instance, upon the purchase price; and such purchaser shall only be required to pay the balance at the time of the sale. But, in case the proceeds of the decedent's real property shall be insufficient to satisfy the cost and expenses of administration and the debts and funeral expenses of the decedent, the purchasing creditor shall be allowed and credited, upon the judicial settlement of the accounts of the executor or administrator, only the amount he may be entitled to receive upon his claim and shall then pay the difference between the amount originally allowed and the amount he is entitled to receive. In case any purchaser has credit on his bid, as aforesaid, no deed shall be delivered to him until the judicial settlement of the accounts of the executor or administrator nor until he shall have paid the entire amount required under the provisions of this section.

Added by chap. 750 of 1904.

§ 2765. Sale to be refused if bond be given.

A decree empowering an executor or administrator to mortgage, lease or sell shall not be granted if any of the persons interested in the estate give bonds to the surrogate in such sum and with such sureties as he directs and approves, with condition to pay all the debts, legacies and expenses of administration so far as the goods, chattels, rights and credits of the deceased are insufficient therefor, within such time as the surrogate may direct.

Added by chap. 750 of 1904.

§ 2766. Bond to be given by executor or administrator.

Repealed by chap. 750 of 1904.

§ 2767. If he refuses, freeholder to be appointed to execute decree.

Repealed by chap. 750 of 1904.

§ 2768. Order directing execution of decree.

Repealed by chap. 750 of 1904.

§ 2769. Order as to distinct parcels after appeal.

Repealed by chap. 750 of 1904.

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§ 2770. Order as to distinct parcels after appeal not affected by death, etc.

Repealed by chap. 750 of 1904.

§ 2772. Mode of sale; notice thereof.

Repealed by chap. 750 of 1904.

§ 2773. Distinct parcels to be sold separately.

Repealed by chap. 750 of 1904.

§ 2775. Order to vacate sale. Resale.

Repealed by chap. 750 of 1904.

§ 2776. Order to confirm sale. Conveyance thereupon.

Repealed by chap. 750 of 1904.

§ 2777. When conveyance not to affect purchaser or mortgagee from heir.

See § 2783, post, Contract for lands; effect of conveyance of part.

§ 2778. Effect of conveyance in other cases.

Repealed by chap. 750 of 1904.

§ 2779. Contract for lands; how sold.

Repealed by chap. 750 of 1904.

§ 2780. Contract for lands; purchaser's bond for payment thereupon.

Repealed by chap. 750 of 1904.

§ 2781. Contract for lands; when interest in part of land may be sold.

Repealed by chap. 750 of 1904.

§ 2784. Purchaser's title not affected by certain irregularities, etc.

Repealed by chap. 750 of 1904.

§ 2785. Id.; presumption, where records have been removed.

See § 2473, ante, Presumption of jurisdiction.
See § 2474, ante, Jurisdiction not lost by defect in record.

§ 2786. Proceeds to be paid into court; effect thereof.

Repealed by chap. 750 of 1904.

§ 2787. Notice of distribution of proceeds.

Repealed by chap. 750 of 1904.

§ 2788. Hearing; proofs of further debts or liens.

Repealed by chap. 750 of 1904.

§ 2789. When sale of unsold property may be directed.

Repealed by chap. 750 of 1904.

§ 2790. Proofs of claims to surplus money.

Repealed by chap. 750 of 1904.

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§ 2791. Decree for distribution.

Repealed by chap. 750 of 1904.

§ 2792. Decree for county treasurer to distribute.

Repealed by chap. 750 of 1904.

§ 2793. Distribution; how made.

Repealed by chap. 750 of 1904.

§ 2794. Dower in lands under contract; how computed.

Repealed by chap. 750 of 1904.

§ 2795. Fund set apart for dower; how invested, etc.

Repealed by chap. 750 of 1904.

§ 2796. Fund set apart for dower; share belonging to infant, etc.

Repealed by chap. 750 of 1904.

§ 2797. Effect upon proceedings under this title, of an action to foreclose, etc.

Repealed by chap. 750 of 1904.

§ 2798. Surplus money on foreclosure and other sales.

See Rule 61 (Sup. Ct.) Surplus moneys.

a. As to real estate property sold to satisfy a mortgage, the surplus remaining after specifying specific liens is required to be paid into the surrogate's court having jurisdiction to distribute the personal estate of the decedent, or the county treasurer, subject to the order of the surrogate's court: Matter of Dusenbury, 34 Misc. 666; 70 N. Y. Supp. 725.

b. A freeholder appointed to sell the real estate of a decedent may, under § 2563 and former § 2786 (now repealed) of the Code of Civil Procedure, be allowed his expenses, counsel fees, etc., by the surrogate upon rendering his account of the sale, and is not obliged to pay over to the county treasurer the gross proceeds of the sale and wait for such payment until the final distribution, under § 2763 of the Code of Civil Procedure: Matter of McGee, 65 App. Div. 460.

c. Supreme Court.—Where a mortgage is foreclosed after the mortgagor's death and the surplus moneys are paid to the county treasurer, subject to the order of the supreme court, that court may, without modifying the judgment of foreclosure, make an order directing that the money be paid out of the supreme court into the surrogate's court, to be held subject to the order of the latter court: Powell v. Harrison, 88 App. Div. 228; 85 N. Y. Supp. 452.

d. Notice.—Surplus moneys on mortgage foreclosure deposited with county treasurer can only be transferred to the surrogate's court on notice to all the parties: Washington Life Ins. Co. v. Clarke, 79 App. Div. 160; 79 N. Y. Supp. 610.

§ 2799. Id.; how distributed.

Where money is paid into a surrogate's court, as prescribed in the last section, and a petition for the disposition of property, as prescribed in this title, is pending before him; or is presented at any time before the distribution of the money; the decree may provide that the money be paid to the executor or administrator to be applied by him as if it was the proceeds of the decedent's real property, sold pursuant to the decree. If such a petition is not pending or presented, or if a decree for the disposition of the decedent's property is not made thereupon, a verified petition, praying for a decree, directing the distribution of the money among the persons entitled thereto, may be presented by any of those persons. Each person, who would be entitled to share in the distribution

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of the proceeds of a sale, must be cited to show cause, why such a decree should not be made. Service of the citation may be made upon all the persons designated therein, by publishing the same in two newspapers designated as prescribed in article first of title second of this chapter, at least once in each of the four successive weeks immediately preceding the return day thereof, except that personal service must be made upon the husband, wife, heirs and devisees of the decedent, and also upon every other person claiming under them, or either of them who resides in this state. Upon the return of the citation, the rights and priorities of the persons interested must be established, and a decree for distribution must be made.

From L. 1867, c. 658, § 2; L. 1870, c. 170, § 1.

Amended by chap. 535 of 1881 and chap. 750 of 1904.

a. **Supreme Court.**—Where a mortgage is foreclosed after the mortgagor's death and the surplus moneys are paid to the county treasurer subject to the order of the supreme court, that court may, without modifying the judgment of foreclosure, make an order directing that the money be paid out of the supreme court into the surrogate's court, to be held subject to the order of the latter court: Powell v. Harrison, 88 App. Div. 228; 85 N. Y. Supp. 452.

b. **Payment of debts.**—Under § 2793, construed with other sections of chap. 18 of tit. 5 of the Code of Civil Procedure, as it read June, 1900 (the section was repealed by chap. 750 of 1904 and partly re-enacted in § 2799), no part of the proceeds of real estate sold for the payment of debts and funeral expenses of a decedent can be used to reimburse the executors for the expenses of administration consisting mainly of the amount paid the attorneys who represented her in a contest over the probate of the will: Matter of Hatch, 182 N. Y. 320, rev'g 97 App. Div. 496; 90 N. Y. Supp. 33.

c. **Expenses.**—A freeholder appointed to sell the real estate of a decedent may, under § 2563 and former § 2786 (now repealed) of the Code of Civil Procedure, be allowed his expenses, counsel fees, etc., by the surrogate upon rendering his account of the sale, and is not obliged to pay over to the county treasurer the gross proceeds of the sale and wait for such payment until the final distribution under § 2763 of the Code of Civil Procedure: Matter of McGee, 65 App. Div. 460.

d. Under former § 2793, subd. 6 (before the general amendment of this title by chap. 750 of 1904) in regard to the disposition of the proceeds of the sale of a decedent's real estate to pay his debts, the decedent's executrix is entitled to payment out of the proceeds of the sale of a sum found due her upon a judicial settlement of her accounts for expenses of administration: Matter of Hatch, 97 App. Div. 496; 90 N. Y. Supp. 33, rev'd 182 N. Y. 320.

e. **Dower.**—Under former § 2793 (before the general amendment of this title by chap. 750 of 1904) where a testator directed his executors to set aside a fixed sum for the support of his wife and such fixed sum proved to exceed the entire income of the estate for the payment of the debts, the court refused the application of the committee of the wife, an incompetent person, to take a gross sum in lieu of dower, as not being for the best interest of the widow: Matter of Grotrian, 35 Misc. 257.

f. Where there was no personalty, the administrator was not entitled to be paid, under former § 2793, subd. 6 (before the general amendment of this title by chap. 750 of 1904), out of the fund resulting from a sale of the real estate, legal expenses which he himself contracted in regard to the estate as the fund was applicable only to the amount found due the administrator for his payments for the debts and funeral expenses of the decedent: Matter of Summers, 37 Misc. 575; 75 N. Y. Supp. 1050.

g. The distribution of surplus moneys arising upon a foreclosure suit and paid into the surrogate's court is governed by this section, and, where no proceeding for the sale of decedent's real estate is pending, every person entitled to share in the distribution of the proceeds must be cited: Matter of Schuessler, 49 Misc. 203.

§ 2800. Right of dower to be considered in sale.

Where the widow of the decedent, or a party to the proceeding, has an existing right of dower in the real estate directed to be sold the court must consider and determine whether a more advantageous sale can be made

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of such real estate by including the sale of such right of dower; and, if it shall be determined by the court that a larger sum will be realized on such sale, applicable to the payment of debts and funeral expenses, by including in such sale the right of dower, the interest of the party entitled thereto shall pass thereby; and the purchaser, his heirs and assigns, shall hold the property free and discharged from any claim by virtue of that right. The regulations and provisions of article two title one of chapter fourteen of this act, prescribing the rules of practice in relation to the right of dower in actions for the partition of real estate, so far as the same may be applicable, shall govern and control the disposition of moneys realized on such sale which shall belong to the owner of said right of dower.

Former § 2800 repealed by chap. 750 of 1904.
Present section added by chap. 430 of 1905.

§ 2801. Restitution for assets subsequently discovered.

Where a decree has been made for the application of the proceeds of real property to the payment of the decedent's debts, or funeral expenses as prescribed in this title, and assets, which should have been applied thereto, are afterwards discovered; or, for any other reason, money or other personal property of the decedent, which should have been applied thereto, afterwards comes to the hands of the executor, administrator, legatee or next of kin, the heir, devisee or other person aggrieved may maintain an action to procure reimbursement therefrom.

New.
Amended by chap. 735 of 1894 and chap. 750 of 1904.

§ 2802. Intermediate accounting; judicial settlement of account; when voluntary. Compensation of trustees.

See § 2725 et seq., ante, Accounting by executors and administrators.
See § 2742, ante, Effect of judicial settlement of account.

a. When full commission should be allowed in each capacity as executor and trustee: Matter of Union Trust Co., 70 App. Div. 5; 75 N. Y. Supp. 68.

b. One commission.—Unless a trust estate's annual income amounts to $100,000, the trustees, however numerous, are together entitled to only one commission on the income: Matter of Holbrook, 39 Misc. 139; 78 N. Y. Supp. 972.

c. Trustee.—§§ 2802 and 2730 clearly contemplate that an estate shall be charged with certain fees for the receiving and paying out of the money coming into the hands of a trustee: Matter of Todd, 64 App. Div. 485; 72 N. Y. Supp. 277.

d. Trust.—§ 2802 confers jurisdiction over testamentary trustees on surrogates; by § 2812 the surrogate is empowered to determine any controversy arising on the settlement of an account of a trustee concerning the right of any party to share in the money or other personal property to be distributed, and since the enactment of chap. 452 of 1893 and the Real and Personal Property Laws (chap. 547 of 1896 and chap. 417 of 1897), certain trusts are made terminable on compliance with specific requirements of the statute, and when the necessary conveyances or releases are executed, it requires no action of a court of equity to abrogate the trust, but it terminates as a matter of law, and if the case falls within the statute the surrogate must decree a proper distribution of the estate exactly the same as if the trust had terminated under the provisions of a will, and if the claim that the trust has ceased is challenged, he must decide that issue in one case just as in the other: Matter of United States Trust Co., 175 N. Y. 304, aff'g 80 App. Div. 77; 80 N. Y. Supp. 475.

e. Who may petition.—Any person absolutely or contingently interested in a fund in the hands of a testamentary trustee may petition the supreme court for an accounting: Matter of Bartells, 109 App. Div. 586.

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a. **Embezzlement.**—When a testamentary trustee, after knowledge that his co-trustee has appropriated to his own use large portions of the trust estate, turns over to such co-trustee the proceeds of a sale of trust property which are also embezzled, he is liable personally for the sums so turned over: Matter of Howard, 110 App. Div. 61; 97 N. Y. Supp. 23, aff'd 185 N. Y. 539.

b. **Judicial settlement.**—Upon the judicial settlement of the accounts of an executor or trustee the surrogate has full power to pass upon all questions necessarily involved in such accounting, whether they refer to real estate or are simply confined to personalty: Matter of Bruchaeser, 49 Misc. 194.

c. **Statute of limitations.**—The statute of limitations does not commence to run in favor of an executor in possession of trust funds which he has failed to turn over to the trustee named in the will until he openly repudiates the trust and exercises individual ownership over the property, and the question as to whether the statute has run will not be decided until after an accounting: Matter of Ashheim, 111 App. Div. 176; 97 N. Y. Supp. 607, aff'd 185 N. Y. 609.

d. **Commissions.** — A testamentary trustee is entitled to commissions when he has executed his trust, although he has for some years paid the income to the beneficiary without deducting his commissions, and has made no accounting during that period; such failure to deduct commissions is not a waiver of his right thereto: Matter of Haskin, 111 App. Div. 754.

e. Where a trustee year after year pays over the entire income of a trust fund without claiming any commissions, his right thereto will be deemed waived and he cannot, upon his final accounting, be awarded commissions upon past income, payable either out of the trust fund or present or future income: Matter of Haskin, 49 Misc. 177.

§ 2803. Intermediate accounting; when compulsory.

See § 2725, ante, Surrogate may make an order requiring executor or administrator to file an intermediate account.

f. One who is of the next of kin of the testatrix and who has been cited, is, under § 2803, a proper person to compel the administrator to carry out a trust, created by the will of the testatrix, and one which the court has already directed him to carry out: Matter of Sill, 41 Misc. 270.

g. Any person absolutely or contingently interested in a fund in the hands of a testamentary trustee may petition the supreme court for an acounting: Matter of Bartells, 109 App. Div. 586.

§ 2804. Petition to compel payment of debt, legacy, etc.

h. A surrogate has no power, in a proceeding by a testamentary trustee for a final accounting, to order a transfer of specific bonds to a legatee who contests the account, with a provision that the trustee be credited therewith at a value thereafter to be determined by the court; such bonds must be reduced to cash before distribution unless the case is brought within the provisions of § 2744: Matter of Hunt, 110 App. Div. 533.

§ 2805. Id.; proceedings upon return of citation.

See §§ 2722, 2723, ante, Petition may be presented to compel executor or administrator to pay debt or legacy.

i. A testamentary direction to executors, as trustees, to pay a certain sum per month out of the income to each child, amounts to a trust interest, and is not assignable by a beneficiary, and where one of them petitions the surrogate to compel the trustees to pay him income, their written answer, setting up an assignment made by him of his interest to a third party and denying that his own claim is valid and legal, does not require a dismissal of the petition, as, within § 2805, the answer does not set forth facts "which show that it is doubtful whether the petitioner's claim is valid and legal:" Matter of Foster, 37 Misc. 581.

§ 2806. Id.; other persons interested to be cited.

j. When a surrogate has granted leave to an assignee of a distributive share of an estate to issue execution on a judgment therefor, which assignment was prior to the final accounting, and there is nothing to show that such assignee was made a party to or had notice of the final accounting so as to be barred by the decree, it is error to refuse an order that the administrator pay such judgment; the order for leave to issue execution except on appeal therefrom is conclusive evidence of assets applicable to the judgment, and the burden is upon the administrator to show that the petitioner is bound by the decree: Matter of Weil, 110 App. Div. 67.

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§ 2807. When surrogate may compel judicial settlement.

See § 2726, ante, Surrogate may require judicial settlement of the account of an executor or administrator.

a. Although under § 2606, the surrogate has jurisdiction when an executor dies to compel the executor of the deceased executor to account, on petition of his successor, as if the decedent had lived and his letters had been revoked and a proceeding for an accounting been instituted against him, the section contemplates that the funds so reached should not be paid to a creditor or legatee instituting the accounting but to the successor of the deceased executor or into court or to some person authorized by law to receive the fund: Bushe v. Wright, 118 App. Div. 320.

§ 2808. Who may apply therefor.

See § 2727, ante, Who may present petition to compel executor or administrator to account.

§ 2810. Judicial settlement on petition of trustee.

b. Although each of three executors and trustees of an estate, the value of which amounted to over $100,000 over all the debts of decedent, are entitled to full commissions under § 2730, they are not each entitled as trustee to one-half of full commissions upon the principal of trusts created for the benefit of certain *cestui que trust* for receiving the same as trustees from themselves as executors; nor to full commissions upon the amount of each year's income received and paid out by them under each of the trusts held by them, where none of such trusts amounted to $100,000; but only to one-third of such commissions, since, under §§ 2730 and 2810, each trust constitutes an estate by itself; the basis upon which their commissions should be computed is the value of the property and income of each trust, separately considered, without reference to the property of the other trusts, or that of the original estate from which they sprang; the statute does not mean that the value of the original estate should follow each of the trusts springing therefrom, but that each of the latter should stand by itself and the commission of the trustees thereof be allowed according to the value of the assets belonging exclusively thereto: Matter of Johnson, 170 N. Y. 139; 32 Civ. Pro. R. 381, mod'y 57 App. Div. 494; 67 N. Y. Supp. 1004.

c. Upon the judicial settlement of the accounts of an executor or trustee the surrogate has full power to pass upon all questions necessarily involved in such accounting, whether they refer to real estate or are simply confined to personalty: Matter of Bruchaeser, 49 Misc. 194.

d. When a testamentary trustee, after knowledge that his co-trustee has appropriated to his own use large portions of the trust estate, turns over to such co-trustee the proceeds of a sale of trust property which are also embezzled, he is liable personally for the sums so turned over: Matter of Howard, 110 App. Div. 61; 97 N. Y. Supp. 23, aff'd 185 N. Y. 539.

§ 2811. Certain provisions of title fourth made applicable.

e. Unless a trust estate's annual income amounts to $100,000, the trustees, however numerous, are together entitled to only one commission on the income: Matter of Holbrook, 39 Misc. 139; 78 N. Y. Supp. 972.

f. Where the *corpus* of a testamentary trust in personalty exceeds $100,000, the trustees, not exceeding three, are each entitled to executor's commissions on the annual income received and disposed by them: Matter of Hunt, 41 Misc. 72; 83 N. Y. Supp. 652.

§ 2812. Surrogate to determine controversies; proportion may be retained.

g. § 2802 confers jurisdiction over testamentary trustees on surrogates; by § 2812 the surrogate is empowered to determine any controversy arising on the settlement of an account of a trustee concerning the right of any party to share in the money or other personal property to be distributed and since the enactment of chap. 452 of 1893 and the Real and Personal Property Laws (chap. 547 of 1896 and chap. 417 of 1897) certain trusts are made terminable on compliance with specific requirements of the statute, and when the necessary conveyances or releases are executed it requires no action of a court of equity to abrogate the trust, but it terminates as a matter of law, and if the case falls within the statute, the surrogate must decree a proper distribution of the estate exactly the same as if the trust had terminated under the provisions of a will, and if the claim that the trust has

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ceased is challenged, he must decide that issue in one case just as in the other: Matter of United States Trust Co., 175 N. Y. 304, aff'g 80 App. Div. 77; 80 N. Y. Supp. 475.

a. **Infant.**—When a will creates a trust for the maintenance and support of an infant during his minority, accumulations and principal to be paid over on his arriving at majority, the trustees may be ordered to apply such portion of the income as is necessary to the support and maintenance of the infant, if the father has not sufficient financial ability to properly care for him: Suesens v. Daiker, 117 App. Div. 668.

§ 2813. Effect of decree.

b. A decree on an intermediate accounting is final on the question whether a dividend should be credited to income or principal: Matter of Elting, 93 App. Div. 516; 87 N. Y. Supp. 833.

c. **Cestui que trust.**—§§ 2812 and 2813 do not invest the surrogate with power to determine the validity of a release executed by a *cestui que trust* to the remainderman, the purpose of which was to destroy the trust created by the will: Matter of United States Trust Co., 80 App. Div. 77; 80 N. Y. Supp. 475.

d. **Res adjudicata.**—When the accounts of the trustees showing the application of the surplus income has been judicially settled by the surrogate on the appearance of all parties without objection, the decisions are binding so long as they stand unreversed and are *res adjudicata,* irrespective of whether the parties are adults or infants if represented by special guardian; but the decisions are binding only as to accumulations and investments already made and passed upon by the surrogate, and are not controlling as to a new application of the surplus income, and form no bar to a subsequent adjudication holding the direction invalid as to property subsequently coming into the hands of the trustees: Kirk v. McCann, 117 App. Div. 56.

§ 2814. Resignation of trust.

e. Whether or not the supreme court has inherent power to appoint a testamentary trustee in the place of those who have resigned, without notice to those interested, such practice is bad: Matter of Bartells, 109 App. Div. 586.

§ 2815. Petition for security from testamentary trustee.

See § 2636 et seq., ante, Objection to appointment of testamentary trustee.

§ 2817. Removal of testamentary trustee.

f. A surrogate will remove an executor where his constant dissensions with his co-executor, as well as his failure to do his part in the management of the estate, indicate that his continuance in office will prejudice the best interests of the trust: Matter of Wheaton, 37 Misc. 184; 74 N. Y. Supp. 938.

g. Statements in an affidavit, used on a motion to remove a testamentary trustee, if relevant, are privileged: Beggs v. McCrea, 62 App. Div. 39; 70 N. Y. Supp. 864.

h. The power to remove a testamentary trustee should be exercised sparingly and only where there is a clear necessity for interference to save the trust property: Wiggins v. Burr: 54 Misc. 149.

i. **Reference.**—When on a petition for the removal of an executor the issues are sent to a referee to hear and report, a failure of the witnesses to sign their testimony is waived when neither party insists that the witnesses sign or calls the attention of the referee to the defect, and they submit the questions involved to the referee without objection; after the filing of the report and opinion of such referee with the surrogate, one party contends that evidence in his behalf was improperly excluded the surrogate personally may hear additional witnesses to supply the defect: Matter of Hirsch, No. 1, 116 App. Div. 367; 101 N. Y. Supp. 893.

j. **Partnership.**—When the will of a deceased partner gives to a surviving partner, who is also made executrix and trustee, the controlling interest in the business and management thereof, free from any control or dictation from any person whomsoever, the surviving partner is the sole legal owner of the assets and has exclusive right of management in winding up the partnership affairs within the limits of good faith; the other representatives of the deceased partner have no right to interfere with the surviving partner, or to require her removal as executrix and trustee, so long as she is applying the proceeds of the firm in settlement of its debts: Matter of Thieriot, 117 App. Div. 686; 102 N. Y. Supp. 952, mod'fg 188 N. Y. 589.

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§ 2818. Appointment of successor.

When a person named in a will as sole testamentary trustee dies prior to the probate of the will, or by an instrument in writing renounces his appointment, or when a sole testamentary trustee dies, or becomes a lunatic, or is by a decree of the surrogate's court removed or allowed to resign, and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. Where one of two or more persons named in a will as testamentary trustees dies prior to the probate of the will, or by an instrument in writing, renounces his or their appointment, or where one of two or more testamentary trustees dies or becomes a lunatic, or is by a decree of the surrogate's court removed or allowed to resign, a successor shall not be appointed, except where such appointment is necessary in order to comply with the express terms of the will, or unless the same court, or the supreme court, shall be of the opinion that the appointment of a successor would be for the benefit of the cestui que trust. Unless and until a successor is appointed the remaining trustee or trustees may proceed and execute the trust as fully as if such trustee (or trustees) had not died, renounced, become a lunatic, been removed or resigned. Where a decree removing a trustee or discharging him upon his resignation does not designate his successor, or the person designated therein does not qualify, the successor must be appointed and must qualify in the manner prescribed by law for the appointment and qualification of an administrator with the will annexed.

New. See L. 1870, c. 359, § 3.
Amended by chap. 408 of 1884 and chap. 370 of 1903.

a. Where a beneficiary and a third person are appointed trustees and the latter refuses to qualify, the former is incompetent to execute the trust or a power of sale given for the purpose thereof: Haendle v. Stewart, 84 App. Div. 274; 82 N. Y. Supp. 823.

b. **Conveyance.**—The office of trustee and beneficiary cannot be united in the same person, and so where two trustees are appointed to execute a trust and one or both is a beneficiary, the trust does not fail as each may act for the other where the disqualification exists and both can act with respect to that portion of the property in which they have no interest; a conveyance by a surviving trustee is effectual to pass a valid title to the entire property: Rankine v. Metzger, 69 App. Div. 264; 32 Civ. Pro. R. 370; 74 N. Y. Supp. 649.

c. **Supreme Court.**—§ 2818, as amended by chap. 370 of 1903, authorizes a surrogate to appoint a successor to a deceased testamentary trustee and therefore the supreme court no longer has exclusive jurisdiction in such case: Matter of Chase, 40 Misc. 616.

d. **Residuary estate.**—Under a testamentary trust of one-quarter of a residuary estate for the benefit of one for life, with directions to divide after his death, the death of the beneficiary does not terminate the trust as it requires the division after his death of the *corpus*, and the appointment of a substituted trustee in place of the beneficiary who was trustee is proper under § 2818: Yates v. Thomas, 35 Misc. 552; 71 N. Y. Supp. 1113.

e. **Necessary.**—§ 2818, as it existed prior to the amendment by chap. 370 of 1903 made no provision for a case where one of two or more testamentary trustees renounced and failed to qualify; the amendment in 1903 provided that where one of two or more such trustees renounces a successor shall not be appointed except where such appointment is necessary: Matter of Wilkin, 90 App. Div. 324; 86 N. Y. Supp. 360.

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§ 2819. Proceedings where testamentary trustee is also executor or administrator.

See § 2688, ante, Decree not to affect testamentary trusts.

a. One of three executors and trustees, who has a life estate, and who alone qualified, cannot alone exercise the power of sale: Hilton v. Sowenfield, 53 Misc. 152.

§ 2821. Power of court to appoint guardians.

See rule 52 (Sup. Ct.), Appointment of general guardian; petition for.

See rule 53 (Sup. Ct.), Court to ascertain the age of infant and amount of property.

See rule 54 (Sup. Ct.), Security to be given by a general guardian.

b. Father.—The natural right of a father to act as the guardian of his own children will be refused recognition, only, where the father is not a fit person and the interest of the infants require the appointment of some one else: Matter of Tully Infants, 54 Misc. 184.

§ 2822. Petition for appointment, by infant over fourteen.

c. When letters of guardianship may be issued on the theory that there was property of the decedent in the county of Kings: Maas v. German Sav. Bank, 73 App. Div. 524; 77 N. Y. Supp. 256.

d. The power to appoint a guardian for infant children and joint guardians of the estate of infant children is vested in the surrogate's court by virtue of §§ 2822 and 2827, and a testator's attempted appointments are without authority: Matter of Burdick, 47 Misc. 28.

§ 2827. Appointment of temporary guardian for infant under fourteen.

e. The power to appoint a guardian for infant children and joint guardians of the estates of infant children is vested in the surrogate's court by virtue of §§ 2822 and 2827, and a testator's attempted appointments are without authority: Matter of Burdick, 47 Misc. 28.

f. When letters of guardianship may be issued on the theory that there was property of the decedent in the county of Kings: Maas v. German Sav. Bank, 73 App. Div. 524; 77 N. Y. Supp. 256.

§ 2830. Qualification of guardian of property.

g. When a suit lies against sureties on a guardian's bond: Van Zandt v. Grant, 67 App. Div. 70; 73 N. Y. Supp. 600.

§ 2832. When letters may be revoked for misconduct, etc.

See § 2686, ante, Petition; citation thereupon.

See § 2687, ante, Hearing; decree.

See § 2833, post, Citation; hearing; decree.

h. Interest of infant.—When an attorney, who is also general guardian of an infant, has petitioned for a judicial settlement of his accounts and for the appointment of a successor and the latter has been appointed, an application to remove the new guardian should not be granted when it appears that it is made by the former guardian solely because the second guardian contested his right to conpensation as attorney, and the proceeding is not brought in the interest of the infant: Matter of Twichell, 117 App. Div. 301.

§ 2833. Citation; hearing; decree.

See § 2603, ante, Effect and contents of decree revoking letters.

See § 2610, ante, Application of this article to executors, etc., heretofore appointed.

i. When an attorney, who is also general guardian of an infant, has petitioned for a judicial settlement of his accounts and for the appointment of a successor and the latter has been appointed, an application to remove the new guardian should not be granted when it appears that it is made by the

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former guardian solely because the second guardian contested his right to conpensation as attorney, and the proceeding is not brought in the interest of the infant: Matter of Twichell, 117 App. Div. 301.

§ 2835. Application by guardian for revocation of letters.

a. A decree settling a guardian's account before his successor has been appointed is not conclusive on an accounting after such appointment: Matter of Tyndall, 48 Misc. 39.

§ 2836. Proceedings thereupon.

b. A decree settling a guardian's account before his successor has been appointed is not conclusive on an accounting after such appointment: Matter of Tyndall, 48 Misc. 39.

§ 2837. Ward or new guardian may require accounting.

c. A degree settling a guardian's account before his successor has been appointed is not conclusive on an accounting after such appointment: Matter of Tyndall, 48 Misc. 39.

§ 2842. Guardian to file annual inventory and account.

See § 2342, ante, Annual examination of accounts, etc.
See § 2855, post, Inventory and intermediate account may be required.

§ 2843. Affidavit to be annexed thereto.

See § 2342, ante, Annual examination of accounts, etc.
See § 2855, post, Inventory and intermediate account may be required.

§ 2844. Annual examination of guardian's accounts.

See § 2342, ante, Annual examination of accounts, etc.
See § 2855, post, Inventory and intermediate account may be required.

§ 2845. Proceedings, when account defective, etc.

See rule 21 (Sur. Ct., N. Y. City), Surrogate has power to appoint special guardian for ward in proceedings to remove guardian.

See § 2342, ante, Annual examination of accounts, etc.
See § 2855, post, Inventory and intermediate account may be required.

§ 2846. Surrogate may direct as to infant's maintenance.

d. The surrogate's court has power, under §§ 2348, 2360, 2361 and General Rule of Practice 59, in its discretion, to make an order directing payment to the guardian of the proceeds of real estate sold for the support of the ward without requiring additional security: Allen v. Kelly, 171 N. Y. 1, rev'g 66 App. Div. 623.

e. A claim by an executor in his individual capacity to recover for board and necessaries against an infant, when he did not at any time have any moneys in his hands to which such infant was entitled or from which the said infant could have obtained an order by the proceeding mentioned in § 2846 for such payment, is not chargeable against the proceeds in an action for partition of real property left by the testator: Johnson v. Weir, 72 App. Div. 325; 76 N. Y. Supp. 76.

§ 2847. When judicial settlement of guardian's account compelled.

f. The purchase by the general guardian of an infant for his individual benefit, of real property belonging to the infant, at a mortgage foreclosure sale thereof, constitutes a violation of the guardian's duty, and if the latter is guilty of such violation, the ward may maintain an action against him to obtain an adjudication that he holds the property simply as trustee, and to compel an accounting for the rents and profits thereof: Coley v. Tallman, 107 App. Div. 445; 95 N. Y. Supp. 339, aff'd 186 N. Y. 569.

§ 2849. When guardian may compel judicial settlement.

g. Statute of limitations is not available to a general guardian called upon to account: Matter of Sack, 70 App. Div. 401; 75 N. Y. Supp. 120.

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§ 2850. Citation; proceedings thereupon; guardian's compensation.

a. Where in a proceeding to compel a general guardian to account, the facts and circumstances indicate a lack of fairness and suggesting a disposition on the part of the guardian to deplete the estate of his ward, commissions may be denied him and costs awarded against him personally: Matter of Ward, 49 Misc. 181.

b. The surrogate's court has no power to allow the claim of a general guardian against his ward for legal services rendered by him in prosecuting a claim in favor of his ward before his appointment: Matter of Tyndall, 48 Misc. 39.

c. A general guardian cannot invest his ward's personalty in realty without first obtaining authority to do so from the supreme court, nor can he invest in bank stock or in a bond of a foreign corporation: Matter of Decker, 37 Misc. 527; 76 N. Y. Supp. 315.

d. **Trust fund.**—In calculating the liability of an executor and guardian for income upon a trust fund, he should be charged with the interest of the proceeds during the term of the lease and thereafter with interest at five per cent; he is not entitled to be reimbursed for the payment of taxes illegally assessed: Matter of Pruyne, 68 App. Div. 584; 73 N. Y. Supp. 859.

e. **Jurisdiction.**—The supreme court has jurisdiction over guardians of an action against a guardian of an estate of infants for provisions furnished at the request of the guardian of their persons: Strubbe v. Kings Co. Trust Co., 60 App. Div. 548; 69 N. Y. Supp. 1092.

§ 2851. Will or deed containing appointment to be proved, etc., and recorded.

f. While a testamentary appointment of guardians for testator's minor children is void under the Domestic Relations Law (chap. 272 of 1896), because it excluded the mother who survives, yet a direction that all funds and securities belonging to such minor children shall be held by other persons as guardians is effective; the testator could not say who should have the custody and control of the property of his infant children generally, but he had the power to direct who should have the custody and control of that part of his property that he choses to give to them during their minority: Matter of Kellogg, 187 N. Y. 355, rev'g 110 App. Div. 472; 96 N. Y. Supp. 965.

§ 2855. Inventory and intermediate account may be required.

See § 2342, ante, Annual examination of accounts, etc.
See §§ 2842-5, ante, Accounts of general guardian.

§ 2857. Effect of decree.

See § 2831, ante, Effect of decree.

§ 2858. Removal of guardian appointed by will or deed.

See § 2815, ante, Petition for security from testamentary trustees.
See § 2834, ante, Effect of suspension of general guardian.

§ 2859. Resignation of such a guardian.

See § 2835, ante, Application by guardian for revocation of letters.
See § 2836, ante, Proceedings upon application by guardian.
See § 2837, ante, New guardian may require accounting.

§ 2860. Appointment of successor.

See § 2818, ante, Appointment of successor of testamentary trustee.

§ 2861. Justice's jurisdiction must be specially conferred by statute.

See Art. 6, § 17, N. Y. Const., The justice of the peace is a constitutional officer.
See § 46, ante, Disqualification of justice.

§ 2862. General civil jurisdiction.

Subd. 6. An action upon a judgment either foreign or domestic rendered in any inferior court not of record, where the sum claimed does not

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exceed two hundred dollars. An action upon a judgment, foreign or domestic rendered in a court of record, where the sum claimed does not exceed fifty dollars.

Co. Proc., § 53.

Amended by chap. 303 of 1896 and chap. 246 of 1906.

§ 1331 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. A justice of the peace has power to entertain an application to set aside the service of a summons; if in a proper case the justice refuses to set aside the service the remedy is by appeal: People ex rel. Ballin v. Smith, 184 N. Y. 96, rev'g 106 App. Div. 613; 95 N. Y. Supp. 1152.

b. **Amendment.**—Although a complaint in a justice's court demands damages in excess of the jurisdiction of that court, when the defendant appears on the return day the justice has power against objection to allow an amendment of the complaint reducing the claim to an amount within his jurisdiction: People v. Wait, 114 App. Div. 334.

c. **Real estate.**—An issue as to the actual possession of land, and not as to the right of such possession, does not involve the title and may be litigated in a justice's court: Town of West Union v. Richey, 64 App. Div. 156; 71 N. Y. Supp. 871.

d. **Deceit.**—Prior to the charter of the city of New York, passed in 1897, its district courts had jurisdiction of an action for deceit and the present municipal court of said city has like jurisdiction: Berney v. Marks, 34 Misc. 527; 69 N. Y. Supp. 993.

§ 2863. No jurisdiction in certain cases.

e. **Costs.**—Where an action involving a matter of account is originally brought in the supreme court and the plaintiff recovers a sum less than $50, it is incumbent upon him, in order to entitle him to costs, to show that the action was one, of which a justice of the peace had not jurisdiction, viz., that the sum total of the accounts of both parties proved, exceeded $400: Youker v. Johnson, 62 App. Div. 584; 71 N. Y. Supp. 178.

f. **Executor.**—§ 2863, giving a justice of the peace jurisdiction of a demand against an executor or administrator where the amount of the claim is less than the sum of fifty dollars ($50), does not render it necessary to bring the action in the justice's court as it is entirely optional with the defendant as to whether he will offer a note as a counterclaim: Osborne v. Parker, 66 App. Div. 277; 72 N. Y. Supp. 894.

§ 2864. Confession of judgment.

See § 1273 et seq., ante, Confession of judgment in courts of record.

See §§ 3010-3012, post, Confession of judgment in justice's court.

§ 2868. Justices to hold court; general powers.

g. § 1184, in regard to treble damages is, by § 2868, made applicable to an action brought in justice's court for a cause of action for injury to property brought under § 654 of the Penal Code: Layton v. McConnell, 61 App. Div. 447.

h. **Justice of the peace.**—A justice of the peace is a town officer and cannot summon a jury and try a case in an adjoining town, where he has an office, even by consent of the parties; and a judgment rendered upon such trial must be reversed, but, in view of the appellant's express consent, the reversal should be without costs: Eisneberg v. Lape, 52 Misc. 329.

§ 2869. In what town, etc., action must be brought.

An action must be brought before a justice of a town or city wherein one of the parties resides, or a justice of an adjoining town or city in the same county, except in one of the following cases:

1. Where the defendant has absconded from his residence, it may be brought before a justice of the town or city in which the defendant, or a portion of his property, is at the time of the commencement of the action.

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2. Where the plaintiff is not a resident of the county, or if there are two or more plaintiffs when all are non-residents thereof, it must be brought in the town where the defendant resides, or in any adjoining town thereto.

3. Where the defendant is a non-resident of the county, it may be brought before a justice of the town or city, in which he is at the time of the commencement of the action.

4. Where it is specially prescribed by law, that a particular action may be brought before a justice of the town, city, county, or district, where an offense was committed, or where property is found.

5. In any town adjoining an incorporated city, no justice of such town shall have jurisdiction of any action brought against a resident of such adjoining city, unless one of the parties plaintiff in such action is a resident of such town.

A defendant designated in section 2879, section 2880, or section 2881 of this act, is deemed, for the purposes of this section, a resident of the town or city, where the person, to whom a copy of the summons is delivered, resides.

2 R. S. 226, §§ 8, 9. Am'd by L. 1894, c. 306; L. 1895, c. 153; L. 1898, c. 112 (in effect Sept. 1, 1898).

Amended by chap. 306 of 1894, chap. 153 of 1895, chap. 112 of 1898.

Subd. 5, added by chap. 74 of 1893, and amended by chap. 521 of 1903.

a. **Elmira.**—The charter of the city of Elmira, § 105, providing that the city court of Elmira "shall have the same jurisdiction over the persons of defendants as is now possessed by justice's courts of towns, pursuant to the provisions of § 2869 of the Code," did not render inapplicable to that court § 2881 as amended by chap. 349 of 1895 which authorized the summons, issued in an action brought against an insurance company in a justice's court to be served upon the local agent of the insurance company residing in the county: Murray v. American Casualty Ins. Co., 88 App. Div. 224.

b. **Mount Vernon.**—Under § 2869, subd. 5, a justice of the peace in the city of Mount Vernon has no jurisdiction of an action brought in his court by a resident of the city of New York against a resident of the city of Yonkers: People ex rel. Gegliardi v. Miller, 97 App. Div. 35.

c. **Adjoining town.**—One not a resident of the city of Lockport cannot sue a defendant who resides in a town adjoining the town but not adjoining the city of Lockport in a justice's court of that city: Sutphen v. Clark, 119 App. Div. 671.

§ 2870. Criminal contempts.

See § 14, ante, Civil contempts generally.
See § 2266 et seq., ante, Proceedings to punish civil contempts.

§ 2877. Contents of summons.

The summons must be directed, generally, to any constable of the county where the justice resides; and it must command him to summon the defendant to appear before the justice, at a place specified therein, to answer the complaint of the plaintiff in a civil action. Where the summons is accompanied with an order to arrest the defendant, it must be made returnable immediately upon the arrest of the defendant, within twelve days after the day when it was issued; in every other case, it must be

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returnable at a time therein specified, not less than six nor more than twelve days after the day when it was issued. A summons shall not be made returnable on a legal holiday.

From Id., § 14.

Amended by chap. 99 of 1904.

See § 22, ante, Writs, etc., in name of the people, and in English abbreviations.

See § 3135, post, General requisites of mandates.

§ 2878. Service of summons.

a. Under § 2878, providing that service of the summons in an action in the justice's court must be made at least six days before the time of appearance specified therein, the day of the appearance is to be excluded from the reckoning: Jones v. Wallace, 75 App. Div. 401; 78 N. Y. Supp. 35.

b. A justice of the peace has power to entertain an application to set aside the service of a summons; if in a proper case the justice refuses to set aside the service the remedy is by appeal: People ex rel. Ballin v. Smith, 184 N. Y. 96, rev'g 106 App. Div. 613; 95 N. Y. Supp. 1152.

§ 2879. Id.; upon a corporation.

Where the defendant to be served is a corporation, or person, company or partnership doing business in another county than that in which he or it resides, the summons may be personally served upon it or him by delivering a copy thereof to an officer, managing agent or person to whom a copy of the summons in an action brought against the corporation in the supreme court might be delivered as prescribed in sections 431 and 432 of this act, or, to any director, managing agent or trustee of the corporation, person, partnership or company by whatever official title he or it is called.

Co. Proc., § 64, subd. 15; L. 1847, c. 470, § 45.

Amended by chap. 527 of 1904.

c. There is no authority for any service of the summons, other than personal, in a municipal court, except in the cases stated in §§ 2879-2882, and where the case is not within any of those sections the defendant may show on appeal that personal service was never made upon him: Newton v. Stachelberg, 36 Misc. 184.

§ 2881. Id.; relating to express, insurance and telegraph companies.

Where the defendant to be served is a corporation, association, partnership or person doing business in the state as an express company, an insurance company, or a telegraph company, and no person resides in the county to whom a copy of the summons may be delivered, as prescribed in the foregoing sections of this article, it may be personally served on the express company by delivering a copy thereof to any local or general agent to receive freight or parcels, route agent, or messenger of the defendant, residing in the county, and on any insurance company by delivering a copy thereof to any local or general agent of the defendant, residing in the county, and on any telegraph company by delivering a copy thereof to any office manager of the defendant, residing in the county; unless at least thirty days before it was issued, the defendant

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had filed in the office of the clerk of the county, a written instrument, designating a person residing in the county, upon whom process to be issued by a justice of the peace against the defendant may be served; in which case the summons may be personally served by delivering a copy thereof to the person so designated.

L. 1864, c. 411, §§ 1, 2.

Amended by chap. 349 of 1895 and chap. 211 of 1905.

a. **Elmira.**—The charter of the city of Elmira, § 105, providing that the city court of Elmira "shall have the same jurisdiction over the persons of defendants as is now possessed by justices' courts of towns pursuant to the provisions of § 2869 of the Code," did not render inapplicable to that court § 2881 as amended by chap. 349 of 1895 which authorized the summons, issued in an action brought against an insurance company in a justice's court to be served upon the local agent of the insurance company residing in the county: Murray v. American Casualty Ins. Co., 88 App. Div. 224.

§ 2884. Where name of defendant is unknown.

b. Assuming that § 2884 is applicable to an action in the municipal court, the only authority there given is that the defendant may be designated in the summons and in any other process or proceeding in the action by a fictitious name or by so much of his name as is known; the judgment only becomes a lien against the property of the person where the name at length of the judgment debtor is entered in the docket-book of the county clerk: Bernstein v. Schoenfeld, 81 App. Div. 171; 81 N. Y. Supp. 11.

§ 2885. Return of summons.

c. The production before a justice of the peace, on the return day of a summons, of the constable's return of service is essential, under § 2885, to the jurisdiction of the justice, and if, without such return being produced before him, he grants an adjournment of the case the error is one requiring the reversal of the judgment subsequently rendered by him in the action: Moore v. Taylor, 88 App. Div. 4; 84 N. Y. Supp. 518.

§ 2886. Parties may appear in person or by attorney.

d. The "attorney" referred to in § 2886 is an attorney in fact, and simply because an attorney in fact is also an attorney at law does not enlarge his authority; the authority of an attorney in the justice's court terminates upon the submission of the case to the justice; the attorney referred to in § 3070 refers to the attorney representing the party in the appellate court on an appeal from a judgment of the justice's court, and the service of an offer of judgment upon an attorney in fact who appeared for the respondent in the court below is ineffective, unless such attorney has been authorized to appear for the party in the appellate court: McLear v. Reynolds, 76 App. Div. 267; 78 N. Y. Supp. 457.

§ 2891. Plaintiff to prove his case, except where a verified complaint is served.

If a defendant fails to appear and answer, the plaintiff cannot recover without proving his case, except in an action which has been commenced by the services of a summons and verified complaint as provided by section twenty-nine hundred and thirty-six of this code; in such action, in case the defendant fails to answer said complaint, as provided by section twenty-nine hundred and thirty-eight of this code, at the time of the return of said summons he shall be deemed to have admitted the allegations of the complaint as true, and the court shall, upon filing the summons and com-

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plaint, with due proof of service thereof, enter judgment for the plaintiff and against the defendant, for the amount demanded in such complaint, with costs, without further proof.

Co. Proc., § 64, subd. 8.

Amended by chap. 291 of 1906.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2892. Defendant may offer to compromise; proceedings thereupon.

See § 738 et seq., ante, Offer to compromise in courts of record.

§ 2895. Id.; in what actions.

See § 549, ante, When the right to arrest depends upon the nature of the action.

See § 550, ante, When the right to arrest depends partly upon extrinsic facts.

a. In an action to recover a sum of money deposited with the defendant by the plaintiff for the payment of dental work on the ground that defendant refused to perform the services or refund the money, an order of arrest may be granted, under § 2895, subd. 2, as the action is one to recover damages for "misconduct or neglect in a professional employment:" Haigh v. Martin, 62 App. Div. 409.

§ 2896. Id.; upon what papers.

See § 728, ante, Disregarding defects in affidavits.

See § 729, ante, Certain bonds, etc., when sufficient.

See § 730, ante, Amending defects in bonds, etc.

See § 810, ante, Bonds, undertakings, etc., must be acknowledged.

See § 816, ante, Bonds to be filed.

See § 3347, subd. 6, post, Application of certain portions thereof, regulated and qualified.

§ 2898. Duty of constable.

See § 3151, post, Transfer of action when justice is a witness.

§ 2905. In what actions, warrant of attachment may be granted.

See § 635 et seq., Attachment in courts of record.

§ 1316 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2906. What must be shown to procure a warrant.

§ 1317 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. **Non-residence.**—An attachment cannot issue out of the municipal court of the city of New York upon the ground of the non-residence of the defendant, unless he is a non-resident of the state of New York; where he is merely a non-resident of New York county the attachment is void, and therefore, where he is not served personally with the summons, no judgment can be entered against him under § 2918, permitting such entry "where the property of the defendant has been duly attached by virtue of a warrant of attachment:" Diller v. Willis, 34 Misc. 197.

c. **Waiver.**—What affidavits do not confer jurisdiction on the municipal court of the city of Buffalo to issue an attachment under § 2906, subd. 2; although a defendant appeared generally in an action on the return day of the summons and neglected to move to vacate the attachment on that day, yet he did not waive his right to move for the vacation of the attachment on the adjourned day, and it would seem that it was the duty of the judge to grant the motion to vacate the attachment whenever such motion was made: Franke v. Havens, 102 App. Div. 67.

d. An affidavit that the defendant "has departed from the country where he last resided with intent to defraud his creditors; that he has covered some of his property with chattel claims, has sold some of the mortgaged property, collected his milk checks and took what

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money he could get, leaving none for his family, and told no one where or when he was going and has been gone since Aug. 21, 1906," is clearly insufficient to confer jurisdiction to issue a warrant of attachment: Morse v. McQuade, 54 Misc. 166.

§ 2907. Warrant; form and contents thereof.

§ 1318 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2908. Undertaking.

See § 640, ante, Security in courts of record.

§ 1319 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2909. Warrant; how executed; perishable property may be sold.

The constable to whom the warrant of attachment is delivered, must execute it at least six days before the return day of the summons, by levying upon and taking into his custody so much of the goods and chattels of the defendant, not exempt from levy and sale by virtue of an execution, including money and bank-notes, which he finds within his county, as will satisfy the plaintiff's demand, with the costs and expenses. He must safely keep the property attached, to be disposed of as prescribed in this article, and must immediately make an inventory thereof, stating therein the estimated value of each item or article. Provided, however, if property attached is perishable, the justice who issued the warrant may, by an order made and entered upon his docket, and with or without notice, as the urgency of the case in his opinion requires, direct the constable to sell such property at public auction, and thereupon the constable must sell it accordingly. A certified copy of the order directing the sale shall be delivered to such constable. Such order must prescribe the time and place of the sale, and notice thereof must be given in such manner and for such time as directed by the order. The constable shall retain in his hands the proceeds of such sale until the final determination of the action.

From Id., § 31.

Amended by chap. 322 of 1903.

§ 1320 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2910. Service of summons and warrant upon defendant.

§ 1321 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2911. Undertaking by defendant; redelivery to him.

§ 1322 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2912. Claim by third person; bond and delivery thereupon.

§ 1323 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. Bond to discharge property from a levy under an attachment, *held* sufficient to authorize the recovery of the value of the property attached, where the complaint alleging such value was not denied: Goldstein v. Goldman, 74 App. Div. 356; 77 N. Y. Supp. 699.

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§ 2913. Action upon bond.

§ 1324 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2914. When defendant may prosecute bond.

§ 1325 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2915. Return of warrant.

§ 1326 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2916. Motion to vacate or modify warrant, etc.

§ 1327 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. **Appeal.**—Where, in an action brought in justice's court, the summons was accompained by an attachment and was personally served upon the defendant, who, upon a denial of his motion to vacate the attachment for the insufficiency of the affidavits upon which it was granted, appeared generally and answered the complaint and judgment was rendered against him for a sum of money only, the appellate court upon appeal must affirm the judgment which supersedes the attachment although the attachment was erroneous and although the appellant appeals from that part of the order and judgment denying his motion to vacate the same: Hindes v. Mills, 51 Misc. 552.

§ 2917. Effect of vacating warrant.

§ 1328 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. **Judgment.**—Where, in an action brought in justice's court, the summons was accompained by an attachment and was personally served upon the defendant who, upon a denial of his motion to vacate the attachment for the insufficiency of the affidavits upon which it was granted, appeared generally and answered the complaint and judgment was rendered against him for a sum of money only, the appellate court upon appeal must affirm the judgment which supersedes the attachment although the attachment was erroneous and although the appellant appeals from that part of the order and judgment denying his motion to vacate the same: Hindes v. Mills, 51 Misc. 552.

§ 2918. Proceedings where summons not personally served.

§ 1329 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

c. **Fraud.**—It would seem that the fraud which under the Code is a ground for granting an attachment is an actual fraud, and not one declared to be a fraud by a statute because of the failure to comply with certain formalities: Mohlman Co. v. Landwehr, 87 App. Div. 83; 83 N. Y. Supp. 1073.

d. **Non-residence.**—An attachment cannot issue out of the municipal court of the city of New York upon the ground of the non-residence of the defendant unless he is a non-resident of the state of New York; where he is merely a non-resident of New York county the attachment is void and therefore, where he is not served personally with the summons no judgment can be entered against him, under § 2918, permitting such entry "where the property of the defendant has been duly attached by virtue of a warrant of attachment:" Diller v. Willis, 34 Misc. 197.

e. **Jurisdiction.**—Where defendant was not personally served with the summons or warrant of attachment or other paper in the action, and judgment is taken upon his default; and the return of the constable of the summons and warrant of attachment, to which summons and warrant is annexed his inventory, states that he served the within summons on the "within named defendant" (naming a person who was not the defendant) "by delivering to and leaving with her personally a true copy thereof," said property was not duly attached within the meaning of § 2918 and the court acquired no jurisdiction to hear and determine the action and the judgment should be reversed with costs to the appellant: Morse v. McQuade, 54 Misc. 166.

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§ 2919. When action for a chattel may be brought.

§ 1331 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2920. Plaintiff may procure replevin; affidavit and undertaking.

§ 1332 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. In an action upon an undertaking given by the plaintiff in a replevin action, which was afterwards discontinued, the defendant's liability is limited to a return of the property replevied or the payment of its value: Pettit v. Allen, 64 App. Div. 579; 72 N. Y. Supp. 287.

§ 2921. Requisition.

§ 1333 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2922. Id.; how executed. Service of summons, etc.

§ 1334 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2923. Return of constable.

§ 1335 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2924. Defendant may except to sureties; proceedings thereon.

§ 1336 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2925. Defendant may reclaim chattel; proceedings thereon.

§ 1337 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2926. Justification of sureties.

§ 1338 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2927. When and to whom constable must deliver chattel.

§ 1339 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2928. Penalty for wrong delivery by constable.

§ 1340 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2929. Claim of title by third person.

§ 1341 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2930. Defendant may demand judgment for return.

§ 1342 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2931. Proceedings in the action; action upon undertaking.

§ 1343 of the Consolidation Act, formerly relating to this section, repealed by Muuicipal Ct. Act, chap. 580 of 1902.

§ 2932. Proceedings when summons not personally served.

§ 1344 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

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§ 2933. When action not affected by failure to replevy.

§ 1345 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2934. When issue to be joined.

a. § 2934, as amended by chap. 380 of 1893, gives the county court of Kings county jurisdiction over actions removed to it from district and justices' courts (of which the municipal courts are a continuance), even if the action is one for a sum of money only, and the defendant is a non-resident of the county; art. 6, § 14, N. Y. Const., expressly preserved this jurisdiction to the county court of Kings county: Raynes v. Bloom, 44 Misc. 81.

§ 2935. Pleadings.

§ 1347 of the consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. A reply is not necessary in justice's court, and on a new trial in the county court, the issues are those framed in the court below: White v. Graw's Sons, 96 App. Div. 154; 89 N. Y. Supp. 481.

§ 2936. Complaint.

The complaint must state, in a plain and direct manner, the facts constituting the cause of action. In an action arising on contract for the recovery of money only, or on an account, the plaintiff or his agent, at or before the time of the issuing of the summons, may make a written complaint as above provided, specifying the amount actually due the plaintiff from the defendant, and praying judgment for the amount so due, which said complaint shall be signed by the plaintiff or his agent and verified in the manner and as provided by section five hundred and twenty-six of this code. Said summons and complaint shall be attached and shall be served upon the defendant by delivering to and leaving with him, personally, true copies thereof, not less than six nor more than twelve days before the return day of said summons; and the official certificate of the constable making such service shall be sufficient evidence thereof.

Co. Proc., § 64, subd. 3.
Amended by chap. 291 of 1906.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

c. A verification of a complaint in justice's court in an action upon a promissory note, made by the attorney and agent of the plaintiff, which gives as a reason why the verification is not made by the plaintiff that he is within another county and not within the county where the action is brought, is sufficient, although it contains no positive statement that the affiant resides in the county where the action is brought or that he has possession of the note: Johnson v. Freeman, 49 Misc. 304.

d. **Objection on appeal.**—The objection that a verified complaint, in an action brought in justice's court to recover upon a judgment rendered by a justice of the peace, does not state facts sufficient to constitute a cause of action in that it fails to allege facts showing that the justice who rendered the judgment being a court of limited jurisdiction had jurisdiction of both the person and subject matter, may not be raised for the first time on appeal: Totman v. Drake, 52 Misc. 60.

§ 2937. What causes of action may be joined.

See § 484, ante, What causes of action may be joined in courts of record.

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§ 2938. Answer.

The answer may contain a general denial of each allegation of the complaint, or a specific denial of one or more of the material allegations thereof. It may also set forth, in a plain and direct manner, new matter constituting one or more defenses or counterclaims. In case the defendant appears and answers in an action in which a verified complaint has been served, his answer shall be in writing and shall be verified as above provided for the verification of the complaint.

Co. Proc., § 64, subd. 4.

Amended by chap. 291 of 1906.

See § 500 et seq., ante, Answer in courts of record.

See § 2945, post, Counterclaims.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. Where the complaint in an action brought in the municipal court is framed upon a *quantum meruit*, while the proof establishes the existence of an express contract, the court may, under § 2943, disregard the variance; § 2938, which provides that the answer may set forth "one or more defenses or counterclaims," must be construed in connection with § 2945, which makes §§ 501-502 applicable to counterclaims interposed in actions commenced in justices' courts; the legislature, when making § 2938 applicable to the municipal court and omitting to make § 2945 applicable to such court, did not intend to allow any new matter constituting a counterclaim to be set up in an answer interposed, but only new matter constituting a counterclaim, as defined in §§ 501-502: Lundine v. Callaghan, 82 App. Div. 621.

§ 2939. Demurrer.

See § 487 et seq., ante, Demurrer in courts of record.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2940. General rules of pleading.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2941. Account, or instrument for payment of money.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2942. Court may require items to be exhibited.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. The power of the municipal court of the city of New York to order the service of a bill of particulars is no longer governed by § 2942, but by § 145 of the municipal court act, chap. 580 of 1902, which section, unlike the Code section, does not limit the time for making such an order to the time of joining issue: Pough & Co. v. Cerimedo, 44 Misc. 246.

§ 2943. Immaterial variance to be disregarded.

See §§ 539-540, ante, Variance in courts of record.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

c. Where the complaint in an action brought in the municipal court is framed upon a *quantum meruit*, while the proof establishes the existence of an express contract, the court may, under § 2943, disregard the variance; § 2938, which provides that the answer may set forth "one or more defenses or counterclaims," must be construed in connection with § 2945, which makes §§ 501-502 applicable to counterclaims interposed in actions commenced in justices' courts; the legislature,

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when making § 2938 applicable to the municipal court and omitting to make § 2945 applicable to such court, did not intend to allow any new matter constituting a counterclaim to be set up in an answer interposed, but only new matter constituting a counterclaim as defined in §§ 501-502: Lundine v. Callaghan, 82 App. Div. 621.

§ 2944. Amendment of pleadings.

§ 1347 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. **Watertown.**—The city court of the city of Watertown has power to allow an amendment of a pleading if substantial justice will be thereby promoted, under § 2944: Reese v. Baum, 83 App. Div. 550; 82 N. Y. Supp. 157.

b. **New cause of action.**—§ 723, which by subd. 6 of § 3347 is made applicable to all courts, was not intended to limit the broad powers of amendment of pleadings conferred upon municipal courts by § 2944, but on the contrary to make their powers of amendment more definite; the municipal court may grant an amendment to the pleadings, although it may involve a new cause of action: Shirtcliffe v. Wall, 68 App. Div. 375; 74 N. Y. Supp. 189.

c. Although the application of § 2944 of the Code of Civil Procedure to the municipal court as it existed under § 1347 of the Consolidation Act was repealed by the new Municipal Court Act, the substance of § 2944 was re-enacted by § 166 of the last mentioned act, and the power of the municipal court to allow an amendment of the pleading goes to the extent of allowing an amendment which involves a new cause of action or defense, provided substantial justice will be promoted thereby: Bunke v. New York Telephone Co., 46 Misc. 97; 34 Civ. Pro. R. 170.

d. § 2944 is applicable to the municipal court of the city of New York, and under it a justice thereof has power to allow, and, if justice will be promoted thereby, should allow an amendment of the pleadings, although it may involve a new cause of action or defense; but upon allowing the same he should grant a reasonable adjournment, if required, and impose such costs as may be proper: Hawkes v. Burke, 34 Misc. 189; 68 N. Y. Supp. 798.

e. **Adjournment.**—The only authority for a justice of the peace to adjourn a cause upon the application of the defendant after issue joined is contained in §§ 2944 and 2965; thus, he is without power to grant an adjournment upon the ground that no bill of particulars had been served or filed by the plaintiff. By allowing such adjournment he loses jurisdiction: Smith v. Denton, 119 App. Div. 49.

f. Upon the adjourned day of an action upon an account stated, a justice of the peace, under § 2944 may permit an amendment changing the action to one for the conversion of a horse: Oney v. Pomfrey, 54 Misc. 171.

§ 2945. Counterclaims.

g. **Municipal court.**—Where the complaint in an action brought in the municipal court is framed upon a *quantum meruit*, while the proof establishes the existence of an express contract, the court may, under § 2943, disregard the variance; § 2938, which provides that the answer may set forth "one or more defenses or counterclaims," must be construed in connection with § 2945, which makes §§ 501-502 applicable to counterclaims interposed in actions commenced in justices' courts; the legislature, when making § 2938 applicable to the municipal court and omitting to make § 2945 applicable to such court, did not intend to allow any new matter constituting a counterclaim to be set up in an answer interposed, but only new matter constituting a counterclaim as defined in §§ 501-502: Lundine v. Callaghan, 82 App. Div. 621.

§ 2947. Consequence of neglect to plead counterclaim.

h. Where, upon the trial of an action against the maker of a promissory note, brought in justice's court, it appears that by agreement the value of services previously rendered by defendant for plaintiff should be applied upon the note in suit and judgment is taken by default, the defendant is not precluded by §§ 2947 and 2948 from maintaining an action to recover for such services, the claim therefor being unliquidated: White v. Curtis, 49 Misc. 50.

§ 2948. The last section qualified.

i. Where, upon the trial of an action against the maker of a promissory note, brought in justice's court, it appears that by agreement the value of services previously rendered by defendant for plaintiff should be applied upon the note in suit and judgment is taken by default, the defendant is not precluded by §§ 2947 and 2948 from maintaining an action to recover for such services, the claim therefor being unliquidated: White v. Curtis, 49 Misc. 50.

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§ 2950. Judgment when accounts exceed $400.

a. Where an action involving a matter of account is originally brought in the supreme court and the plaintiff recovers a sum less than $50, it is incumbent upon him, in order to entitle him to costs, to show that the action was one of which a justice of the peace had not jurisdiction, viz., that the sum total of the accounts of both parties proved, exceeded $400: Youker v. Johnson, 62 App. Div. 584; 71 N. Y. Supp. 178.

§ 2951. Answer of title.

§ 1349 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

b. When an action in justice's court for trespass has been discontinued on the ground that the title to real property is involved, and in a subsequent action a nonsuit is granted on failure of the plaintiff to show any trespass, the defendant is entitled to costs; as the plaintiff has failed to establish a case, there has been no "trial of an issue of fact" as contemplated by § 3235: Shaffer v. Shaffer, 110 App. Div. 487.

§ 2952. Undertaking thereupon.

§ 1350 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

c. Where a summary proceeding has been instituted in the district court to dispossess a tenant and was discontinued upon the erroneous supposition that the court had no jurisdiction, as the defendant interposed an answer involving the title of the premises in question, and with it tendered the bond required by § 2952, and a subsequent action was commenced in the supreme court, that court has jurisdiction, although it was commenced on the erroneous supposition that the district court had lost jurisdiction: Jones v. Reilly, 174 N. Y. 97, rev'g 68 App. Div. 116; 74 N. Y. Supp. 243.

d. When an action in justice's court for trespass has been discontinued on the ground that the title to real property is involved, and in a subsequent action a nonsuit is granted on failure of the plaintiff to show any trespass, the defendant is entitled to costs; as the plaintiff has failed to establish a case, there has been no "trial of an issue of fact" as contemplated by § 3235: Shaffer v. Shaffer, 110 App. Div. 487.

§ 2953. In what court new action to be brought.

§ 1351 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

The superior court of Buffalo was abolished by art. 6, § 5, ante, and its jurisdiction transferred to the supreme court.

e. Where an action brought in the municipal court of the city of New York, borough of Brooklyn, to recover damages for a trespass alleged to have been committed in the borough of Manhattan, is discontinued because the defendant set forth in his answer facts showing that the title to real property would come into question upon the trial, and a new action is brought in the supreme court in Kings county, pursuant to the provisions of § 2953, the defendant is not entitled, as a matter of right, to have the place of trial changed to the county of New York: Eaton v. Hall, 78 App. Div. 542; 79 N. Y. Supp. 887.

§ 2954. When action before justice to be discontinued.

§ 1352 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2955. Effect of failure to give undertaking.

§ 1353 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2956. When title comes in question on plaintiff's own showing.

§ 1354 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

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§ 2957. Pleadings in new action. Undertaking before justice, when applicable.

§ 1355 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

a. In an action commenced in the justice's court, but commenced anew in the county court, under § 2957, because of the interposition of a plea of title, the plaintiff must set forth the same cause of action and the defendant must set up the same defense, and the county court has no power to permit the defendant to amend the answer so as to set forth a new defense by way of counterclaim: Moisen v. Burr, 102 App. Div. 248.

§ 2958. Answer of title as to one of several causes of action.

§ 1356 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

§ 2959. Adjournment by justice.

b. An adjournment of more than eight days granted by a justice of the peace on the plaintiff's application, upon the return day of the summons is, under §§ 2959 and 2969, unauthorized and deprives the justice of jurisdiction: Moore v. Taylor, 88 App. Div. 4; 84 N. Y. Supp. 518.

c. Holding a case for a few minutes to accommodate counsel does not deprive a justice of jurisdiction, and the record "adjourned by consent" implies the presence of the parties: Hardenburgh v. Fish, 61 App. Div. 333; 70 N. Y. Supp. 415.

§ 2960. Adjournment on application of plaintiff.

d. When a justice adjourns a case for more than eight days, he loses jurisdiction which is not restored by the defendant subsequently participating in the trial: Wright v. Shephard, 44 Misc. 454; 90 N. Y. Supp. 154.

§ 2965. Subsequent adjournments.

e. The only authority for a justice of the peace to adjourn a cause upon the application of the defendant after issue joined is contained in §§ 2944 and 2965; thus, he is without power to grant an adjournment upon the ground that no bill of particulars had been served or filed by the plaintiff. By allowing such adjournment he loses jurisdiction: Smith v. Denton, 119 App. Div. 49.

§ 2967. Adjournment when warrant to attach absent witness is issued.

See § 3003, post, Adjournment thereupon.

§ 2969. When justice may issue subpoena.

See § 867 et seq., ante, Subpoena *duces tecum* in courts of record.

See § 3135, post, General requisites of mandates in justice's court.

f. An adjournment of more than eight days granted by a justice of the peace on the plaintiff's application, upon the return day of the summons is, under §§ 2959 and 2969, unauthorized and deprives the justice of jurisdiction: Moore v. Taylor, 88 App. Div. 4; 84 N. Y. Supp. 518.

§ 2971. Warrant of attachment against defaulting witness.

See § 855 et seq., ante, Warrant for witness in courts of record.

§ 2980. Commission to examine witness upon interrogatories.

See § 870 et seq., ante, Depositions for use within the state in courts of record.

§ 2983. Adjournment.

g. The provisions of § 2983 relating to adjournment of cases in justices' courts apply to the municipal court of the city of Buffalo; it is proper to allow the correction of a commission issued to take the testimony of a foreign witness: Winquist v. Preston, 118 App. Div. 564.

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§ 2988. Effect of failure of defendant to appear.

Where the defendant makes default in appearing or pleading, upon the return of a summons, which has been duly served as prescribed in this chapter, the justice must hear the allegations and proofs of the plaintiff, and render judgment according to law and equity, as the very right of the case appears, except in an action commenced by the service of a summons and verified complaint as provided by section twenty-nine hundred and thirty-six of this code, in which case judgment may be entered as provided by section twenty-eight hundred and ninety-one of this code.

2 R. S. 242, § 92.

Amended by chap. 291 of 1906.

§ 2990. When jury trial may be demanded.

a. Where a default has been opened in the New York municipal court, the defendant may demand a jury trial: Levy v. Roossin, 93 App. Div. 387; 87 N. Y. Supp. 707.

§ 2991. Drawing jurors.

b. A justice of the peace is not deprived of jurisdiction because a jury is drawn from an uncertified list; he should set aside the venire and draw another jury: Woodcock v. Gladdings, 75 App. Div. 199; 77 N. Y. Supp. 955.

c. **Waiver.**—On the return days of a summons in a city court, the plaintiff complained orally for goods sold and delivered and defendant interposed a general denial but did not demand a jury trial under § 2990, on the adjourned day plaintiff amended his cause of action and defendant set up a general denial and demanded a jury trial, *held,* defendant had not waived his right to a jury trial: Reese v. Baum, 83 App. Div. 550; 82 N. Y. Supp. 157.

d. A demand for a jury trial, made by a party to an action brought in a justice's court at the time issue was joined, relates to a new trial had after the disagreement of the jury drawn at the first trial, unless such demand has previously been waived: Hartmann v. Hoffman, 65 App. Div. 443; 72 N. Y. Supp. 982.

§ 3008. Jury, when to be discharged; new venire.

e. A demand for a jury trial, made by a party to an action brought in a justice's court at the time issue was joined, relates to a new trial had after the disagreement of the jury drawn at the first trial, unless such demand has previously been waived: Hartmann v. Hoffman, 65 App. Div. 443; 72 N. Y. Supp. 982.

§ 3010. Judgment by confession.

See § 1273 et seq., ante, Confession of judgment in courts of record.

See § 2864, ante, Confession of judgment, jurisdiction of justice of the peace.

See § 3223, post, Confession of judgment, in justice's court of Albany and Troy.

§ 3013. Judgment of nonsuit.

f. Where a summons and a verified complaint are filed in a justice's court and on the return day the plaintiff fails to appear, the justice, in default of the filing of a verified answer, should, although the defendant appears, enter judgment for the plaintiff against the defendant for the amount demanded in the complaint without further proof, and it is improper for the justice in such a case to dismiss the action under § 3013, subd. 2: Lent v. Moyer, 45 Misc. 139.

g. **Verdict.**—Where a cause is submitted to a justice who, after hearing the proof, reserves final decision of the case, his subsequent determination is equivalent to a verdict and a judgment thereon; and, though he may call it a judgment of nonsuit and enter it accordingly, it will be a bar to subsequent action: Miller v. International R. Co., 52 Misc. 344.

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§ 3015. When judgment to be rendered.

a. A court of equity will not set aside a judgment rendered by a justice of the peace upon defendant's default, either because the judgment was obtained by perjury or because defenses existed which might have been, but were not, interposed, where the defendant neglected his remedy by appeal: Hoskins v. Nichols, 48 Misc. 465.

b. On an appeal from a judgment rendered by a justice of the peace, the date of the rendition and entry of judgment will be determined by the return of the justice and not by the statement placed at the beginning of the printed case: Erdman v. Upham, 70 App. Div. 315; 75 N. Y. Supp. 241.

§ 3017. Transcript of judgment; docketing the same.

§ 1392 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

c. **Statute of limitations.**—By chap. 307 of 1894, §§ 376, 384 and 3017 were amended so as to make the twenty years' limitation apply to all judgments "hereafter docketed pursuant to the provisions of § 3017:" Matter of Guttroff, 39 Misc. 483; 80 N. Y. Supp. 219.

d. Chap. 307 of 1894, which amended §§ 376, 382, subd. 7, and 3017, so as to prescribe a twenty-year statute of limitations for an action on a justice's judgment, a transcript of which has been filed in the county clerk's office, instead of the six-year statute existing prior to that date, applied only to future justices' judgments and did not apply to a justice's judgment rendered April 8, 1892, a transcript of which was filed in the county clerk's office April 25, 1892: McMahon v. Arnold, 107 App. Div. 132.

e. **Purpose.**—The filing of a transcript of a judgment was intended to facilitate the collection of judgments from both personal and real property: Sill Stove Works v. Scott, 62 App. Div. 566; 71 N. Y. Supp. 181.

f. **County clerk.**—§§ 1247 and 3017 provide that the county clerk to whom a transcript of the municipal court is presented, must, upon payment of his fees therefor, immediately file it, and docket the judgment as prescribed in § 1246: Bernstein v. Schoenfeld, 81 App. Div. 171; 81 N. Y. Supp. 11.

g. **Supplementary proceedings.**—The supreme court may set aside supplementary proceedings instituted on a judgment recovered in the municipal court, a transcript of which was docketed in the county clerk's office, but it cannot vacate the judgment: Johnson v. Manning, 75 App. Div. 285; 78 N. Y. Supp. 96.

§ 3031. Return of execution.

h. The allowance of costs upon the discontinuance of an action being discretionary and not involving a substantial right, the appellate term cannot review an order of the general term of the city court of the city of New York reversing an order of the special term of that court, permitting the plaintiff to discontinue without costs: Petty v. Metropolitan Street R. Co., 33 Misc. Rep. 728, appeal dismissed, 34 Misc. 517.

§ 3043. Execution upon judgment docketed with county clerk.

See § 1367, ante, General requisites of executions on filing transcript from justices' court.

See § 3082, ante, Transcript of judgment, docketing same.

§ 3044. Justice's judgment reviewed by appeal.

i. Where, at the time of the argument of an appeal to the county court from a judgment rendered by a justice of the peace, the respondent makes a formal notice to dismiss the appeal, and the county judge sustains the appeal and reverses the judgment, the respondent cannot, after his time to appeal from the judgment of reversal has expired, appeal from the order denying the motion to dismiss the appeal which resulted in a reversal: Sammis v. Nassau Light & Power Co., 91 App. Div. 7; 86 N. Y. Supp. 243.

§ 3045. Who may appeal; to what court appeal to be taken.

See § 1294, ante, When party may appeal.

j. An appeal does not lie from a justice's judgment by one of two defendants as to whom the action was dismissed by stipulation; a new action in the county court is not created by an appeal from a justice's court: Jerry v. Blair, 62 App. Div. 590; 71 N. Y. Supp. 189.

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a. When summary proceedings originate in a justice's court, and an appeal has been taken to the county court, there can be no further appeal to the appellate division from the determination of the county court: Barrus v. Parsons, 109 App. Div. 634.

§ 3046. Appeal, when and how taken.

b. Where, at the time of the argument of the appeal to the county court from a judgment rendered by a justice of the peace, the respondent makes a formal notice to dismiss the appeal, and the county judge sustains the appeal and reverses the judgment, the respondent cannot, after his time to appeal from the judgment has expired, appeal from the order denying the motion to dismiss the appeal which resulted in a reversal: Sammis v. Nassau Light & Power Co., 91 App. Div. 7; 86 N. Y. Supp. 243.

c. **Fraud.**—A justice of the municipal court may vacate a judgment where it has been obtained by fraud although an appeal is still open to the defendant in such a case: Ludwin v. Siano, 36 Misc. 537; 73 N. Y. Supp. 940.

d. **Default.**—The Municipal Court Act, chap. 580 of 1902, contains no provision permitting an appeal from a judgment taken by default in an action in the municipal court and such an appeal is no longer permissible: Brown v. Bouse, 43 Misc. 72; 86 N. Y. Supp. 240.

§ 3047. Service of notice upon justice; payment of costs and fee.

See § 3322, post, Fees of a justice of the peace.

See § 3323, post, Constable's fees.

e. **Attorney.**—The service by an appellant of an offer of judgment upon an attorney in fact who appeared for the respondent in a justice's court and who had not, at the time of such service, been authorized to appear for her in the appellate court, is ineffective: McLear v. Reynolds, 76 App. Div. 267; 78 N. Y. Supp. 457.

f. **Costs.**—Payment of costs and fees, when unnecessary on filing notice of appeal: Cooley v. Penn. R. R. Co., 40 Misc. 239; 81 N. Y. Supp. 692.

§ 3049. Amendment; when allowed.

See § 1303, ante, Defects in proceedings may be supplied.

§ 3050. Undertaking to stay execution upon judgment.

g. An undertaking to procure a stay on appeal of an execution on a judgment of the municipal court of the city of New York is expressly required by the first clause of § 3050, to be approved by the justice rendering judgment or by a judge of the appellate court, and this requirement is not affected by the last clause of said section making § 1335 applicable to such an undertaking, which latter section, among other things, provides that "it is not necessary that the undertaking should be approved:" Howley v. Kraemer, 35 Misc. 444.

§ 3053. Return.

h. Where no return has been made as required by § 3053 because of the failure of the appellant to pay the stenographer's fees for a transcript of the evidence, yet it remains his duty to perfect the appeal by securing the filing of the return, by paying the stenographer's fees, if necessary, or if not, by compelling the making and filing of a return under § 3055: King v. Norton, 36 Misc. 53; 72 N. Y. Supp. 591.

i. A justice of the peace has power to entertain an application to set aside the service of a summons; if, in a proper case, the justice refuses to set aside the service, the remedy is by appeal: People ex rel. Ballin v. Smith, 184 N. Y. 96, rev'g 106 App. Div. 613; 95 N. Y. Supp. 1152.

j. **Amendment.**—When on a motion to amend the return of a justice of the peace, it appears by the affidavit of the justice that a judgment rendered on the defendant's default was made on the oral evidence of the plaintiff reduced to writing instead of upon a verified complaint as erroneously stated in the return, the return should be amended to show the true facts: Pitkin v. Clifford, 118 App. Div. 509.

§ 3055. Further return; how compelled.

See rule 46 (Sup. Ct.), Motion to amend justices' return on appeal where the county court cannot act.

k. Before the enactment of chap. 580 of 1902, there was no authority in a justice of the municipal court of the city of New York to settle a case appealed therefrom, and amendments desired to his return could be obtained only by a

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motion for an amended return made, under § 3055: Cothren v. Chaffee, 39 Misc. 339; 79 N. Y. Supp. 841.

a. Where no return has been made as required by § 3053 because of the failure of the appellant to pay the stenographer's fees for a transcript of the evidence, yet it remains his duty to perfect the appeal by securing the filing of the return, by paying the stenographer's fees, if necessary, or if not, by compelling the making and filing of a return under § 3055: King v. Norton, 36 Misc. 53; 72 N. Y. Supp. 591.

§ 3056. Id.; when justice is dead, etc.

b. Previous to the taking effect of the Municipal Court Law, chap. 580 of 1902, the appellate division could receive affidavits as to a judgment rendered by the municipal court only in a case specified in § 3056 of the Code: Andres v. Brooklyn Heights R. R. Co., 84 App. Div. 596; 82 N. Y. Supp. 729.

§ 3057. Proceedings when error in fact is alleged.

c. Where the docket of a judgment rendered by a justice of the peace contains a recital of personal services of the summons upon the defendant, such recital may not be questioned collaterally, but the defendant may appeal from the judgment and establish the falsity of the recital in the county court in the manner prescribed by § 3057: Sammis v. Nassau Light & Power Co., 91 App. Div. 7; 86 N. Y. Supp. 243.

d. The expression, "error of fact in the proceedings not affecting the merits of the action and not within the knowledge of the justice," as used in § 3057 relative to the grounds of appeal in justice's court, does not refer to any error or mistake of the justice in finding the facts, but relates to errors of fact affecting the regularity and validity of the proceedings, and not appearing on the record, such as death, coverture or infancy: Tarder v. Bezozi, 34 Misc. 551.

e. The words, "error in fact," as used in §§ 3057 and 3066, have reference to some occurrence which affects the validity of the trial, such as service of summons by one not authorized, infancy of a party for whom no guardian *ad litem* has been appointed, relationship of the justice, misconduct of the jury and the like. The words have no reference to an erroneous ruling or finding on the evidence by a justice or a jury: Smith v. Cayuga Lake Cement Co., 105 App. Div. 307; 93 N. Y. Supp. 959; 107 App. Div. 525.

f. **Fraud.**—A justice of the municipal court may vacate a judgment where it has been obtained by fraud although an appeal is still open to the defendant in such a case: Ludwin v. Siano, 36 Misc. 537; 73 N. Y. Supp. 940.

g. **Service of summons.**—There is no authority for any service of the summons, other than personal, in a municipal court except in the cases stated in §§ 2879-2882, and where the case is not within any of those sections the defendant may show on appeal that personal service was never made upon him: Newton v. Stachelberg, 36 Misc. 184; 73 N. Y. Supp. 147.

h. A justice of the peace has power to entertain an application to set aside the service of a summons; if, in a proper case, he refuses to set aside the service, the remedy is by appeal: People ex rel. Ballin v. Smith, 184 N. Y. 96, rev'g 106 App. Div. 613; 95 N. Y. Supp. 1152.

i. **Proper remedy.**—When there has been no personal service of the summons or an appearance by the defendant in the action, a judgment of the municipal court for the plaintiff will be reversed and the complaint dismissed; an appeal from the judgment is the proper remedy: Mears v. North Am. Brew Co., 113 App. Div. 41.

§ 3062. Hearing of appeal; dismissal thereof.

j. Under § 3342, a county court may grant a reargument of an appeal from a judgment rendered by a justice of the peace: Bumpus v. Anderson, 49 Misc. 417.

§ 3063. Judgment.

k. Under § 3063, the county court has power to reverse a judgment of the justice's court as against the weight of evidence: Clinton v. Frear, 107 App. Div. 571; 95 N. Y. Supp. 321.

l. When a trustee in bankruptcy brings an action in a justice's court to recover payment from an execution creditor and neither alleges or proves that the defendant had reasonable cause to believe that a preference was intended, a judgment in his favor must be reversed under § 3063: Starbuck v. Gebo, 48 Misc. 333.

m. The amendment to § 3063 by chap. 553 of 1900, controlled all appeals pending in the county court at the time it went into effect regardless of the date of the notice of appeal or whether the appellant had demanded a new trial in the county court: Hartman v. Hoffman, 76 App. Div. 449; 78 N. Y. Supp. 796.

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a. **Appellate division.**—Under this section the appellate division will sustain the judgment of the justice's court and reverse the county court on an appeal from that court, even though the appellate division have to sustain the judgment in a different theory than the one on which the case was decided by the justice's court: Jackson v. Helmer, 73 App. Div. 134.

b. Since § 3063 was amended by chap. 553 of 1900, the appellate division has the same power to review the facts in a case tried in the municipal court as to review judgments rendered by the supreme court, and hence may reverse a judgment as against the weight of evidence: Blumenthal v. Lewy, 82 App. Div. 535; 81 N. Y. Supp. 528.

c. **Weight of evidence.**—§ 3063, as amended by chap. 553 of 1900, is only applicable where the judgment appealed from is contrary to or against the weight of evidence: Markel v. Gummer, 84 App. Div. 634; 82 N. Y. Supp. 1107.

d. The county court should not reverse the judgment as against the weight of evidence unless the justice's judgment is so clearly against the weight of evidence and preponderance of proof that it can be seen that the justice could not reasonably have arrived at the decision which he made: Brewer v. Califf, 103 App. Div. 138; 92 N. Y. Supp. 627.

e. Plaintiff having recovered judgment in the municipal court of the city of Buffalo and the evidence being strongly in favor of defendant's intention, and it appearing that the verdict included an item for the services of an umpire whose claim had been assigned to plaintiff, to justify which there was no evidence, the judgment on appeal to the supreme court will be reversed under § 3063, as against the weight of evidence: Underhill v. Smith, 52 Misc. 349.

f. It is manifest that the authority conferred by § 3063, as amended by chap. 553 of 1900, of county courts to reverse a judgment of a justice's court because it is contrary to or against the weight of evidence, is to be exercised only when the judgment is so plainly against the weight and preponderance of proof that it can be seen that the justice could not reasonably have arrived at the decision which he made. The county court, by this provision of the Code, has no greater power over judgments rendered by justices of the peace, than has the appellate division and court of appeals over judgments of courts and referees: Murtagh v. Dempsey, 85 App. Div. 204; 83 N. Y. Supp. 296.

g. Under § 3063, the county court is a court of review and not a court of original jurisdiction to decide the facts; where the evidence does not preponderate so as to render a finding to the contrary plainly against the weight of evidence, the county court should not reverse; it is not error for the justice's court to exclude the justice's minutes of the testimony of the plaintiff and another witness taken on a former trial of the action: McRay v. Barto, 114 App. Div. 262.

h. A county court in exercising the right given by the amendment to § 3063 by chap. 553 of 1900, to reverse the judgments of a justice's court and to grant new trials, should only reverse when the judgment is so plainly against the weight of evidence that the decision of the justice or jury could not reasonably have been made: International Tailoring Co. v. Bennett, 113 App. Div. 476.

i. **Wages.**—The county court has power under § 3063, as amended, to reverse a judgment of a justice's court on the facts, only when the judgment is so clearly against the weight of evidence that it can be seen that the justice could not reasonably have arrived at the decision made: McDonald v. Dunbar, 114 App. Div. 306.

j. Evidence in action for wages by a farm laborer considered and judgment for the plaintiff affirmed. Id.

k. **City of Rochester.**—The county court has no power prior to the amendment of § 3163 by chap. 553 of 1900 to reverse a judgment of the municipal court of the city of Rochester as against the weight of evidence if there was any disputed question of fact: Mason v. West, 61 App. Div. 40; 70 N. Y. Supp. 478.

l. **Error.**—Where an order setting aside a verdict fails to recite the grounds upon which it was granted, the court on appeal will disregard the error, if there be one, under § 3063: Scharmann & Sons v. Bard, 60 App. Div. 449.

m. **Substantial justice.**—Affirmance of judgment where it appears that substantial justice has been done: Reynolds v. Cohen, 68 App. Div. 642; 74 N. Y. Supp. 191.

n. **Excessive verdict.**—If the county court decides that the verdict below was excessive it may, instead of reversing the judgment unconditionally, provide that if the plaintiff shall stipulate to reduce the verdict to the amount thought proper by the court, the verdict shall stand as reduced: Lynch v. Syracuse L. & W. Ry. Co., 73 App. Div. 95; 76 N. Y. Supp. 368.

o. **Municipal court.**—The rule that one justice of the municipal court of the city of New York cannot review the decision of another justice of that court does not apply to a case where, after the defendant's motion to open his default has been denied, as he alleges, upon affidavits surreptitiously handed to the justice by or for the plaintiff after the argument of the motion, and because of the justice's misconception that the defendant had paid the judgment voluntarily, the defendant applies, without leave from that justice, for leave to reargue and for a reargument of the motion to another justice, brought

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within eighteen days into the municipal court district by the system of rotation in the assignment of its justices, who granted a reargument and also vacated the order of the first justice denying the motion to open the default — as the motion before the incoming justice is, under the circumstances, to be deemed practically a separate motion, made on different or additional facts: Stromberg v. Di Salvo, 38 Misc. 139; 77 N. Y. Supp. 102.

a. **Sum of money only.**—Where, in an action brought in justice's court, the summons was accompanied by an attachment and was personally served upon the defendant, who, upon a denial of his motion to vacate the attachment for the insufficiency of the affidavits upon which it was granted, appeared generally and answered the complaint, and judgment was rendered against him for a sum of money only, the appellate court upon appeal must affirm the judgment which supersedes the attachment, although the attachment was erroneous, and although the appellant appeals from that part of the order and judgment denying his motion to vacate the same: Hindes v. Mills, 51 Misc. 552.

§ 3064. When new trial in justice's court may be directed.

b. When a trustee in bankruptcy brings an action in a justice's court to recover payment from an execution creditor, and neither alleges nor proves that the defendant had reasonable cause to believe that a preference was intended, a judgment in his favor must be reversed under § 3063: Starbuck v. Gebo, 48 Misc. 333.

c. **Equity.**—A court of equity will not set aside a judgment rendered by a justice of the peace upon defendant's default, either because the judgment was obtained by perjury or because defenses existed which might have been, but were not interposed, where the defendant neglected his remedy by appeal: Hoskins v. Nichols, 48 Misc. 465.

d. Where, upon an appeal to the county court from a judgment rendered against the appellant, upon his default before a justice of the peace, the county court refuses to exercise the discretionary power granted by § 3064 to open the default and grant a new trial, the appellate division has jurisdiction, under §§ 1340 and 1342, to review the exercise of such discretionary power, whether the determination of the county court be considered as a judgment or as an order: Kilts v. Neahr, 101 App. Div. 317.

e. Under § 3064 made applicable to the municipal court of the city of New York, the appellate term has discretionary power to set aside a final order of the inferior court dispossessing tenants and taken on their default, where they show that manifest injustice has been done them and render a satisfactory excuse for their default: Tiernan v. Davenport, 36 Misc. 186.

f. **Default.**—Where, in an action brought in a justice's court, judgment is rendered against the defendant upon his default in appearance, he may appeal to the county court, but is not entitled to demand a new trial in that court, nor, under the provisions of § 3064, to excuse his default and ask for a new trial before the same or another justice: Doughty v. Picott, 105 App. Div. 339.

g. **Failure to appear.**—When, on an appeal from a justice's judgment taken upon defendant's failure to appear, the judgment must be affirmed upon the ground that the defendant has neither made "a satisfactory excuse for his default" nor established that "manifest injustice has been done" within the meaning of § 3064: Coleman v. Keady, 53 Misc. 523.

§ 3065. Id.; proceedings before justice.

h. A constitutional right to a jury trial may be waived, and when this occurs it cannot be retracted, but remains good during the life of the litigation; the rule has no application to cases where, by the express language of the statute governing the action or proceeding, the waiver, though once occurring, is not conclusive upon the rights or remedies of the parties in subsequent stages of the action or proceeding: Tracy v. Falvey, 102 App. Div. 585; 34 Civ. Pro. R. 189.

§ 3066. Costs; when awarded.

i. Where the county court reverses a judgment of a justice of the peace for an error of law, the appellant is entitled, under subd. 4 of § 3066, to costs: Moore v. Taylor, 88 App. Div. 4; 84 N. Y. Supp. 518.

j. **Appellate division.**—Where, under § 3066, subd. 2, costs of an appeal are in the discretion of the county court, the appellate division has no authority to review the award of costs by the appellate division: Flewellen v. Lent, 98 App. Div. 241.

k. **Error in fact.**—An error committed by a justice of the peace in dismissing a complaint in an action pending before him, because certain costs awarded against the plaintiff on an appeal from the judgment against him had not been paid, is not an "error in fact" within the meaning of § 3066, which renders it discretionary for the county court, when

reversing a judgment of the justice of the peace for an "error in fact" to grant or withhold costs; the words "error in fact" as used in §§ 3057 and 3066 have reference to some occurrence which affects the validity of the trial — such as service of summons by one not authorized, infancy of a party to whom no guardian *ad litem* has been appointed, relationship of the justice, misconduct of the jury, and the like. The words have no reference to an erroneous ruling or finding on the evidence by a justice or a jury: Smith v. Cayuga Lake Cement Co., 105 App. Div. 307; 93 N. Y. Supp. 959; 107 App. Div. 525.

a. When a judgment in favor of a defendant in an action for trespass which was tried in justice's court was reversed on appeal to the county court, an execution against the defendant's person for costs was properly issued: Losaw v. Smith, 109 App. Div. 754.

§ 3068. When appellant may demand new trial in appellate court.

b. **Counterclaim.** — Although the plaintiff in an action in a justice's court only demands judgment for forty-nine dollars, the defendant on appeal is entitled to a new trial in the county court if the answer sets out a counterclaim for over fifty dollars, and the county court cannot dispose of an appeal from a judgment for the plaintiff upon a question of law only: Vandervort v. Mini, 113 App. Div. 601.

c. Where a return has not been made, an appeal will be dismissed with costs of motion unless the appellant procures the filing of a return and pays the costs of the motion to dismiss: King v. Norton, 36 Misc. 53; 72 N. Y. Supp. 591.

d. **Presumption.**—It will be presumed that the value of 28 cattle exceeds $50, where, in asking for a new trial, the value is not shown: Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

§ 3070. Offer to compromise before return.

e. The "attorney" referred to in § 2886 is an attorney in fact and simply because an attorney in fact is also an attorney at law does not enlarge his authority; the authority of an attorney in the justice's court terminates upon the submission of the case to the justice; the attorney referred to in § 3070 refers to the attorney representing the party in the appellate court on an appeal from a judgment of the justice's court, and the service of an offer of judgment upon an attorney in fact, who appeared for the respondent in the court below, is ineffective unless such attorney has been authorized to appear for the party in the appellate court: McLear v. Reynolds, 76 App. Div. 267; 78 N. Y. Supp. 457.

f. Where the defendant recovers judgment against the plaintiff for more than fifty dollars in a municipal court and the plaintiff, after having duly appealed to the supreme court of the county, makes an offer of judgment for less than fifty dollars and the defendant accepts it, the latter is entitled to judgment for the offer and to costs up to the entry of judgment as fixed by chap. 19 of 1898, creating the municipal court: Lauffer v. Bast, 34 Misc. 408; 69 N. Y. Supp. 874.

g. **Interest.**—In actions where the damages are liquidated, interest from the date of the offer to the date of the recovery should be taken into consideration in determining whether the recovery is more favorable than the offer; a defendant is not entitled to costs under § 3070 where the plaintiff's recovery is greater than the offer of judgment even with interest added from the date of the offer; where an appeal is taken from a judgment of the justice's court and a new trial is demanded in the county court, §§ 3070 and 3073 of the Code regulating costs on such appeals are inapplicable, but the plaintiff, if he recovers fifty dollars or more in the county court, is entitled to costs under § 3228: Rose v. Wells, 92 App. Div. 75; 86 N. Y. Supp. 889.

§ 3071. Proceedings in appellate court.

h. The exception contained in § 3071, providing that on an appeal from a justice's court all the proceedings are the same as if the action had been commenced in the appellate court "except as otherwise specially prescribed," does not operate to exclude from the operation of said § 3071, the whole matter of offers and costs dealt with in §§ 3070, 3072 and 3073: Lawson v. Speer, 91 App. Div. 411.

i. § 3071, prescribing the time when issue is deemed to be joined in the appellate court, should be construed to relate to the issue only and in no way to affect the time when the action shall be deemed pending in the county court: Cutting v. Jessmer, 101 App. Div. 283.

§ 3073. Amount of costs.

j. In actions where the damages are liquidated, interest from the date of the offer to the date of the recovery should be taken into consideration in determining whether the recovery is more favorable than the offer; a defendant is not

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entitled to costs under § 3070 where the plaintiff's recovery is greater than the offer of judgment even with interest added from the date of the offer; where an appeal is taken from a judgment of the justice's court and a new trial is demanded in the county court, §§ 3070 and 3073, regulating costs on such appeals, are inapplicable, but the plaintiff, if he recovers fifty dollars or more in the county court, is entitled to costs under § 3228: Rose v. Wells, 92 App. Div. 75; 86 N. Y. Supp. 889.

a. The exception contained in § 3071, providing that on an appeal from a justice's court all the proceedings are the same as if the action had been commenced in the appellate court "except as otherwise specially prescribed," does not operate to exclude from the operation of said § 3071, the whole matter of offers and costs dealt with in §§ 3070, 3072 and 3073: Lawson v. Speer, 91 App. Div. 411.

b. **Trespass.**—When a judgment in favor of a defendant in an action for trespass which was tried in justice's court was reversed on appeal to the county court, an execution against the defendant's person for costs was properly issued: Losaw v. Smith, 109 App. Div. 754.

c. When an action in justice's court for trespass has been discontinued on the ground that the title to real property is involved, and in a subsequent action a nonsuit is granted on failure of the plaintiff to show any trespass, the defendant is entitled to costs; as the plaintiff has failed to establish a case, there has been no "trial of an issue of fact" as contemplated by § 3235: Shaffer v. Shaffer, 110 App. Div. 487.

§ 3074. When prevailing party to recover costs. What costs allowed.

Except as otherwise specially prescribed by law, a party who recovers judgment in an action in a justice's court, is entitled to costs; which must be included in the judgment. Costs consist of the fees, allowed by law, for services necessarily rendered in the action, at the request of the party entitled to costs, or paid by him, as prescribed by law; and of such other expenses, as a party is entitled to include in his costs, by express provision of law. The defendant in an action brought in a justice's court may require security for costs to be given, where the plaintiff is a foreign corporation. So far as practicable, the provisions of title three of chapter twenty-one of this act, shall apply to the proceedings for requiring such security, the requisites of the undertaking and the justification of sureties therein.

2 R. S. 247, § 126; L. 1857, c. 775, § 2; L. 1866, c. 692, § 2.

Amended by chap. 276 of 1903.

See § 3322, post, Fees of a justice of the peace.

See § 3323, post, Constable's fees.

d. **Summary proceedings.**—Where a landlord voluntarily discontinues, before final submission, summary proceedings taken by him in the municipal court of the city of New York, the tenant is entitled as costs to his actual disbursements to the extent of ten dollars besides the fees of any witness attending from another county: Cohen v. Melle, 43 Misc. 79; 86 N. Y. Supp. 514.

§ 3075. When neither party to recover costs.

e. The fact that, in an action in a justice's court, the defendant, by affidavits presented and read on the return of the summons, charged, and the justice denied that he, on the trial before him of a former action, said, in court, that he would not believe the defendant or his counsel under oath, affords the justice no right or reason to dismiss the action with costs against the plaintiff: Truesdell v. Winne, 44 Misc. 451; 90 N. Y. Supp. 155.

§ 3076. Amount of costs limited.

f. Where a landlord voluntarily discontinues, before final submission, summary proceedings taken by him in the municipal court of the city of New York since the passage of chap. 580 of 1902, the tenant under § 3076, subd. 2, is en-

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titled as costs to his actual disbursements to the extent of ten dollars besides the fees of any witnesses attending from another county: Cohen v. Melle, 43 Misc. 79; 86 N. Y. Supp. 514.

a. **Summary proceedings.**—A landlord who succeeds in a summary proceeding, not involving a forcible entry or detainer, is entitled under §§ 2250 and 3076, subd. 2, to ten dollars costs and no more, and is not entitled to an extra allowance under § 3253; § 3240 does not apply to a summary proceeding: Lauria v. Capobianco, 39 Misc. 441.

§ 3082. Action against person suffering animals to stray.

b. Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings of title 10, under §§ 3084 and 3085 are special proceedings instituted by petition and precept, but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action:" Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

c. When the owners of land upon which horses, straying from the highway, strayed upon are entitled to a lien upon such horses under the provisions of the Town Law: Lynch v. Ford, 72 App. Div. 536; 76 N. Y. Supp. 546.

§ 3083. Penalties to be recovered.

d. Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings under title 10, under §§ 3084 and 3085 are special proceedings instituted by petition and precept but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action:" Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

§ 3084. Certain officers to seize animals straying.

See § 3082, ante, Action against person suffering animals to stray.

e. **Summons.**—Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings under title 10, under §§ 3084 and 3085 are special proceedings instituted by petition and precept, but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action:" Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

f. **Petition.**—A petition made in proceedings taken relative to animals straying upon a highway fails to allege facts necessary to authorize the seizure of animals unless the petitioner alleges, under §§ 3084 and 3085, that the animals were pastured in a highway bordering upon real property owned or occupied by him and were then trespassing upon such real property: Burns v. Morrow, 42 Misc. 657.

§ 3085. When private person may seize such animals.

g. Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings under title 10, under §§ 3084 and 3085, are special proceedings instituted by petition and precept, but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action:" Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

h. A petition made in proceedings taken relative to animals straying upon a highway fails to allege facts necessary to authorize the seizure of animals, unless the petitioner alleges, under §§ 3084 and 3085, that the animals were pastured in a highway bordering upon real property owned or occupied by him and were then trespassing upon such real property: Burns v. Morrow, 42 Misc. 657.

§ 3090. Answer; trial.

i. Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings under title 10, under §§ 3084 and 3085, are special proceedings instituted by petition and precept, but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action:" Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

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§ 3091. Decision in favor of petitioner; warrant to sell.

a. Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings under title 10, under §§ 3084 and 3085, are special proceedings instituted by petition and precept, but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action;" and § 3091 provides that upon the trial, if the decision is in favor of the petitioner, the justice must make a final order directing a sale of the animals seized and the applying the proceeds as prescribed in § 3092: Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

§ 3092. Application of proceeds of sale.

b. Actions to recover penalties under §§ 3082 and 3083 are commenced by summons in the usual way, the complaint stating the cause and what penalties are sought to be recovered in the judgment; the other proceedings under title 10, under §§ 3084 and 3085, are special proceedings instituted by petition and precept, but under § 3090 it is provided that when issue is joined "the subsequent proceedings must be the same as in an action;" and § 3091 provides that upon the trial, if the decision is in favor of the petitioner, the justice must make a final order directing a sale of the animals seized and the applying the proceeds as prescribed in § 3092: Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

§ 3099. Action by owner in such a case.

c. § 3099 provides for an action by the owner in case his animals are willfully set at large: Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

§ 3104. Appeal from final order.

d. If the animals exceed in value $50, a new trial can be had in the county court by demanding it, as prescribed by § 3068: Harding v. Pratt, 37 Misc. 243; 75 N. Y. Supp. 247.

§ 3116. Justice in sixth district must be an attorney.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3117. Justice's jurisdiction in Brooklyn extended.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3118. Justices to receive salaries in lieu of fees; to account and pay over fees monthly.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3119. Clerk; how appointed; salary; bond.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3120. Duties of clerk.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

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§ 3126. When plaintiff may serve complaint with summons; proceedings thereupon.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1250-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3127. Jury trial; when and how demanded.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3128. Setting aside default, etc.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3129. Additional costs upon recovery of $100.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3130. Additional costs upon recovery of $100 when defendant recovers judgment.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3131. Costs in action by working woman.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3132. Costs upon adjournment.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3140. Docket-book to be kept by justice; entries therein.

See §§ 938-940, ante, Justice's docket, etc., as evidence.

See § 3015, ante, Entry of judgment by justice of the peace in his docket book.

See Crim. Code, § 220, Justice's criminal docket.

§ 3146. Town or city clerk to demand books, etc., upon death, etc., of justice.

If a justice of the peace dies, or his office become otherwise vacant, the town or city clerk must demand and receive all books and papers, which belonged to the justice in his official capacity, from any person having them in his possession, and such clerk may make and issue a transcript of a judgment so rendered by such a justice of the peace and appearing

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upon the docket of such justice of the peace so on file in his office, upon receiving his fees for the same, which shall be the same now allowed a justice of the peace for issuing a transcript, and such transcript so issued by such clerk shall have the same force and effect as though the same had been issued by such justice of the peace during his term of office.

Id., 271, § 255.

Amended by chap. 436 of 1905.

§ 3147. Delivery; how compelled.

See § 2471a, ante, How delivery of books and papers to a public officer is enforced.

§ 3150. Transfer of action when justice's term expires, etc.

a. An order made pursuant to § 3150, transferring an action pending before a justice of the peace to another justice, must be made upon notice, although the section does not specifically provide for such notice: Dezur v. Provost, 99 App. Div. 14.

§ 3154. Action on judgment of justice.

See § 382, subd. 7, ante, Action must be brought within six years.

§ 3156. Execution of mandate by private person.

See § 2878 et seq., ante, Service of summons in justice's court.

See § 3135, ante, General requisites of mandates in justice's courts.

§ 3157. Constable to execute mandates in person.

See § 2885, ante, Return of summons.

§ 3159. Provisions, applying generally to courts of record, subject to certain qualifications.

Each of the foregoing provisions of this act, which is made, by chapter twenty-two of this act, applicable to the city court of the city of New York, or generally to courts of record, is subject to the qualifications and exceptions expressed or plainly implied in this title.

Amended by chap. 707 of 1907.

§ 3162. Service of notice of trial; filing of note of issue.

b. A case should not be stricken from the calendar merely because the attorney filed his note of issue before he served his notice of trial, where both acts were done by him on the same day, and this because the law does not often take account of fractions of a day: Lederer v. Adler, 44 Misc. 217; 88 N. Y. Supp. 1010.

§ 3164a. Fees of clerk of city court of city of New York.

The clerk of the city court of the city of New York is entitled to receive for the use of the city of New York, for the services performed by him the following fees and none other: For filing a note of issue for the general or equity calendar, three dollars; for entering final judgment in an action, including the filing of the judgment roll, fifty cents; and ten cents in addition for each folio exceeding ten, contained in said judgment. For filing and entering an order directing the change of name, one dollar for each name so changed. For entering any other order or an interlocutory judgment, ten cents for each folio exceeding five. For a certified or other copy

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of an order, record, or other paper, entered or filed in his office, five cents for each folio. For filing and entering a certificate of satisfaction, of a judgment twenty-five cents and for certifying a copy thereof twelve cents. For filing and entering an assignment of a judgment twenty-five cents, and for certifying a copy thereof twelve cents. For filing and entering a release of a judgment twenty-five cents, and for certifying a copy thereof twelve cents. For certifying a transcript of the docket of a judgment twelve cents. For an extract of the minutes of a trial ten cents. For attesting the correctness of the copy of any paper or record on file in his office, ten cents for each folio. For a certificate other than herein described, twenty-five cents. For making and certifying a search for any paper or record, one dollar. For comparing and certifying the printed papers on appeal from an order or judgment taken as prescribed in article fourth of title first of chapter twenty of this act, one cent per folio thereof. But where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provisions of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

Added by chap. 273 of 1906.

§ 3165. Summons.

See § 1360, ante, Certain sections not to apply to New York city court; who a non-resident.

§ 3167. Enforcement of certain judgments in favor of working women.

Repealed by chap. 707 of 1907.

§ 3169. Proof necessary to obtain warrant of attachment.

See § 635 et seq., ante, Warrant of attachment.

a. An affidavit that defendant is in custody in default of $2,000 to await the action of a magistrate, and may be discharged at any time, in which event he will leave this state for the purpose of defrauding plaintiff, is insufficient to bring the case within the provisions of § 3169, and an attachment granted upon such affidavit will be vacated upon motion: Tocci v. Gianvecchio, 48 Misc. 351.

b. **Complaint.**—The courts will not pass upon the merits of an action on a motion to vacate an attachment unless it is clear that the complaint is so defective that the plaintiff must ultimately fail in the action; but the judicial facts upon which the attachment is granted may be attacked, and, where an attachment was granted on the ground of defendant's non-residence and he appears to be a resident, the attachment will be vacated: Aspell Wholesale Groc. Co. v. Meeker, 54 Misc. 55.

§ 3170. Service of summons without the city, or by publication.

See § 438, ante, Cases in which service of summons by publication may be ordered.

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§ 3171. Commission to take testimony.

See § 887 et seq., ante, Depositions, taken without the state for use therein.

§ 3172. Court may refer question arising upon a motion.

See § 887 et seq., ante, Depositions, taken without the state for use therein.
See § 1011 et seq., ante, General provisions relating to references.

§ 3186. Id.; trial.

a. **Consolidation.**—An action upon a promissory note, brought in the city court of New York, should be consolidated with a prior action upon a promissory note brought in the supreme court when the only grounds upon which the consolidation is resisted is the possibility that the plaintiff may get his case upon the short calendar of the city court and obtain an earlier trial: Goepel v. Robinson Machine Co., 118 App. Div. 160.

§ 3188. Appeal from a judgment.

See § 1340 et seq., ante, Appeal to the supreme court from an inferior court.

b. After the trial of the whole issue by the court without a jury, a motion for a new trial on the minutes will not lie, and an order denying such a motion is unauthorized and presents no question for review by the appellate court; the remedy of the defeated party is by appeal from the judgment under § 1346, made applicable to appeals from final judgments of the city court of the city of New York, by § 3188: Simpson v. Hefter, 43 Misc. 608; 88 N. Y. Supp. 282.

c. **Costs.**—Upon the reversal of an interlocutory judgment of the city court, overruling a demurrer to a complaint with costs of the appeal, the successful party is entitled to tax twenty dollars costs before notice of argument and forty dollars for argument, and from an order allowing said items an appeal lies to the appellate term under § 3188 and not under § 3189; the failure to omit "interlocutory judgment" from § 3189, by the amendment by chap. 515 of 1902, was an inadvertence, and the intention of the legislature as evinced by the affirmative act of introducing a reference to § 1349, "interlocutory judgment," into § 3188, was to omit the reference to § 1349 and those words from § 3189: Campbell v. Hallihan, 46 Misc. 409.

§ 3189. Id.; from an order.

d. Under § 3189, as amended in 1902, the supreme court has full power to review discretionary orders of the city court of the city of New York: Tirpak v. Hoe, 53 Misc. 535.

e. An appeal from an interlocutory judgment of the trial or special term of the city court of New York lies to its general term, but no further appeal lies to the appellate term, where final judgment has not been directed by the said judgment: Levy v. Metropolitan St. R. Co., 34 Misc. 220, appeal dismissed, 34 Misc. 518.

f. **Costs.**—Upon the reversal of an interlocutory judgment of the city court, overruling a demurrer to a complaint with costs of the appeal, the successful party is entitled to tax twenty dollars costs before notice of argument and forty dollars for argument, and from an order allowing said items an appeal lies to the appellate term under § 3188 and not under § 3189; the failure to omit "interlocutory judgment" from § 3189 by the amendment by chap. 515 of 1902, was an inadvertence, and the intention of the legislature as evinced by the affirmative act of introducing a reference to § 1349, "interlocutory judgment," into § 3188, was to omit the reference to § 1349 and those words from § 3189: Campbell v. Hallihan, 46 Misc. 409.

g. **Appellate division.**—No appeal lies to the appellate term from an order sustaining or overruling a demurrer to a complaint, but where, though the notice of appeal recites the entry of a judgment, the record does not contain a judgment entered upon such an order, an appeal therefrom will be dismissed: Smith v. Ely, 46 Misc. 458.

§ 3190. Time to appeal and proceedings thereupon.

h. The time in which an appeal is required to be brought from a judgment of the city court of the city of New York is not affected by a subsequent motion to review the taxation of costs and order reducing the amount of costs taxed: Ost v. Salmanowitz, 54 Misc. 547.

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§ 3194a. Appeals from the city court of the city of New York.

Where, on an appeal from a judgment or order taken as prescribed in article fourth of title first of chapter twenty of this act, a party shall present to the clerk a printed copy of the judgment roll or order appealed from, it shall be the duty of the clerk, as required, to compare and certify the same, for which service the clerk must receive, for the use of the city of New York a fee at the rate of one cent per folio. Where the attorneys for all the parties interested, other than parties in default, or against whom a judgment or a final order has been taken, and is not appealed from, stipulate in writing that a paper is a copy of any paper whereof a certified copy is required by any provisions of this act, the stipulation takes the place of a certificate, as to the parties so stipulating, and the clerk is not required to certify the same, or entitled to any fees therefor. And the paper so proved by stipulation shall be received by the clerks of all the courts and by the courts and shall be used or filed with the same force and effect as if certified by a clerk of the court.

Added by chap. 430 of 1904.

§ 3207. Service of complaint with summons; proceedings thereupon.

a. §§ 3228 and 3229, providing that the plaintiff is to recover costs only when he obtains a judgment for fifty dollars or more, otherwise the defendant is entitled to costs, do not apply to actions commenced in a district or municipal court and removed to the city court, but do apply only to courts of record; costs are regulated by statute; neither party is entitled to costs in actions commenced in a district or municipal court and removed to the city court: Levene v. Hahner, 62 App. Div. 195; 70 N. Y. Supp. 913.

b. The Municipal Court Act, § 63, chap. 580 of 1902, has repealed §§ 3207-3214 of the Code of Civil Procedure and provides that none of these sections shall apply to actions or proceedings in the municipal court except as specially therein provided: Brown v. Bouse, 43 Misc. 72; 86 N. Y. Supp. 240.

§ 3213. Appeals.

c. The appellate court, in a proper case, may direct the trial court to make a further or amended return: Andres v. Brooklyn Heights R. R. Co., 84 App. Div. 596; 82 N. Y. Supp. 729.

d. **Defaults.**—No appeal lies from a judgment taken by default, and the defendant's remedy is to open his default in the court below: Brown v. Bouse, 43 Misc. 72; 86 N. Y. Supp. 240.

§ 3215. Jurisdiction in civil actions.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3216. Removal of certain actions to city court.

Repealed by Mun. Ct. Act of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

e. A defendant waives his right, within § 1366 of the Greater New York charter, chap. 466 of 1901, and § 1326 of the Code of Civil Procedure, to remove a case from the municipal to the city court of the city of New York, only by obtaining an adjournment after issue was joined, but must take at once the steps necessary to remove the action: Duke v. Caluwaert, 40 Misc. 623.

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a. Where an action begun in the district court of the city of New York has been duly removed upon the return day of the summons to the city court of said city, that court has cognizance thereof, and costs are governed by the rules obtaining therein as to them, and when the plaintiff recovers less than fifty dollars upon the trial in the city court of the action, in which the complaint demanded judgment for a sum of money only, she is entitled to no costs, and the defendant is entitled to costs as of course: Levene v. Hahner, 34 Misc. 154; 68 N. Y. Supp. 853.

§ 3217. When order of arrest may be granted.

Repealed by Mun. Ct. Act. of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3218. Proceedings thereupon.

Repealed by Mun. Ct. Act. of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3219. Requisites of certain undertakings.

Repealed by Mun. Ct. Act. of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3220. Docketing judgment; execution thereupon.

Repealed by Mun. Ct. Act. of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3221. Enforcement of certain judgments in favor of working women.

Repealed by Mun. Ct. Act. of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

b. A person imprisoned under a body execution issued upon a judgment of the municipal court of the city of New York, rendered in an action brought against him by a working woman to recover for services performed by her, was entitled, under the provisions of former § 3221, to be discharged after fifteen days' confinement, and no action on the part of any court was necessary to secure the discharge; such a discharge was a discharge by "due process of law," within the meaning of §§ 1399 and 1901 of the Consolidation Act: Padreshefsky v. Walton, 65 App. Div. 432.

§ 3222. Costs in action by working woman.

Repealed by Mun. Ct. Act. of N. Y. City, chap. 580 of 1902.

The substance of this section may now be found in the Greater N. Y. charter, chap. 378 of 1897, §§ 1350-1384, particularly as amended by chap. 466 of 1901, etc., in regard to the organization, etc., of the municipal court.

§ 3226. Provisions of code applicable to municipal court of Rochester.

The provisions of chapter nineteenth of this act, excluding section three thousand sixty-three, excluding article three of title eight, and excluding titles tenth and eleventh thereof, apply to the municipal court of the city of Rochester, and to the judges thereof; except so far as they are

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inconsistent with the next section, or with the charter of the city of Rochester or with any other statute applying to said court or the judges thereof as now existing or hereafter amended. For the purpose of applying the same, the court is deemed a justice's court; each judge thereof is deemed a justice of the peace; and the city of Rochester is deemed a town of Monroe county.

Amended by chap. 754 of 1907.

a. The county court had no power, prior to the amendment of § 3063 by chap. 553 of 1900, to reverse a judgment of the municipal court of the city of Rochester as against the weight of evidence, if there was any disputed question of fact: Mason v. West, 61 App. Div. 40; 70 N. Y. Supp. 478.

§ 3227. Appeals.

Appeals may be taken to the county court of Monroe county from the judgments and orders of the municipal court of the city of Rochester and from orders of the judges thereof as provided in article two of title eight of chapter nineteenth of this act, and the provisions thereof, except section three thousand sixty-three, apply to such appeals, except as herein expressly modified. The appeal must be heard on the return or a certified copy thereof, and may be brought on for hearing in the county court in the same manner and on the same notice as motions are or may be brought on for hearing in said court, or may be put on the calendar of said court as provided in section three thousand sixty-two of this act. The county court and other appellate courts on such appeals must render judgment according to the justice of the case, without regard to technical errors or defects which do not affect the merits, and may affirm or reverse, wholly or partly, or modify, the judgment or order appealed from for errors of law or of fact or because the judgment is excessive or insufficient or contrary to the evidence or contrary to law, and may, if necessary or proper, grant a new trial or hearing in the municipal court of the city of Rochester or before a judge thereof, as may be proper, at a time designated by it, and thereupon the municipal court or judge must proceed, and adjournments may be granted, a jury trial demanded, and all other proceedings taken as if the action or proceeding had been commenced anew. A copy of the judgment or order granting a new trial or hearing must be served by the party entering it on the opposite party or his attorney at least two days before the time set for the new trial or hearing. When a new trial or hearing is granted the appellate court may in its discretion award costs of the appeal to either party absolutely or to abide the event.

Amended by chap. 601 of 1881 and chap. 754 of 1907.

§ 3228. When plaintiff entitled to costs of course.

The plaintiff is entitled to costs of course, upon the rendering of a final judgment in his favor, in either of the following actions:

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1. An action, triable by a jury, to recover real property, or an interest in real property; or in which a claim of title to real property arises upon the pleadings, or is certified to have come in question upon the trial.

2. An action to recover a chattel. But if the value of the chattel, or of all the chattels, recovered by the plaintiff, as fixed, together with the damages, if any, awarded to him, is less than fifty dollars, the amount of his costs cannot exceed the amount of the value and the damages.

3. An action specified in subdivision first, third, fourth or fifth of section 2863 of this act. But if, in an action to recover damages for an assault, battery, false imprisonment, libel, slander, criminal conversation, seduction, or malicious prosecution; or a fine or penalty in which the people of the state are a party, the plaintiff recovers less than fifty dollars' damages, the amount of his costs can not exceed the damages.

4. An action, other than one of those specified in the foregoing subdivisions of this section, in which the complaint demands judgment for a sum of money only. But the plaintiff is not entitled to costs, under this subdivision, unless he recovers the sum of fifty dollars or more.

5. In all actions hereafter brought in the supreme court, triable in the county of New York or the county of Kings, which could have been brought, except for the amount claimed therein, in the city court of the city of New York or the county court of Kings county, and in which the defendant shall have been personally served with process within the counties of New York or Kings, the plaintiff shall recover no costs or disbursements unless he shall recover five hundred dollars or more; and in all actions hereafter brought in the city court of the city of New York or the county court of Kings county, which could have been brought, except for the amount claimed therein, in the municipal court of the city of New York, and in which the defendant shall have been personally served with process within the city of New York, the plaintiff shall recover no costs or disbursements unless he shall recover two hundred and fifty dollars or more. The fact that in any action a plaintiff is not entitled to costs under the provisions of this subdivision shall not entitle the defendant to costs under the next following section.

Co. Proc., § 304.

Amended by chap. 110 of 1898 and chap. 557 of 1904.

See § 461, ante, Costs shall not be awarded against a person suing as a poor person.

See §§ 731-734, ante, Costs after tender is made.

See §§ 738-739, ante, Costs after offer to compromise.

See § 779, ante, How motion costs are collected.

See § 1231, ante, Costs of interlocutory judgment.

See § 1281, ante, Costs upon submission of a controversy.

See § 3236, post, Motion costs.

§ 1418 of the Consolidation Act, formerly relating to this section, repealed by Municipal Ct. Act, chap. 580 of 1902.

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a. The purpose of § 3228, subd. 5, was designed to discourage the bringing of actions in the supreme court which might be tried in the city court; it is not intended to deprive the defendant of costs merely because the plaintiff is not entitled to costs by reason of his failure to recover $500. Thus, when in an action in the supreme court in said counties the defendant has made an offer of judgment not accepted and the plaintiff at trial recovers less than the offer and less than $500, the plaintiff is not entitled to tax costs accruing prior to the offer of judgment: Patterson v. Woodbury Dermatological Institute, 117 App. Div. 600.

b. **Trial fee.**—Only one trial fee can be taxed by the plaintiffs where they are nonsuited on the trial, where the decision was reversed by the appellate division, and the latter decision affirmed by the court of appeals and judgment absolute there given the plaintiffs on a stipulation to that effect. In such a case a subsequent assessment of damages is not a trial, but clerk's, jurors' and witnesses' fees are taxable thereon: Young v. Syracuse B. & N. Y. R. R. Co., 35 Misc. 114.

c. **Event.**—Where the court of appeals reversed a judgment granted against executors and granted a new trial with "costs to abide the event" and a judgment was obtained against said executors on said new trial, the special term has no power to award the costs of both motions and both appeals, since the provisions of § 3228 are general, and when read in connection with § 1836 become subordinate to the special rule governing costs against executors, and the judgment of reversal by the court of appeals "with costs to abide the event" must be read in the light of § 1836, and when thus read the word "event" means not only final success but a valid award of costs, under § 1836: Benjamin v. Ver Nooy, 168 N. Y. 578, mod'y 36 App. Div. 581; 55 N. Y. Supp. 796.

d. **District court.**—Where an action, begun in the district court of the city of New York, has been duly removed upon the return day of the summons to the city court of said city, that court has cognizance thereof, and costs are governed by the rules obtaining therein as to them, and when the plaintiff recovers less than fifty dollars upon a trial in the city court of the action in which the complaint demanded judgment for a sum of money only, she is entitled to no costs and the defendant is entitled to costs as of course: Levene v. Hahner, 34 Misc. 154; 68 N. Y. Supp. 853.

e. **Divorce.**—Where, in an action for divorce a co-respondent is served with a copy of the summons and complaint, and thereupon appears, serves an answer, defends and fails in his defense, the court has a discretion as to the allowance of costs against him: Billings v. Billings, 73 App. Div. 69; 76 N. Y. Supp. 628.

f. **Municipal court.**—§§ 3228 and 3229, providing that the plaintiff is to recover costs only when he obtains a judgment for fifty dollars or more, otherwise the defendant is entitled to costs, do not apply to actions commenced in a district or municipal court and removed to the city court, but do apply only to courts of record; costs are regulated by statute; neither party is entitled to costs in actions commenced in a district or municipal court and removed to the city court: Levene v. Hahner, 62 App. Div. 195; 70 N. Y. Supp. 913.

g. **Equity.**—§ 3228, subd. 4, does not limit the costs or apply to an action in equity, and one cognizable only there, for special relief against a defective notice of a lien: Faville v. Hadcock, 39 Misc. 397.

h. **Account.**—Where an action involving a matter of account is originally brought in the supreme court and the plaintiff recovers less than $50, it is incumbent upon him, in order to entitle him to costs, to show that the action was one of which a justice of the peace had not jurisdiction, namely, that the total of the accounts of both parties proved exceeded $400: Youker v. Johnson, 62 App. Div. 584; 71 N. Y. Supp. 178.

i. **Judgment reversed.**—Where the appellate division reverses a judgment entered on a verdict and orders a new trial, the plaintiff, on account of obtaining a judgment, is entitled to the costs of the first trial and not to the additional allowances granted on that trial: Meeker v. Remington & Son Co., 62 App. Div. 476; 70 N. Y. Supp. 1072.

j. **Interest.**—In actions, where the damages are liquidated, interest from the date of the offer to the date of the recovery should be taken into consideration in determining whether the recovery is more favorable than the offer; a defendant is not entitled to costs under § 3070, where the plaintiff's recovery is greater than the offer of judgment, even with interest added from the date of the offer; where an appeal is taken from a judgment of the justice's court and a new trial is demanded in the county court, §§ 3070 and 3073 of the Code, regulating costs on such appeals, are inapplicable, but the plaintiff, if he recovers fifty dollars or more in the county court, is entitled to costs, under § 3228: Rose v. Wells, 92 App. Div. 75; 86 N. Y. Supp. 889.

k. **Trespass.**—In an action for trespass on land and cutting timber thereon, a verdict that defendant did not cut timber and that plaintiff owned the land does not sustain a judgment that defendant be barred of all claim to the land and that plaintiff have costs: Hill v. McMahon, 81 App. Div. 324; 81 N. Y. Supp. 431.

l. **Administratrix.**—In an action against an administratrix on a claim against her intestate, in which $6.42 is recovered and the court did not award costs to either party and did not certify that the claim had been duly presented

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and payment unreasonably resisted, neither party is entitled to costs: German-Am. Provision Co. v. Garone, 73 App. Div. 409; 77 N. Y. Supp. 134.

a. When a defendant, as a condition for leave to amend his answer, has been ordered to pay plaintiff's costs and disbursements to date, and has paid the same, the plaintiff, though successful on the trial, is not entitled again to tax the disbursements paid, nor is he entitled to tax the costs of prior appeals which have been paid, but he is entitled to tax the costs before and after notice of trial, with term fees and costs of all subsequent proceedings: Grant v. Pratt, 110 App. Div. 149.

b. **Mistrial.**—Costs cannot be imposed on the moving party as a condition for granting a new trial when a verdict has been set aside on the grounds of a mistrial: Terriberry v. Mathot, 110 App. Div. 370; 97 N. Y. Supp. 20.

c. **Client.**—The costs of an action belong to the client, and as he may settle without costs if he desires, the attorney, after such settlement without costs, is not entitled to a lien for costs under a contract which gives him "all costs and interest recovered or to which he may be entitled:" Olshei v. Metropolitan Street Ry. Co., 110 App. Div. 709; 97 N. Y. Supp. 447.

d. **Costs in action under § 2653a.**—In an action under § 2653a, brought to establish the invalidity of a will, the court in its discretion, may award costs out of the estate to unsuccessful contestants of the will; in such an action the costs are governed by § 3230 and are discretionary; they are not governed by § 3228: Larkin v. McNamee, 109 App. Div. 884; 96 N. Y. Supp. 827, aff'd 188 N. Y. 558.

e. **City court.**—In an action in the city court of the city of New York brought upon two causes of action amounting to $776, where one cause of action is settled and by statute eliminated from the suit, and the plaintiff recovers a verdict for $200 on the other cause of action, he is not entitled to costs: Hill v. Kann, 50 Misc. 360.

f. Where a judgment of the city court of the city of New York against defendants is reversed on appeal, with costs to the appellant to abide the event, and on the new trial the plaintiffs recover judgment for less than $250, the plaintiffs are entitled to tax the costs of the appeal on the entry of final judgment: LaRosa v. Wilner, 54 Misc. 574.

g. **Third trial.**—Whereupon, an appeal to the appellate division by the defendant from a judgment against him, the judgment was reversed with costs to the appellant to abide the event, and, after a subsequent trial resulting in a judgment for defendant, the court of appeals reversed that judgment and granted a new trial with costs to abide the event, and on a third trial the plaintiff recovered judgment, he is not entitled to tax the costs of the appeal from the first judgment: Adams v. Massey, 51 Misc. 230.

h. **Calendar.**—When a party has improperly placed his cause on the short cause calendar and after a partial trial the justice sends the case back for trial on the general calendar where it belongs, he is not entitled to tax costs and disbursements on the first trial if successful at the second trial, for he cannot charge his adversary with the costs of a trial brought on by his own mistake; but when the unsuccessful party has improperly brought the case to trial on the short cause calendar he is chargeable with the costs and disbursements of that trial: Browning v. Brokaw, 114 App. Div. 104.

§ 3229. When defendant entitled to costs of course; rule as to two or more defendants.

i. In an action under § 2653a, brought to establish the invalidity of a will, the court in its discretion may award costs out of the estate to unsuccessful contestants of the will; in such an action the costs are governed by § 3230 and are discretionary; they are not governed by § 3228: Larkin v. McNamee, 109 App. Div. 884; 96 N. Y. Supp. 827, aff'd 188 N. Y. 558.

j. **Wrong defendant.**—A person who is served with a summons who has the same name as a defendant intended to be served, is justified in defending, and when the mistake is shown should be granted a dismissal, with costs: City of New York v. Ackerman, 51 Misc. 424.

k. **Malicious prosecution.**—In an action for malicious prosecution, the costs are not in the discretion of the court, but the successful party has a statutory right to them: Stearns v. Titus, 114 App. Div. 197.

l. **Mistrial.**—Costs cannot be imposed on the moving party as a condition for granting a new trial when a verdict has been set aside on the grounds of a mistrial: Terriberry v. Mathot, 110 App. Div. 370; 97 N. Y. Supp. 20.

m. **Client.**—The costs of an action belong to the client, and as he may settle without costs if he desires, the attorney, after such settlement without costs, is not entitled to a lien for costs under a contract which gives him "all costs and interest recovered or to which he may be entitled:" Olshei v. Metropolitan Street Ry. Co., 110 App. Div. 709; 97 N. Y. Supp. 447.

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a. **Justice's court.**—When an action in justice's court for trespass has been discontinued on the ground that the title to real property is involved, and in a subsequent action a nonsuit is granted on failure of the plaintiff to show any trespass, the defendant is entitled to costs; as the plaintiff has failed to establish a case, there has been no "trial of an issue of fact" as contemplated by § 3235: Shaffer v. Shaffer, 110 App. Div. 487.

b. **Costs.**—Where a chattel belonging to a plaintiff is taken under an execution against the plaintiff's husband, and the action is brought against the execution creditor and the marshal who made the levy, and the court dismisses the complaint as to the execution creditor, but adjudges the marshal liable, it may properly, in the exercise of its discretion, decline to award costs to the execution creditor: Sinskie v. Brust, 66 App. Div. 34; 72 N. Y. Supp. 922.

c. An action under § 1819 to recover two general legacies, where the defendant alleged that the legacies were revoked by a codicil to a will, is an action at law, and if decided in favor of the defendant, the latter is entitled to costs under § 3229 as a matter of right: Ladies' Union Benevolent Soc. v. Van Natta, 96 App. Div. 99; 88 N. Y. Supp. 1083.

d. Where the complaint is dismissed as to a defendant who answered separately, costs are in the discretion of the court; and a judgment entered in such a case, including costs where none have been awarded, should be corrected on motion: Ljungquist v. Hartmetz, 54 Misc. 87.

§ 3230. When costs are discretionary.

e. In an action under § 2653a, brought to establish the invalidity of a will, the court, in its discretion, may award costs out of the estate to unsuccessful contestants of the will; in such an action the costs are governed by § 3230 and are discretionary; they are governed by § 3228: Larkin v. McNamee, 109 App. Div. 884; 96 N. Y. Supp. 827, aff'd 188 N. Y. 558.

f. Costs will not be allowed to both parties for the same services in the same court: Stevens v. Central National Bank, 168 N. Y. 560, rev'g 35 App. Div. 35; 54 N. Y. Supp. 673.

§ 3232. Interlocutory costs upon issue of law.

g. When costs are awarded upon an interlocutory judgment deciding a question of law, and an issue of fact remains undisposed of, all proceedings on the part of the parties required to pay the same are stayed except to review or vacate the order or judgment until payment; if an order dismissing the complaint upon default has been subsequently obtained by the party liable for the costs, the default should be opened as a matter of right: Bigelow v. Drummond, 109 App. Div. 132.

h. **Demurrer.**—When a demurrer to the entire complaint in a common-law action is sustained and leave is given to the plaintiff to amend, the defendant is entitled, as a matter of right, on entering the interlocutory judgment, to costs of the trial of the issue of law and of all proceedings after notice and before trial: De Tuckerheim v. Thomas, 113 App. Div. 123; 99 N. Y. Supp. 104.

i. Under § 779 costs are enforcible by execution granted by an interlocutory judgment sustaining demurrers to counterclaims; §§ 3232 and 3233 have changed the nature of costs and the manner of collecting them: Bernheimer v. Hartmayer, 34 Misc. 346; 69 N. Y. Supp. 816.

j. A decision of the appellate division, on an appeal from an interlocutory judgment, should be construed to read "interlocutory judgment reversed with costs," and the costs, though absolute, are not immediately collectible by execution, while the judgment entered on the decision should provide that such costs be included in the final judgment if rendered in his favor or set off any costs subsequently recovered by the other party: Cassavoy v. Pattison, 101 App. Div. 128; 91 N. Y. Supp. 876.

§ 3233. Id.; how collected.

k. When costs are awarded upon an interlocutory judgment deciding a question of law, and an issue of fact remains undisposed of, all proceedings on the part of the parties required to pay the same are stayed except to review or vacate the order or judgment until payment; if an order dismissing the complaint upon default has been subsequently obtained by the party liable for the costs, the default should be opened as a matter of right: Bigelow v. Drummond, 109 App. Div. 132.

l. Under § 779 costs are enforcible by execution granted by an interlocutory judgment sustaining demurrers to counterclaims; §§ 3232 and 3233 have changed the nature of costs and the manner of collecting them: Bernheimer v. Hartmayer, 34 Misc. 346; 69 N. Y. Supp. 816.

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§ 3234. Costs, where there are several issues of fact.

a. The dismissal of a cause of action on the ground that it is barred by a judgment in a former action is a decision on the merits, and not a mere nonsuit, and entitles the successful party to costs: Cook v. Casler, 87 App. Div. 8; 83 N. Y. Supp. 1045.

§ 3235. Id.; after discontinuance upon answer of title.

b. When an action in justice's court for trespass has been discontinued on the ground that the title to real property is involved, and in a subsequent action a nonsuit is granted on failure of the plaintiff to show any trespass, the defendant is entitled to costs; as the plaintiff has failed to establish a case, there has been no "trial of an issue of fact" as contemplated by § 3235: Shaffer v. Shaffer, 110 App. Div. 487.

§ 3236. Costs of a motion.

See § 779, ante, How motion costs collected.

See § 3251, post, Amount of costs generally.

c. A decree of a surrogate, vacating and setting aside an assessment of a transfer tax made by him is a final order in a special proceeding, and costs, on an appeal therefrom, are governed by § 3240; such costs, if awarded by the appellate court, are by the provisions of the section at the same rates as upon an appeal from a judgment, and the order of the appellate court need not specify the items or rates, but they should be fixed on a taxation thereof by the surrogate, while such order need not specify that disbursements are allowed, as they follow the allowance of costs by the provisions of § 3256. Costs upon an appeal from an interlocutory order are controlled by § 3236 and § 3251, subd. 3: Matter of Babcock, 86 App. Div. 563.

§ 3238. Costs upon appeal from final judgment.

See § 3251, post, Amount of costs.

See § 3256, post, Disbursements for printing to be included in costs.

d. The provisions of § 3238, relating to costs of appeals, are general, and when read in connection with § 1836 they become subordinate to it, for the latter lays down a special rule governing costs against executors; "costs" to abide event must be read in the light of § 1836, and when thus read, the word "event" means not only final success in the action but also a valid award of costs, generally under § 1836: Benjamin v. Vernooy, 168 N. Y. 578.

e. **Two appeals.**—Costs will be allowed against an appellant on the dismissal of one of two appeals from the same judgment on two separate records which present the same question, although it was taken from an abundance of caution: Abbey v. Wheeler, 170 N. Y. 122.

f. **Administrator.**—A judgment for costs, recovered against an administratrix in an unsuccessful action brought by her in her representative capacity against a person to recover of him a debt which she believed to have been due her intestate in his lifetime, is entitled to a preference over debts due general creditors of the intestate, as it is to be regarded as an expense of administration: Matter of Mahoney, 37 Misc. 472; 75 N. Y. Supp. 1056.

g. When a defendant, as a condition for leave to amend his answer, has been ordered to pay plaintiff's costs and disbursements to date, and has paid the same, the plaintiff, though successful on the trial, is not entitled again to tax the disbursements paid, nor is he entitled to tax the costs of prior appeals which have been paid, but he is entitled to tax the costs before and after notice of trial with term fees and costs of all subsequent proceedings: Grant v. Pratt, 110 App. Div. 149.

§ 3239. Id.; upon appeal from interlocutory judgment or order.

h. Where a motion for a new trial, on the ground of newly discovered evidence, made by the defendants upon a separate appeal book, is denied by the special term of the city court of the city of New York, and the order is affirmed by its general term, the latter may award the respondent costs and disbursements of the affirmance, as § 3239, subd. 2, denying to either party costs of an appeal from an order refusing a new trial relates only to new trials on the minutes: Streep v. McLoughlin, 36 Misc. 165.

i. **Merits.**—§ 3239, subd. 2, contemplates an order granting or refusing a new trial on the merits, when an appeal from both the judgment and order are unnecessary, and does not apply to an

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appeal from an interlocutory judgment and an appeal from an order denying a motion for a new trial made under § 1010: Garrett v. Wood, 61 App. Div. 293.

a. **Tax Law.**—The provisions of § 259 of the Tax Law exempting a county treasurer from the payment of costs in supplementary proceedings apply to the original proceedings and do not cover an unsuccessful appeal by him from an adverse order in such original proceedings: Matter of Pryor, 67 App. Div. 316.

§ 3240. Id.; in a special proceeding.

See § 2086, ante, Costs.

See § 2100, ante, Final order; costs.

See § 2109, ante, Jury; how procured.

See § 2143, ante, Costs.

See § 2149, ante, Who may be discharged.

See § 2250, ante, Costs in summary proceedings.

See § 2316, ante, Costs.

See § 2401, ante, Costs allowed.

See § 2445, ante, Referee to be sworn.

See § 2456, ante, Costs to judgment debtor, etc.

b. **Highway.**—A proceeding under the Highway Law to lay out a highway is a special proceeding within the meaning of § 3334 and the petitioner, if successful, is entitled, in the discretion of the court, to recover costs and disbursements at the rate allowed in an action under § 3240, which provides that costs in a special proceeding may be awarded at the rates allowed for similar services in an action; costs referred to in § 152 of the Highway Law only relate to costs of motions made in such a proceeding, as distinguished from costs of the proceeding itself, and does not prevent the court, in its discretion, from awarding the latter costs pursuant to § 3240: Matter of Peterson, 94 App. Div. 143.

c. **Transfer tax.**—A decree of a surrogate vacating and setting aside an assessment of a transfer tax made by him is a final order in a special proceeding, and costs, on an appeal therefrom, are governed by the provisions at the same rates as upon an appeal from a judgment, and the order of the appellate court need not specify the items or rates, but they should be fixed on a taxation thereof by the surrogate, while such order need not specify that disbursements are allowed as they follow the allowance of costs by the provisions of § 3256. Costs upon an appeal from an interlocutory order are controlled by § 3256 and § 3251, subd. 3: Matter of Babcock, 86 App. Div. 563.

d. **Village.**—Costs, prior to the appointment of commissioners in a proceeding under § 159 of the Village Law, relative to the recovery of damages resulting from changing the grades of village streets, are in the discretion of the court to be allowed under § 3240 of the Code, and the provisions of §§ 3357-3384, do not affect in any manner the costs incurred by a petitioner prior to the appointment of commissioners: Matter of Bley v. Village of Hamburg, 84 App. Div. 23.

e. **Supplementary proceedings.**—The provisions of § 259 of the Tax Law, exempting a county treasurer from the payment of costs in supplementary proceedings, apply to the original proceedings and does not cover an unsuccessful appeal by him from an adverse order in such original proceeding: Matter of Pryor, 67 App. Div. 316.

f. **Attorney's lien.**—Where proceedings are instituted to ascertain the amount of an attorney's lien, it is improper to charge costs and disbursements against the attorney when it is found that he is entitled to such lien: Ward v. Ward, 67 App. Div. 121.

g. **Summary proceeding.**—A landlord who succeeds in a summary proceeding, not involving a forcible entry or detainer, is entitled, under §§ 2250 and 3076 of subd. 2, to ten dollar costs and no more, and is not entitled to an extra allowance under § 3253; § 3240 does not apply to a summary proceeding: Lauria v. Capobianco, 39 Misc. 441.

h. A motion made by the foreign committee of a lunatic life beneficiary for an order directing the transmission of surplus income to said committee is a special proceeding, and, under § 3240, the trustees and remaindermen who successfully opposed the motion may not be granted an extra allowance of costs: Matter of Mankowski, 49 Misc. 606.

i. **Appeal.**—A petitioner erroneously charged with costs in a proceeding for the commitment of an insane person, under chap. 545 of 1896, is not required to appeal but may move before the surrogate for a correction of the decree: Matter of Murtaugh, 117 App. Div. 302.

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§ 3246. Id.; by or against executor, etc.

a. **Costs.**—Under §§ 1822, 1835, 1836 and 3246, exempting executors from payment of costs unless payment of a claim was unreasonably resisted or neglected by them, such executors are entitled to one lawful trial, and to exemption from costs until they have had one lawful trial, by which the Code means a binding and effective trial which lawfully determines their liability: Benjamin v. Ver Nooy, 168 N. Y. 578, mod'y 36 App. Div. 581; 55 N. Y. Supp. 796.

b. Where in a proceeding to compel a general guardian to account, the facts and circumstances indicate a lack of fairness and suggesting a disposition on the part of the guardian to deplete the estate of the ward, commissions may be denied him and costs awarded against him personally: Matter of Ward, 49 Misc. 181.

c. A provision in a decree of the surrogate's court, rendered upon the judicial settlement of an administrator's accounts, directing the administrator to pay personally a specified amount of costs to the contestants, cannot be enforced by contempt proceedings pursuant to § 2555: Matter of Banning, 108 App. Div. 12.

d. **Individually.**—Where executors unlawfully withhold property, costs should be awarded against them individually: Rooney v. Bodkin, 93 App. Div. 431; 87 N. Y. Supp. 800.

e. **Disputed claim.**—Where a disputed claim against a decedent's estate is referred by consent to the surrogate and heard by him, costs to the successful claimant are discretionary, but their amount must be within the limit prescribed by § 2561: Matter of Ingraham, 35 Misc. 577; 72 N. Y. Supp. 62.

f. **Trustee.**—Costs should not be awarded personally against a substituted trustee where the original trustee was removed and the substituted trustee illegally appointed: Hughes v. Cuming, 63 App. Div. 363; 71 N. Y. Supp. 599.

§ 3247. Costs in case of transfer, etc., of cause of action.

g. **Judgment creditor.**—A judgment creditor, at whose motion a receiver of the property of the judgment debtor was appointed in proceedings supplementary to execution, is not liable for costs under § 3247 where he requested the receiver to commence the action to recover property alleged to belong to the judgment debtor, and the receiver recovered a judgment, from which an appeal was taken by the defendants, the judgment reversed and an appeal taken therefrom to the court of appeals where the judgment of the appellate division was affirmed: Droege v. Baxter, 77 App. Div. 78.

h. **Contempt.**—As § 3247 provides that the disobedience of an order for the payment of costs is a contempt of court. such an order should not provide for the issuance of an execution: Beck v. Kerr, 87 App. Div. 1; 83 N. Y. Supp. 1057.

i. **Judgment.**—When the transcript of a judgment of a municipal court has been docketed in the county clerk's office, it becomes a judgment of the supreme court, and the defendants who have recovered a judgment for costs may have an order requiring the plaintiff's assignors, who are beneficially interested in the action, to pay such costs, but the moving papers must show or state that the judgment was duly given as required by § 532: Friedman v. Met. Steamship Co., 109 App. Div. 600.

j. **Corporation.**—When former owners of milk cans have sold them to a corporation of which they became officers, and the corporation directs its agent to sue for the statutory penalty for an unlawful detention of the cans, a defendant who succeeds on trial is not entitled to charge the former owners with the costs under § 3247 as being beneficially interested, for the action was brought in behalf of the corporation and not the former owners of the cans: Pierson v. Clark, 116 App. Div. 519.

§ 3251. Amount of costs generally.

See § 2401, ante, Costs in foreclosure by advertisement.

See § 3372, post, Costs in condemnation proceedings.

See §§ 1835, 1836, ante, Costs against executor or administrator.

See § 2143, Costs in certiorari.

k. What term fees are taxable: Crim v. Drain, 64 App. Div. 581; 72 N. Y. Supp. 298.

l. **Motion costs.**—Costs allowed on an appeal from an order granting a new trial are "costs of a motion:" Cohen v. Krulewitch, 81 App. Div. 147; 80 N. Y. Supp. 689.

m. **Reargument.**—Where a reargument is ordered, a fee is taxable for it as well as for the first argument: Roberson v. Rochester Folding Box Co., 68 App. Div. 528; 73 N. Y. Supp. 898.

n. **Juror withdrawn.**—A plaintiff who withdraws a juror on a first trial and succeeds on the second trial is not en-

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titled to tax twenty-five dollars for all proceedings after the granting of and before the new trial: Bloch v. Linsley, 40 Misc. 184.

a. The withdrawal of a juror during the progress of a trial at the request of a party does not affect the right of the successful party to tax a trial fee: Browning v. Goldman, 35 Misc. 272; 71 N. Y. Supp. 822.

b. **Two trials.**—Where the jury disagree on the first trial of a case and the plaintiff succeeds on the second, she is entitled to tax two items for costs after notice of trial: Friedheim v. Metropolitan Street R. Co., 35 Misc. 199; 71 N. Y. Supp. 485.

c. When judgment for the plaintiff is reversed and a new trial granted, with costs to abide the event, and the plaintiff succeeds upon the second trial, he is entitled to tax the costs of both trials. There is a distinction between cases where costs are allowed "to abide the event" or "to the appellant to abide the event;" but where the plaintiff, sucessful on second trial, amends his complaint after the cause is placed on the calendar, he is not entitled to tax a term fee prior to the amendment: Mossein v. Empire State Surety Co., 117 App. Div. 782.

d. **Demurrer sustained.**—Where a demurrer interposed to one of three defenses contained in an answer is sustained, with leave to the defendant to amend upon payment of costs of the demurrer, the plaintiff is entitled to the costs allowed for proceedings after notice of trial and before trial and a trial fee, but he is not entitled to the costs allowed for proceedings before notice of trial: Garrett v. Wood, 61 App. Div. 294; 70 N. Y. Supp. 359.

e. **To whom costs belong.**—Costs are awarded to litigants as indemnity for the expense which they have incurred in the litigation and belong to the litigants, and not to their attorneys; a litigant has, therefore, a right to satisfy a judgment for costs awarded in her favor, and, in the absence of any question as to the agreement between the judgment creditor and her attorney, such satisfaction will not be set aside at the instance of such attorney: Earley v. Whitney, 106 App. Div. 399.

f. The purpose of § 3228, subd. 5, was designed to discourage the bringing of actions in the supreme court which might be tried in the city court; it is not intended to deprive the defendant of costs merely because the plaintiff is not entitled to costs by reason of his failure to recover $500. Thus, when in an action in the supreme court in said counties the defendant has made an offer of judgment not accepted and the plaintiff at trial recovers less than the offer and less than $500, the plaintiff is not entitled to tax costs accruing prior to the offer of judgment: Patterson v. Woodbury Dermatological Institute, 117 App. Div. 600.

g. **Stipulation.**—Power of supreme court to impose costs upon discontinuance, by stipulation of an action in which no counterclaim is interposed: National Exhibition Co. v. Crane, 167 N. Y. 505, aff'g 54 App. Div. 175; 66 N. Y. Supp. 361.

h. **Trial.**—§§ 3369 and 3372 relate to the "trial" only, that is, the trial of an issue raised by an answer to the petition; that is the only "trial" that is had in a condemnation proceeding, and the word does not relate to or designate the hearing before the commissioners at all; under § 3372 costs are allowed upon the hearing before the commissioners, if no offer has been made by the plaintiff, the defendant recovers costs without regard to the amount of the award; if such an offer has been made, he recovers costs only if the award be larger than the offer; the costs allowed are costs before and after notice of trial and a trial fee: Padden v. City of New York, 45 Misc. 516.

i. **Demurrer overruled.**—Upon the reversal of an interlocutory judgment of the city court, overruling a demurrer to a complaint with costs of the appeal, the successful party is entitled to tax twenty dollars costs before notice of argument and forty dollars for argument, and from an order allowing said items an appeal lies to the appellate term under § 3188, and not under § 3189; the words "trial term" in § 3251, subd. 4, are intended to be the equivalent of "in the same court or in a circuit court" as said section stood prior to the consolidation of and alterations of our judicial system made by the Constitution of 1894: Campbell v. Hallihan, 46 Misc. 409.

j. **Order reversed.**—Upon reversing an order denying an application, the appellate division will not award costs of the appeal against a party who did not oppose the granting of the application and against whom it was made: Matter of Collins, 104 App. Div. 184.

k. **Waiver.**—While § 1279 provides for the submission of a controversy with costs discretionary with the court, yet either party may waive his right to have the court exercise its discretion in his favor, and when it is stipulated that the judgment rendered shall be without costs, a judgment granting costs will be modified by striking out such costs: Real Estate Corporation v. Harper, 174 N. Y. 123, mod'y 70 App. Div. 64; 74 N. Y. Supp. 1065.

l. A defendant, by serving a notice of argument of an appeal from an order denying his motion to retax costs on an appeal, waives a stay because of plaintiff's non-payment of costs of a motion; where, upon the entry of an interlocutory judgment overruling a demurrer,

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the defeated party is allowed to plead over on payment of costs, the successful party is entitled to tax costs after notice and before trial and a trial fee and disbursements, but not costs before notice of trial. Costs subsequently imposed upon a motion made for a reargument of the appeal are improperly taxed, as they form no part of the costs referred to in the order affirming the judgment. Costs which were or should have been taxed on the entry of the interlocutory judgment in the court below are not properly taxable under the order of the appellate term. An item of costs for service of the summons and complaint, being taxable upon entry of the final judgment, is not properly taxable under the order of the appellate term and should have been disallowed: Hill v. Muller, 53 Misc. 262.

a. **Weight of evidence.**—An order setting aside a verdict as against the evidence and the weight thereof must be considered as a favor granted by the court, and should be made conditional upon the payment of costs by the party against whom the verdict was rendered: Larsen v. U. S. Mortgage & Trust Co., 104 App. Div. 76; 93 N. Y. Supp. 610; 113 App. Div. 484.

b. **Ejectment.**—In an action of ejectment, a judgment for the plaintiff was reversed by the appellate division with costs to the defendant to abide "the event," the plaintiff on the second trial obtained judgment, which was affirmed by the appellate division, and on a third trial, obtained by the defendants under § 1525, judgment was for defendants, *Held* "the event" was in favor of defendants and the costs of the first appeal should be taxed in their favor: Barson v. Mulligan, 44 Misc. 26; 89 N. Y. Supp. 704; 107 App. Div. 614, aff'g 111 App. Div. 913.

c. Under § 1525, whereby the defendant in an action of ejectment is entitled to a new trial as a matter of right upon costs within three years after entry of judgment against him, it is immaterial whether the costs be paid by the defendant voluntarily or collected from him by execution on the judgment. This section does not refer to a voluntary payment of costs only. Actual payment within the time specified is all that is necessary; the situation is not affected by reason of the fact that the execution was satisfied by a sale of the interest of the defendant in the premises: Townshend v. Keenan, No. 1, 117 App. Div. 484.

d. Upon an interlocutory judgment sustaining a demurrer to the complaint, the defendant is not entitled to tax costs before notice of trial: Penfield v. City of New York, 53 Misc. 39.

e. **Condemnation proceedings.**—When the amount awarded the owner of real estate by commissioners in a condemnation proceeding, under § 3372, exceeds the amount offered by the corporation taking the lands, with interest from date of offer, the land owner is entitled to the amount of costs awarded to defendant under § 3251, when defendant prevails in action in the supreme court after a trial; ten dollars cost for proceedings before notice of trial and fifteen dollars after notice of trial, with thirty dollars costs for trial of issue of fact and ten dollars for trial occupying more than two days: Matter of Brooklyn Union El. R. R. Co., 176 N. Y. 213, rev'g 82 App. Div. 567; 81 N. Y. Supp. 527.

f. In condemnation proceedings, the award should include counsel fee, taxable costs, and other disbursements, and a reasonable counsel fee is five per cent upon the amount of the award to each owner, not exceeding $1,000 in any case: Matter of the Board of Rapid Transit Railroad Comrs., 117 App. Div. 160.

g. **Transfer tax.**—A decree of a surrogate vacating and setting aside an assessment of a transfer tax made by him is a final order in a special proceeding, and costs in an appeal therefrom are governed by the provisions of the section at the same rates as upon an appeal from a judgment, and the order of the appellate court need not specify the items or rates, but they should be fixed on a taxation thereof by the surrogate, while such order need not specify that disbursements are allowed, as they follow the allowance of costs by the provisions of § 3256. Costs upon an appeal from an interlocutory order are controlled by §§ 3256 and 3251, subd. 3: Matter of Babcock, 86 App. Div. 563.

h. **Injunction.**—Persons knowing of the existence of an injunction order and its terms, and clearly understanding the nature of their acts, who act contrary to such injunction, are properly adjudged guilty of a criminal contempt for willful disobedience tending to cast discredit upon the administration of justice; costs are not allowable in a proceeding to punish for a criminal contempt: People ex rel. Stearns v. Marr, 181 N. Y. 463; 34 Civ. Pro. R. 300, mod'y 88 App. Div. 422; 84 N. Y. Supp. 965.

i. **Tort.**—In an action of tort in which the defendant is liable to arrest and imprisonment if the plaintiff is successful, a judgment in favor of the defendant for costs may be enforced by an execution against the person: Saffier v. Haft, 86 App. Div. 284; 83 N. Y. Supp. 763.

j. In an action in tort the costs before notice of trial should be taxed at twenty-five dollars, but if the action be *ex contractu* said costs should be taxed at fifteen dollars; in case of doubt whether an action is in tort or on contract, it should be construed to be an action on contract, and the costs before notice of trial taxed at fifteen dollars: Lange v. Schile, 111 App. Div. 613.

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a. **Mechanics' liens.**—In an action brought to foreclose several mechanics' liens, filed by different persons, it is improper to allow the owner separate bills of costs against unsuccessful lienors who filed separate liens; only one bill of costs can be allowed to one party: Woolf v. Schaefer, 103 App. Div. 567.

b. **Conversion.**—In an action for conversion, it is proper for the court, under § 999, to grant defendant's motion for a new trial unless plaintiff reduce the amount of the verdict to a sum supported by the evidence, but the defendant should be required to pay the costs as a condition of obtaining the favor: Lawrence v. Wilson, 86 App. Div. 472; 83 N. Y. Supp. 821.

c. **Assessment.**—A judge presiding at an assessment for damages, had after the rendering of a judgment absolute on the affirmance of an appeal by the court of appeals, may entertain a motion for a new assessment of damages; such a motion is addressed largely to the discretion of the trial judge, and the order made thereon is appealable to the appellate division: Lewin v. Lehigh Valley R. R. Co., 66 App. Div. 409, aff'g 169 N. Y. 336; 72 N. Y. Supp. 881.

d. **Two appeals.**—Costs will be allowed against appellant on the dismissal of one of two appeals from the same judgment on two separate records which present the same question, although it was taken from an abundance of caution to make certain of the hearing of the question upon one record or the other, and to settle a doubtful question of practice and the appellant is successful on the other appeal: Abbey v. Wheeler, 170 N. Y. 122, rev'g 58 App. Div. 451; 69 N. Y. Supp. 432.

e. **Judgment.**—The mere fact that a provision was inserted in a judgment awarding costs and directing execution therefor, does not make the judgment a final one and the remedy for the improper insertion of the costs is by motion to strike out and not by appeal: Osborn v. Cardeza, 180 N. Y. 69, dismissing appeal, 92 App. Div. 612; 87 N. Y. Supp. 1129.

f. **Newly discovered evidence.**—Where an order granting a new trial to the defendant for newly discovered evidence is reversed on appeal, with costs, the plaintiff is not entitled to tax costs for making and serving case on appeal, nor costs for the case being over fifty folios, nor three term fees for the motion for a new trial, where the case was made by the defendants and the motion was on the calendar for one term only: Koepel v. Koepel, 51 Misc. 64.

g. **Term fee.**—Where a case not noticed by plaintiff for trial goes over the term by reason of due service of an amended complaint, the term fee and witnesses' fees of the successful defendant are improperly taxed by the clerk: Fuller Buggy Co. v. Waldron, 49 Misc. 278.

h. **Performance.**—When plaintiffs have been allowed to amend their complaint so as to set up a new cause alleging substantial performance instead of complete performance of a building contract, and such amendment was conditioned on the payment of "all costs and disbursements subsequent to the service of the complaint herein," etc., they are not entitled to tax costs of the former action, although the judgment in their favor was reversed with "costs to abide the final award of costs": Rowe v. Gerry, No. 2, 109 App. Div. 156.

i. **Appeal.**—Costs of an appeal may be awarded against a respondent on appeal who did not appear on the trial below, if he appears on the appeal and unsuccessfully insists that part of the judgment below should be retained; a motion below to modify the judgment upon the remittitur by the appellate division so as to award costs allowed against him on the appeal should be granted, but should be limited to the costs of the appeal: McWhirter v. Bowen, 114 App. Div. 68.

j. When a judgment for the plaintiff is reversed and a new trial granted, "with costs to abide the event," the plaintiff is entitled to tax the costs of the appeal if successful on the new trial: Davis v. Reflex Camera Co., 114 App. Div. 814.

k. **Demurrer.**—When a demurrer to the entire complaint in a common-law action is sustained, and leave is given to the plaintiff to amend, the defendant is entitled, as a matter of right, on entering the interlocutory judgment, to costs of the trial of the issue of law, and of all proceedings after notice and before trial: De Turckheim v. Thomas, 113 App. Div. 123; 99 N. Y. Supp. 104.

l. **The appellate term** will refer to the opinion of the court below to ascertain the grounds or reasons for its disposition of the case; and, where, on appeal from an order granting a new trial, it thus appears that the motion granted on the ground that the verdict was contrary to the evidence and the answer should, therefore, have imposed the payment of costs of the first trial upon the defendants, it will be modified accordingly: Israel v. Ury, 52 Misc. 525.

m. **A taxpayer's action** brought under chap. 531 of 1881, as amended in 1892, to restrain official acts by public officers is only authorized where the acts are without power and where corruption, fraud and bad faith amounting to fraud is charged; where the complaint in such an action does not allege fraud and acts of bad faith, the complaint will be dismissed at the trial, but without costs: Craft v. Lent, 53 Misc. 484.

n. **Separate appearance.**—In an action at law defendants who separately appear

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and answer may tax separate bills of costs unless it be shown that they are united in interest or collusively appear by separate attorneys in bad faith for the purpose of enhancing the costs: Rowe v. Granger, 118 App. Div. 459.

a. Where the complaint is dismissed as to a defendant who answered separately, costs are in the discretion of the court; and a judgment entered in such a case, including costs where none have been awarded, should be corrected on motions: Ljungquist v. Hartmetz, 54 Misc. 87.

b. **New defendant.**—Where an intervening plaintiff moves to bring in a new defendant, which motion is opposed by the original plaintiff, the court, in its discretion, may decide between the conflicting interest of the co-plaintiffs and bring in a new defendant if he is the proper party; but the plaintiff who objects should be secured against costs if the defendant brought in be successful, and the moving party should be required to give a bond to indemnify him: Weed v. First National Bank, 117 App. Div. 340.

c. **Experts.**—A new trial will be granted upon the payment by the defendant of costs and trial costs where it appears on appeal that the opinions of experts as to the injuries of the plaintiff were not well founded: Fogel v. Interborough R. T. Co., 53 Misc. 32.

d. **Default.**—An order requiring the service of a complaint, if regarded as the opening of the default, should be granted only on terms: Shenstone v. Wilson, 117 App. Div. 752.

e. **Tender.**—When before action brought to recover the value of stock alleged to have been intrusted to defendant for sale, the defendant tenders the proceeds of the sale and on the refusal of the tender deposits the sum in court, the defendant is entitled to a verdict if the plaintiff fails to establish a right to more than the sum tendered; when the plaintiff fails to recover more than the tender, he is not entitled to costs: Goldman v. Swartout, 117 App. Div. 185.

f. **City court of New York.**—In an action in the city court of the city of New York, where the plaintiff recovers judgment for more than fifty dollars which is reversed on appeal to the appellate term, with costs to the appellant to abide the event, and upon a second trial, the plaintiff recovers less than fifty dollars, he is not entitled to costs of the first trial nor to costs of the appeal; but the defendant is entitled to costs of appeal and of both trials: Lennon v. Charig, 54 Misc. 298.

g. Where a judgment of the city court of the city of New York against defendants is reversed on appeal, with costs to the appellant to abide the event, and on the new trial the plaintiff's recover judgment for less than $250, the plaintiffs are entitled to tax the costs of the appeal on the entry of final judgment: LaRosa v. Wilner, 54 Misc. 574.

h. Where the defendants appeal from a judgment of the city court of the city of New York and the appellate term reverses the judgment and orders a new trial, with costs to the appellant to abide the event, and the defendants, thereupon, by permission of the appellate term, appeal to the appellate division, stipulating that, if the appellate division affirms the judgment, judgment absolute shall be rendered for the defendants, and the judgment of reversal is affirmed and judgment absolute is thereupon rendered in favor of the defendants, the defendants are entitled to tax the costs before and after notice of trial and a trial and term fee: Feltenstein v. Ernst, 54 Misc. 223.

i. **Verdict set aside.**—When on plaintiff's motion a verdict in her favor is set aside on the ground that the damages are insufficient, the trial court is not required as a matter of law to award costs against the plaintiff, and in its discretion may refuse such costs when it does not appear that the verdict resulted from the fault or mistake of the plaintiff: Waltz v. Utica & Mohawk Valley Railway Co., 116 App. Div. 563.

j. **Divorce.**—An action of divorce is an action *in rem* and service on the defendant without the state may be made by publication, but unless the defendant appear or jurisdiction has been obtained by attachment, a judgment for alimony and costs cannot be entered; and execution on a judgment for costs improperly entered will be vacated, though it would be better practice to move to set aside the judgment: Burch v. Burch, 116 App. Div. 865.

k. **Failure to prosecute.**—When three years have elapsed since joinder of issue and a case has not been placed upon the calendar and no excuse is given for the delay, the action will be dismissed on motion for failure to prosecute. The dismissal should not be conditioned on the plaintiff's failure to pay costs of the motion: Anderson v. Hedden & Sons Co., 116 App. Div. 231.

l. **Amendment.**—When plaintiffs allege that they rendered services as attorneys in the formation of a corporation to take over the business of several firms, and allege that they were retained by members of various separate firms who desired to become parties to the corporation, the actions upon the several and separate contracts of employment cannot be joined in one complaint; when the severance of such causes of action is required the plaintiff will be granted leave to amend on payment of costs: Myers v. Lederer, 117 App. Div. 27; 101 N. Y. Supp. 1088.

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a. An amendment should be allowed to a summons and complaint to state the true name of the defendant corporation; in such a case the amendment should be permitted upon the payment of costs: Ward v. Terry & Tench Construction Co., 118 App. Div. 80.

b. The plaintiff and respondent who succeeds on the defendant's appeal to the appellate division from a judgment rendered by a justice of the peace is not entitled to costs for making and serving amendments to a case, though the record contained in the justice's return was changed and abbreviated for use before the appellate division: Brick v. Favilla, 55 Misc. 38.

c. **Certiorari.**—Where the return to a writ of certiorari to review an assessment for taxation raises no issue of fact but admits the illegality of the assessment, a notice of trial is neither necessary nor proper; and no more than twenty-five dollars costs should be awarded to the relator: People ex rel. Phoenix Co. v. O'Donnel, 52 Misc. 311.

d. **Error of jury.**—Costs should not be imposed upon a party to whom a new trial is granted for error of the jury: Duffy v. City of New York, 55 Misc. 25.

§ 3252. Additional allowance to plaintiff in foreclosure, partition, etc.

e. Extra allowances cannot be made to parties defending an action for the construction of a will as such an action is not within § 3253, and such an allowance is not provided for by § 3252, and the right of a guardian *ad litem* for infant defendants in such an action to compensation, beyond taxable costs, exists only so far as funds, to which the infants are presently entitled, may be the subject of litigation, and, therefore, where the interests of the infants in the principal were contingent, the court limited the basis of the guardian's compensation to the accrued income payable to them under the decree: Hafner v. Hafner, 34 Misc. 99.

f. **Will.**—In an action under § 2653a to set aside a will on the grounds of undue influence and lack of testamentary capacity, and there was nothing from which the jury could infer either of these grounds, the court has the power and it was its duty to direct a verdict for the defendants, and further had power to award an additional allowance to the successful party: Haughian v. Conlan, 86 App. Div. 290.

§ 3253. Additional allowance to either party in difficult cases, etc.

In an action brought to foreclose a mortgage upon real property, or for the partition of real property, or in a difficult and extraordinary case (where a defense has been interposed in an action), or, except in the first and second judicial districts, in a special proceeding by certiorari to review an assessment under article eleven of chapter 908 of the laws of 1896, and the acts amending the same, the court may also, in its discretion, award to any party a further sum, as follows:

1. In an action to foreclose a mortgage, a sum not exceeding two and one-half per centum upon the sum due, or claimed to be due upon the mortgage, nor the aggregate sum of two hundred dollars.

2. In any action, or special proceeding, specified in this section, where a defense has been interposed, or in an action for the partition of real property, a sum not exceeding five per centum upon the sum recovered or claimed, or the value of the subject-matter involved.

Id., § 309; L. 1876, c. 431.

Amended by chap. 571 of 1896, chap. 61 of 1898, chap. 299 of 1889 and chap. 316 of 1903.

See rule 45 (Sup. Ct.), Restrictions upon application for additional allowance.

g. **Strictly construed.**—§ 3253 must be strictly construed, and an ordinary action against a carrier for damage to goods, which presents no unusual features, is not difficult and extraordinary within the meaning of the statute, and an extra allowance should not be granted: Frey v. New York Central & H. R. R. R. Co., 144 App. Div. 623.

h. Although an action may be difficult and extraordinary, an extra allowance of costs to the successful defendant

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is erroneous where no sum is recovered or claimed, and there is no allegation, proof or finding as to the value of the subject-matter involved: Kitching v. Brown, 180 N. Y. 414.

a. **Extraordinary.**—An action arising from an accident at a railroad crossing may be difficult and require much labor and expense, yet such an action cannot be said in any sense to be extraordinary: Smith v. Lehigh Valley R. R. Co., 77 App. Div. 47.

b. **Foreclosure.**—Under this section an extra allowance may be granted in a mortgage foreclosure action, even though the judgment is rendered upon a default; the motion may be granted under the notice of application for judgment: Badger v. Johnston, 106 App. Div. 237.

c. The amendment to § 3253 allows an extra allowance in excess of $200 in actions to foreclose a mortgage on real estate only when the case is difficult and extraordinary; the burden is on the plaintiff to show that the action was difficult and extraordinary, and when these facts do not appear, the allowance should be limited to $200: Riesgo v. Glengariffe Realty Co., 114 App. Div. 172.

d. The amendment of § 3253 in 1898 permits the court in a difficult and extraordinary action to foreclose a mortgage upon real property to grant an extra allowance of five per cent upon the sum due even though the allowance exceed the sum of $200: Long Island L. & T. Co. v. L. I. C. & N. R. R. Co., 85 App. Div. 36; 82 N. Y. Supp. 644.

e. **Trade-mark.**—In an action to restrain defendants from using certain labels on the ground that they were an infringement upon those adopted by the plaintiffs, where no damages were awarded to the plaintiffs and there was no evidence that the plaintiffs' sales had fallen off, or that their profits had been decreased or that their trade-mark had been injured, there is no basis for an additional allowance: Volger v. Force, 63 App. Div. 122; 71 N. Y. Supp. 209.

f. **Accounting.**—In an action brought by executors of a deceased partner against the surviving partner to compel an accounting of the partnership assets, the allowance is based upon the proportion of the assets to which the moving party has shown himself to be entitled and not upon the total of the assets: Slater v. Slater, 99 App. Div. 460.

g. **Libel.**—The court may require a plaintiff to pay the defendant an extra allowance as a condition of discontinuing an action of libel, where it appears that the complaint demanded judgment for $25,000 and that the questions presented were difficult and called for more than ordinary investigation in preparation for trial: Kilmer v. Evening Herald Co., 70 App. Div. 291; 75 N. Y. Supp. 243.

h. **Partition.**—It is plain that § 3253, as amended by chap. 299 of 1899, expressly authorizes an allowance to a defendant in actual partition: Crossman v. Wyckoff, 64 App. Div. 554; 72 N. Y. Supp. 337.

i. **Counterclaim.**—Where the plaintiff's claim is admitted and the only contest is over a counterclaim, the court has no authority to grant an extra allowance, although the contest upon the counterclaim rendered the case a difficult and extraordinary one: Huber v. Clark, 105 App. Div. 127.

j. An extra allowance is improperly granted in an action upon contract for the recovery of money only, to which a counterclaim was interposed, where the case was disposed of by stipulation in a manner favorable to both parties, by reason of a former judgment rendered in another state upon the same cause of action between the same parties, and they, therefore, in effect, settled the controversy without trial: Campbell v. Emslie, 188 N. Y. 509, mod'y 113 App. Div. 905.

k. **Penalties.**—In an action to recover penalties for violation of the Forest, Fish and Game Law, the extra allowance is to be based on the amount of the penalties claimed: People v. Bootman, 95 App. Div. 469; 88 N. Y. Supp. 887.

l. **Will.**—Extra allowances cannot be made to parties defending an action for the construction of a will, as such an action is not within § 3253, and such an allowance is not provided for by § 3252, and the right of the guardian *ad litem* for infant defendants in such an action to compensation, beyond taxable costs, exists only so far as funds, to which the infants are presently entitled, may be the subject of litigation, and, therefore, where the interests of the infants in the principal were contingent, the court limited the basis of the guardian's compensation to the accrued income payable to them under the decree: Hafner v. Hafner, 34 Misc. 99.

m. **Negligence.**—Where an answer in a negligence action was withdrawn upon the trial and the only question was the amount of damages, the court has no power under § 3253 to grant an additional allowance even though the case is to be treated as fully contested, and where it did not involve the examination of difficult questions of law or difficulty with reference to making the proof, an order granting such allowance must be reversed: Standard T. Co. v. N. Y. C. & H. R. R. Co., 178 N. Y. 407.

n. When negligence action is not extraordinary or difficult within the meaning of this section: Freemont v. Boston & Maine R. R. Co., 111 App. Div. 831.

o. **Summary proceeding.**—A landlord who succeeds in a summary proceeding, not involving a forcible entry or detainer, is entitled, under §§ 2250 and 3076, subd. 2, to ten dollar costs and no

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more, and is not entitled to an extra allowance under § 3253; § 3240 does not apply to a summary proceeding: Lauria v. Capobianco, 39 Misc. 441.

a. **Contract.**—In an action brought by a manager and agent to recover commissions under a contract, an additional allowance of costs was disallowed on appeal: Wright v. Fulling, 104 App. Div. 49.

b. **Objections.**—While an additional allowance may have been improperly made, yet, where it was made without objections, equitable reasons may exist why it should not be denied on appeal: Schiff v. Tamor, 104 App. Div. 42; 93 N. Y. Supp. 853.

c. **Referee.**—Where a referee to whom an action against an executor has been referred, reports in favor of the plaintiff, with costs, and certifies that in his opinion the case is a difficult and extraordinary one within the meaning of § 3253, and that the plaintiff is entitled to an additional allowance, and upon the application for the additional allowance at special term, the defendant does not raise the objection that the referee made no certificate under § 1836 to the effect that payment of the claim had been unreasonably resisted or neglected by the executor, such an objection cannot be raised upon an appeal from the order granting the extra allowance, but it will be assumed that the referee granted the necessary certificate: Weeks v. Coe, 76 App. Div. 310.

d. **New trial.**—Where a new trial is granted on the ground of surprise, addressed to the discretion of the court with power to impose terms, it should not be granted upon terms providing for an extra allowance of five per cent upon the amount claimed: Simpson v. Hefter, 46 Misc. 67.

e. **Fourth Department.**—It is the policy of the courts of the fourth judicial department to refrain from granting an extra allowance of costs except in cases which is obviously "difficult and extraordinary" which an action brought by a receiver to have a chattel mortgage declared void is not: Swan v. Stiles, 94 App. Div. 117; 87 N. Y. Supp. 1089.

f. **Verdict set aside.**—When the verdict upon which an additional allowance is based is set aside, the allowance fails with it: Meeker v. Remington & Son Co., 62 App. Div. 476; 70 N. Y. Supp. 1072.

g. **Extraordinary action.**—Extra allowance affirmed on the ground that the question as to whether the action should be regarded as difficult and extraordinary was addressed to the discretion of the trial court: Rowe v. Granger, 118 App. Div. 459.

h. Although a case presents close questions for determination, if it is neither difficult nor extraordinary, an extra allowance should not be granted: Walker v. Newton Falls Paper Co., 111 App. Div. 19.

i. **Order.**—An entry of an order granting an extra allowance on the clerk's minutes is sufficient without the entry of a formal order signed by the judge, but such order cannot be reviewed except upon appeal therefrom: Harris v. Baltimore Machine and Elevator Co., 112 App. Div. 389.

j. **Commissioners.** — Commissioners in condemnation proceedings are not entitled to an extra allowance in a proceeding to open a street: Matter of the City of New York, 49 Misc. 609.

k. When an additional allowance in an action by an agent to recover commissions of his principal will be denied: Brown v. Retsof Mining Co., 109 App. Div. 150; 95 N. Y. Supp. 815.

l. **Water rights.**—Where the right of a plaintiff to have the unobstructed flow of a stream is at issue, and this is shown by affidavits to be of a certain value, the value of the subject matter is sufficiently proven to warrant an extra allowance: Henderson Estate Co. v. Carroll Electric Co., 113 App. Div. 775.

m. **Injunction.**—When, in an action by a city to restrain the defendant from putting in fixtures not fireproof, the defendant is successful in vacating the temporary injunction upon the pleadings, no extra allowance is proper, as the case is not difficult nor extraordinary within the meaning of this section: City of New York v. Stewart Realty Co., 113 App. Div. 50.

n. **Questions of fact.**—Although there are no difficult questions of law involved, an extra allowance to the defendant is proper when difficult questions of fact render the case difficult and extraordinary within the meaning of the statute: Am. Fruit Product Co. v. Ward, 113 App. Div. 319.

o. **Discontinuance.**—The payment of an extra allowance should not be imposed on the plaintiff as a condition for discontinuing an action for an accounting when no specific amount is demanded by the plaintiff, for there is no basis on which the court can compute the value of the subject matter involved: Weidenfeld v. Byrne, 113 App. Div. 410.

p. **Vendor's lien.**—In an action to foreclose a vendor's lien, an extra allowance should be limited to five per cent upon the sum sought to be recovered and should not be figured upon the agreed price: Occidental Realty Co. v. Palmer, 117 App. Div. 505.

q. **One bill of costs.**—Only one bill of costs should be allowed and should be divided among all the defendants in an action whose demurrers are sustained: Gause v. Boldt, 115 App. Div. 897, aff'd 188 N. Y. 546; 100 N. Y. Supp. 1117.

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a. **Judgment creditor's action.**—In a judgment creditor's action in affirmance of a deed of trust for the benefit of creditors, the court may, in its discretion, grant an extra allowance: Nicholas v. Lord, 118 App. Div. 800.

§ 3256. Disbursements to be included in bill of costs.

b. In the absence of proof showing any peculiar necessity for personal service of an answer, an amended answer and order upon the plaintiff's attorney, disbursements for such services should not be allowed: Fuller Buggy Co. v. Waldron, 49 Misc. 278.

c. Where plaintiff's attorney makes an affidavit that a copy of the stenographer's minutes, procured after the trial, but before the decision was rendered or briefs were submitted, was for the purpose of preparing amendments to the case on appeal, he is entitled to tax the expense thereof in his bill of costs: Heim v. Schwoerer, 51 Misc. 96.

d. When a defendant, as a condition for leave to amend his answer, has been ordered to pay plaintiff's costs and disbursements to date, and has paid the same, the plaintiff, though successful on the trial, is not entitled again to tax the disbursements paid, nor is he entitled to tax the costs of prior appeals which have been paid, but he is entitled to tax the costs before and after notice of trial, with term fees and costs of all subsequent proceedings: Grant v. Pratt, 110 App. Div. 149.

e. **Minutes.**—Disbursements of a respondent in procuring the stenographer's minutes in order to prepare amendments to a proposed case are properly taxed on affirmance of the judgment, although he did not first request the loan of the appellant's copy. If the appellant would save himself from liability for such disbursements he must tender the minutes to the respondent: Starkweather v. Sundstrom, 113 App. Div. 401.

f. Only one trial fee can be taxed by the plaintiffs where they are nonsuited on the trial, the decision reversed by the appellate division, the latter decision affirmed by the court of appeals and judgment absolute there given the plaintiffs on a stipulation to that effect. In such a case a subsequent assessment of damages is not a trial, but clerk's, jurors' and witnesses' fees are taxable thereon: Young v. Syracuse B. & N. Y. R. R. Co., 35 Misc. 114.

g. **Transfer tax.**—A decree of a surrogate vacating and setting aside an assessment of a transfer tax made by him is a final order in a special proceeding, and costs in an appeal therefrom are governed by the provisions of the section at the same rates as upon an appeal from a judgment, and the order the appellate court need not specify the items or rates, but they should be fixed on a taxation thereof by the surrogate, while such order need not specify that disbursements are allowed as they follow the allowance of costs by the provisions of § 3256. Costs upon an appeal from an interlocutory order are controlled by § 3256 and § 3251, subd. 3: Matter of Babcock, 86 App. Div. 563.

h. **Stenographer's minutes.**—The expense of a daily transcript of the stenographer's minutes of a trial, not ordered by the court but by the prisoner's counsel alone, must be disallowed: People ex rel. Levy v. Grout, 37 Misc. 430; 75 N. Y. Supp. 290.

i. When stenographer's fees will not be taxed against a party who refused to stipulate that a stenographer should be employed on a reference: Gallagher v. Baird, 60 App. Div. 29; 69 N. Y. Supp. 676.

j. **Witness fees.**—The plaintiff is entitled to tax as disbursements the witness fees of special excise agents: Culinan v. Union Surety Co., 51 Misc. 643.

§ 3262. Costs; how taxed; allowances, etc.; how computed.

k. When a defendant, as a condition for leave to amend his answer, has been ordered to pay plaintiff's costs and disbursements to date, and has paid the same, the plaintiff, though successful on the trial, is not entitled again to tax the disbursements paid, nor is he entitled to tax the costs of prior appeals which have been paid, but he is entitled to tax the costs before and after notice of trial, with term fees and costs of all subsequent proceedings: Grant v. Pratt, 110 App. Div. 149.

l. **Interlocutory judgment.**—When the appellate division has modified an interlocutory judgment, the entry thereof in the court below for the purpose of taxing costs is a mere formality and there is no authority in the attorneys for either party or in the county clerk to change or modify the order of the appellate division; when an interlocutory judgment requiring the severance of actions has been modified by the appellate division by granting leave to amend, the right to amend is effective without further action on the part of the clerk of the court below: Myers v. Lederer, 119 App. Div. 332.

m. **Appeal.**—A defendant, by serving a notice of argument of an appeal from an order denying his motion to retax his costs on an appeal, waives a stay because of plaintiff's non-payment of costs of motion; where, upon the entry of an interlocutory judgment overruling a demurrer, the defeated party is allowed to plead over on payment of costs, the suc-

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cessful party is entitled to tax costs after notice and before trial and a trial fee and disbursements, but not costs before notice of trial. Costs subsequently imposed upon a motion made for a reargument of the appeal are improperly taxed, as they form no part of the costs referred to in the order affirming the judgment. Costs which were or should have been taxed on the entry of the interlocutory judgment in the court below are not properly taxable under the order of the appellate term. An item of costs for service of the summons and complaint being taxable upon entry of the final judgment, is not properly taxable under the order of the appellate term, and should have been disallowed: Hill v. Muller, 53 Misc. 262.

§ 3264. Retaxation.

a. Under § 3254, a motion by the defendant made twelve days after entry of judgment to retax costs is promptly made and should have its merits considered and passed on, although the defendant had taken an appeal from the judgment and filed and served an undertaking: McDermott v. Yvelin, 103 App. Div. 418.

b. **Without notice.**—Where costs are taxed without notice and notice of retaxation is immediately given and the clerk dismisses the retaxation because the adverse party did not appear, he cannot have a retaxation under § 3264, and his remedy to review the taxation is by a motion for a new taxation made under § 3265: Talcott v. Jonasson, 43 Misc. 372.

c. **City court of New York.**—The time in which an appeal is required to be brought from a judgment of the city court of the city of New York is not affected by a subsequent motion to review the taxation of costs and order reducing the amount of costs taxed: Ost v. Salmanowitz, 54 Misc. 547.

§ 3265. Review of taxation.

d. Where costs are taxed without notice and notice of retaxation is immediately given and the clerk dismisses the retaxation because the adverse party did not appear, he cannot have a retaxation under § 3264, and his remedy to review the taxation is by a motion for a new taxation made under § 3265: Talcott v. Jonasson, 43 Misc. 372.

e. When an order without a caption may be regarded as an order of the county court and not of the county judge; the latter does not have authority to make the order required by this section: Lawson v. Speer, 91 App. Div. 411; 86 N. Y. Supp. 915.

f. Under § 3265 only the items of a bill of costs objected to before the taxing officer can be called in question upon a review of the taxation: Fourteenth St. Bank v. Strauss, 54 Misc. 588.

g. When a defendant, as a condition for leave to amend his answer, has been ordered to pay plaintiff's costs and disbursements to date, and has paid the same, the plaintiff, though successful on the trial, is not entitled again to tax the disbursements paid, nor is he entitled to tax the costs of prior appeals which have been paid, but he is entitled to tax the costs before and after notice of trial, with term fees and costs of all subsequent proceedings: Grant v. Pratt, 110 App. Div. 149.

§ 3267. Affidavit respecting disbursements.

See § 3262, ante, Costs; how taxed. Allowances, etc.; how computed.

§ 3268. When defendant may require security for costs.

The defendant, in an action brought in a court of record, may require security for costs to be given, as prescribed in this title, where the plaintiff was, when the action was commenced, either

1. A person residing without the state; or if the action is brought in a county court, except in the counties of Kings, Queens and Richmond, or in the city court of the city of New York, the city court of Yonkers or the justice's court of the city of Albany, residing without the city or county, as the case may be, wherein the court is located; or
2. A foreign corporation; or
3. A person imprisoned under execution for a crime; or
4. The official assignee of a person so imprisoned; the official assignee

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or official trustee of a debtor; or an assignee in bankruptcy; where the action is brought upon a cause of action, arising before the assignment, the appointment of the trustee, or the adjudication in bankruptcy.

2 R. S. 620 (Part 3, c. 10, tit. 2), § 1.

Amended by chap. 179 of 1891, and chap. 524 of 1904.

See § 1360, ante, Certain sections not to apply to New York city court; who a non-resident.

a. **Residence.**—Where the plaintiff was domiciled in this state at the time of the commencement of the action and for a considerable time prior thereto, the fact that for a few weeks, which included the day when the action was commenced, she had been with a relative in New Jersey and then returned to this state, does not constitute her "a person residing without the state" within the meaning of § 3268, subd. 1: Taylor v. Norris, 104 App. Div. 21.

b. **Imprisoned for crime.**—On a motion, under § 3268, subd. 3, to require the plaintiff to give security for costs on the ground that he was imprisoned under execution for a crime, where it appears that the motion was delayed for two years after the action was commenced, it is discretionary with the special term to grant or deny the motion and the appellate division will not interfere with the exercise of such discretion: Gibbons v. Bush Company, Limited, 98 App. Div. 283.

c. **Bankruptcy.**—In an action brought by a trustee in bankruptcy to set aside assignments by which certain creditors were given an unlawful preference, the defendants are not entitled, as a matter of right, under § 3268, to require the plaintiff to file security for costs, as that section only applies where the cause of action existed prior to the adjudication in bankruptcy; the court may, however, under § 3271 of the Code of Civil Procedure, in its discretion, require the trustee to give security for costs: Kelley v. Kremer, 74 App. Div. 456; 77 N. Y. Supp. 515.

d. "A person" who is a non-resident of this state may, as a matter of right, be compelled to give security for costs; the right to compel a trustee in bankruptcy, whether resident or non-resident, to give security for costs rests in the discretion of the court under § 3271, unless the cause of action arose before the adjudication in bankruptcy: Cole v. Manson, 42 Misc. 149; 85 N. Y. Supp. 1011.

e. A trustee in bankruptcy may be required to give security for costs under § 3268, subd. 4, even though the claim on which the action is based arose before the trustee was appointed: Joseph v. Makley, 73 App. Div. 156; 76 N. Y. Supp. 669.

f. An order requiring security for costs is properly vacated, as § 3268 does not apply to an action by a trustee in bankruptcy to set aside transfers made by the bankrupt: Schreier v. Hogan, 70 App. Div. 2; 74 N. Y. Supp. 1051.

g. In an action by a trustee in bankruptcy, the defendant if not guilty of *laches* is entitled as a matter of right to require security for costs under § 3268, even though the cause of action arose before the adjudication in bankruptcy; *it seems*, if the application is made under § 3271, the granting of such application is discretionary with the court: Joseph v. Raff, 75 App. Div. 447; 78 N. Y. Supp. 310; 33 Civ. Pro. R. 173.

h. Where it is assumed, in an action by a trustee in bankruptcy, that the cause of action did not accrue prior to the trustee's appointment, the defendant is not entitled as a matter of right to security for costs under § 3268, but the plaintiff may, in the discretion of the court, be required to give such security under § 3271; if made under § 3268, the application may be made *ex parte* to a justice out of court; but if it is made under § 3271, it must be made to the court upon notice; where the order required the plaintiff to give security under § 3268, and was granted *ex parte*, but the motion should have been made to the court upon notice under § 3271, the court has no power to treat the motion to vacate as an original application under § 3271, and to refuse to vacate the order provided he determines in his discretion that the case is one in which he should require security under § 3271; Kronfeld v. Liebman, 78 App. Div. 437; 79 N. Y. Supp. 1083.

i. An order requiring the plaintiff who has become bankrupt after the joinder of issues to give security for costs, should not be vacated on the ground of laches by the defendant in discovering the bankruptcy: Donnelly v. Third Ave. R. R. Co., 112 App. Div. 648.

j. **Infant.**—An infant suing as a poor person should not be required to give security for costs: Gallagher v. G. W., S. F. & C. L. Traction Co., 39 Misc. 637; 80 N. Y. Supp. 606.

k. § 3268 of the Code, before subd. 5 was stricken therefrom by chap. 524 of 1904, permitted a defendant to require security for costs from an infant whose guardian *ad litem* had not given security and was not unconstitutional: Venanzio v. Weir, 64 App. Div. 483.

l. **Foreign corporation.**—Where a foreign corporation, plaintiff in an action of replevin, has given the undertaking required by § 1699, it cannot be compelled to give security for costs un-

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der § 3268: Vulcanite Cement Co. v. Williams, 46 Misc. 405.

a. **Affidavit.**—An affidavit to obtain an order requiring the plaintiff in an action brought in the city court of New York to give security for costs under § 3268, which does not allege that the plaintiff has no office for the transaction of business either in the Bronx or in the borough of Manhattan is insufficient: Pelz v. Roth, 46 Misc. 419.

b. **Amended complaint.**—The service by a non-resident plaintiff, who originally brought his action against the defendant "as substituted trustee" of an amended summons and complaint, from which the words quoted were omitted wherever they appeared in the original complaint, so far changes the proceedings as to entitle the defendant to move for an order requiring the plaintiff to give security for costs, although such defendant has answered the original complaint without making any motion for security: Boyd v. United States Mortgage and Trust Co., 90 App. Div. 32; 85 N. Y. Supp. 588.

c. **Administrator.**—In an action by an administrator the plaintiff is not required absolutely to give security for costs under § 3268; it is a matter of discretion with the court in regard to such security under the provisions of § 3271: Clarendon v. Milliken Bros., 116 App. Div. 930.

d. **Non-resident plaintiff.**—In the first and second judicial departments, a defendant's absolute right to compel a non-resident plaintiff to give security for costs, pursuant to § 3268, is waived unless asserted before answer; and a motion made after service of an answer, being addressed to the discretion of the court, some fact must be shown to excuse the delay in making it: Knaggs v. Easton, 54 Misc. 51.

e. A defendant in an action brought by non-resident plaintiffs is entitled to security for costs as a matter of right under § 3268: Myers v. Stephens, 52 Misc. 632.

f. It seems, that when it is conceded that the plaintiff is a non-resident and has no property within the state, the defendant's right to security for costs is absolute under § 3268; in any event, the court, in the exercise of its discretion, under § 3271, should order security for costs under such circumstances: McKeaggan v. Post et al., 117 App. Div. 129.

g. An order requiring a non-resident plaintiff to give security for costs should be vacated on motion where it is shown that an order permitting the plaintiff to sue as a poor person, had been granted before the commencement of the action. The order permitting suit as a poor person can only be vacated upon a motion regularly made for that purpose, and is not invalidated by the failure of the plaintiff to serve a copy thereof upon the defendant: Buccolo v. New York Life Insurance Co., 117 App. Div. 423.

h. When it is established without dispute that the plaintiff in an action based on personal injuries resulting in death, as well as all the next of kin of the deceased, are residents of another state, and that the decedent was unmarried and left no children or children of deceased children, and that the only asset in this state is the cause of action against the defendant, the plaintiff should be required to give security for costs: Meaney v. Post & McCord, 117 App. Div. 563.

i. **Waiver.**—A defendant waives his absolute right to require a non-resident plaintiff to give security for costs unless the motion, therefor be made before answer. After the defendant has answered, the granting of security for costs is in the discretion of the court, and the burden is on the defendant to excuse his failure to apply for security before answer: Fabrik Schiller'scher Verschluesse v. Nease, 117 App. Div. 379.

§ 3269. Id.; after action commenced.

See § 1360, ante, Certain sections rot to apply to New York city court; who a non-resident.

j. An order requiring the plaintiff who has become bankrupt after the joinder of issues to give security for costs, should not be vacated on the ground of laches by the defendant in discovering the bankruptcy: Donnelly v. Third Ave. R. R. Co., 112 App. Div. 648.

§ 3271. Id.; in action by and against executors, etc.

k. **Discretion.**—A motion under § 3271, to require the plaintiff to give security for costs, on the ground that the defendant is used as executor, is addressed to the discretion of the court, and may be denied though it appears that the defendant would be unable to collect his costs if he should be successful: Cowen v. Rouss, 49 Misc. 338.

l. The discretion to require costs under § 3271 is lodged in the appellate division as well as in the special term: Hagar v. Radam Microbe Killer Co., 119 App. Div. 839.

m. It seems, that when it is conceded that the plaintiff is a non-resident and has no property within the state, the defendant's right to security for costs is absolute under § 3268; in any event the court, in the exercise of its discretion, under § 3271, should order security for costs under such circumstances: McKeaggan v. Post et al., 117 App. Div. 129.

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a. The right to compel a trustee in bankruptcy, whether a resident or non-resident, to give security for costs, rests in the discretion of the court, under § 3271, unless the cause of action arose before the adjudication in bankruptcy: Cole v. Manson, 42 Misc. 149.

b. An application made by a defendant to compel the plaintiff, an administrator appointed in another state, to give security for costs, is controlled by § 3271 and is addressed to the discretion of the court: Pelkey v. Town of Saranac, 67 App. Div. 337; 73 N. Y. Supp. 493.

c. **Bankruptcy.**—Where it is assumed in an action by a trustee in bankruptcy, that the cause of action did not accrue prior to the trustee's appointment, the defendant is not entitled as a matter of right to security for costs, under § 3268, but the plaintiff may, in the discretion of the court, be required to give such security under § 3271; if made under § 3268 the application may be made *ex parte* to a justice out of court; but if it is made under § 3271 it must be made to the court upon notice; where the order required the plaintiff to give security, under § 3268, and was granted *ex parte*, but the motion should have been made to the court upon notice under § 3271, the court has no power to treat the motion to vacate as an original application, under § 3271, and to refuse to vacate the order provided he determines in his discretion that the case is one in which he should require security under § 3271: Kronfeld v. Liebman, 78 App. Div. 437; 79 N. Y. Supp. 1083.

d. In an action brought by a trustee in bankruptcy to set aside assignments by which certain creditors were given an

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§ 3272. Order to give security.

h. Where a non-resident plaintiff has been required to give security for costs under this section, and an appeal is pending from a judgment dismissing

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§ 3273. Requisites of undertaking.

See rule 5 (Sup. Ct.), An attorney or counselor ca
taking or bond.

See § 810 et seq., ante, General provisions relatin

§ 3275. Justification of sureties. Allowa

See rule 5 (Sup. Ct.), Justification of sureties.

See §§ 578-580, ante, Justification of sureties o
an order for arrest.

§ 3276. Order to give additional security

i. Where the defendant, in an action brought by a non-resident, makes two motions, one to require plaintiff to give security for costs and the other for additional security, but abandons both of such motions upon the plaintiff voluntarily delivering in each case an undertaking for costs, the court, never having ordered plaintiff to give security for costs, has no jurisdiction to direct plaintiff to file additional

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given in compliance with an order and not where it was voluntarily given after the service of a notice of motion therefor: Dunk v. Dunk, 177 N. Y. 264, aff'g 88 App. Div. 297; 85 N. Y. Supp. 25.

a. The additional security contemplated by this section is not limited to actions in which no judgment has been rendered: Bender v. Paulus, 109 App. Div. 148.

§ 3282. Penalty for extortion.

See Penal Code, § 557, Violation of this section is a misdemeanor.

§ 3287. Fees of certain officers to be taxed upon demand.

See § 3307, post, Sheriff's fees.

b. The appellate division will not review an order made, under § 3287, at a special term and stated in the record to have been entered in the clerk's office as that section requires the fees to be taxed by a justice of the supreme court, and *quaere*, where an order made pursuant to the provisions of § 2287, taxing the fees of a register of the county for making a search, is appealable to the appellate division: Matter of Howe, 66 App. Div. 7.

§ 3296. Referee's fees generally.

c. § 3296, relative to a referee's fees, does not contemplate that the referee is to fix his compensation, or that the parties to an action which is proceeding before a referee are to be placed in a position of either having to grant or refuse an application by the referee to be allowed fees in excess of those fixed; when a referee requests counsel to agree that his fees be fixed at a rate higher than that fixed by § 3296, and one counsel refuses and believes that the referee would be prejudiced against him, he is entitled to have his action tried before another referee: Smith v. Dunn, 94 App. Div. 429.

d. **Stipulation.**—A stipulation in the following form, "It is stipulated that the referee shall not be confined to the statutory compensation, but may charge and be paid a reasonable compensation for the services performed," omits to fix the compensation as required by § 3296, and the compensation of such referee is at the rate of ten dollars per day: N. Y. M. S. & L. Assn. v. Westchester F. Ins. Co., 98 App. Div. 285.

e. In the absence of a stipulation of the parties, a referee in a special proceeding is only entitled to ten dollars for each calendar day spent in the business of the reference, and the fact that the hearings were protracted and held at unusual hours and places cannot entitle him to more: Matter of Bieber, 36 Misc. 341; 73 N. Y. Supp. 552.

f. Where a cause is referred by stipulation, each of the parties is liable for the fees of the referee: Keeler v. Bell, 48 Misc. 427.

g. **Stenographer.**—When a referee accepts a smaller sum for his fees and the stenographer's fees, he cannot reduce the fees of such stenographer without the latter's consent: Poucher v. Faber, 46 Misc. 596.

h. **Executors.**—The court has no power to compel executors to take up a referee's report on an accounting: Morrow v. McMahon, 71 App. Div. 171; 75 N. Y. Supp. 534.

i. **Motion costs.**—Where a reference was necessary in order to enable a senior lienor to establish his claim, the court should charge a junior lienor, who intervened and contested, with motion costs and only one-half of the referee's fees: American Mortgage Co. v. Butler, 36 Misc. 253; 73 N. Y. Supp. 334.

j. **Misconduct.**—A referee's report will be set aside for misconduct where he requested the party against whom he subsequently decided, to stipulate to allow him double the statutory fees and has required the stenographer to divide his fees with him: Dickinson v. Earle, 63 App. Div. 134; 71 N. Y. Supp. 227.

§ 3297. Id.; upon sales of real property.

k. The fees of a referee to sell in an action of foreclosure in the county of New York are governed by the Consolidation Act, and he is also entitled to commissions such as are fixed by § 3297, but his total fees and commissions cannot exceed fifty dollars unless the mortgaged property sold for ten thousand dollars or upwards: Harrington v. Bayles, 40 Misc. 388; 33 Civ. Pro. R. 363; 82 N. Y. Supp. 379.

l. **Foreclosure.**—Where the plaintiff in an action to foreclose a mortgage bids in the premises, and the amount of his bid is applied upon the judgment without being paid to the referee, the commissions of the referee are, under § 3297, the sum of ten dollars; § 3307, subd. 6, does not authorize a referee, appointed to sell real property in an action to foreclose a mortgage, to charge fifty cents for receiving the judgment of sale: Kant v. Bergman, 97 App. Div. 118; 89 N. Y. Supp. 593.

m. **Price of property.**—The fees of a referee appointed in a judgment of partition, when the real property is sold, are to be computed upon the price the property brings: Duffy v. Miller, 52 Misc. 11.

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§ 3305. Certain provisions not affected by the last section.

a. The fixing of salaries to the offices of sheriff, register and county clerk of Kings county in lieu of fees by chaps. 704, 705 and 706 of the laws of 1901, considered: McGrath v. Grout, 171 N. Y. 7.

§ 3307. Sheriff's fees.

A sheriff is entitled, for the services specified in this section, to the following fees:

1. For serving a summons, with or without either a copy of the complaint, or a notice specified in section 419 or section 423 of this act; or for serving or executing an order of arrest, or any other mandate, for the service or execution of which no other fee is specially prescribed by law, except a subpœna, one dollar for each person served or as to whom it is executed; and for necessary traveling to serve or execute the same, six cents for each mile traveled, going and returning; the traveling fees to be computed from the court house of the county; or, if there are two or more court houses, from that nearest to the place of service or execution. But where two or more mandates are delivered to a sheriff, to be served upon or executed against one person, at one time, in one action or special proceeding; or where a mandate is served upon or executed against two or more persons, in one action or special proceeding, and in the course of one journey; the sheriff is entitled, in all, to six cents only, for each mile traveled.

2. For levying a warrant of attachment, against the property of a defendant, issued as prescribed in title third of chapter seventh of this act, or for executing a requisition to replevy one or more chattels, one dollar; and, also, such additional compensation, for his trouble and expenses, in taking possession of and preserving the property, as the judge, issuing the warrant, or in case of a replevin, as the court or a judge thereof allows, and the judge or court may make an order requiring the party liable therefor to pay the same to the sheriff. For making and filing a description of real property, or an inventory of personal property attached, twenty-five cents for each folio; for each necessary copy thereof, twelve cents for each folio; together with such compensation to the appraisers, as the judge issuing the warrant allows, not exceeding two dollars to each appraiser, for each day actually employed. For advertising, during the pendency of the action, personal property attached, the same fees as are allowed to a sheriff for advertising personal property for sale, by virtue of an execution. If the action is settled, either before or after judgment, the sheriff is entitled to poundage, upon the value of the property attached, not exceeding the sum at which the settlement is made.

3. For a copy, necessarily made by him, of a summons or other mandate, or of a complaint, affidavit, or other paper served by him, where no fee therefor is specially prescribed by law, twelve cents for each folio.

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4. For notifying jurors to attend a trial term of a court of record, fifty cents for each cause placed upon the calendar for trial by a jury, to be paid by the party first putting the cause on the calendar for that term. But the sheriff is not entitled to more than one dollar and fifty cents for calendar fees in one action. The clerk shall not put a cause upon the calendar, for trial by jury, until the fee specified in this subdivision is paid to him for the use of the sheriff. And where the cause is tried at a subsequent term without a new note of issue as prescribed in section 977 of this act, the party moving the trial must pay to the clerk for the use of the sheriff the calendar fee or fees remaining unpaid. No sheriff who receives an annual salary in whole or in part for his services shall be entitled to the fees provided by this subdivision, and in all counties where the sheriff receives such annual salary, the clerk shall place all causes upon the calendar for trial without the payment or collection of any fee therefor.

5. For notifying jurors drawn to attend upon a writ of inquiry, or to try the validity of a claim to personal property, seized by virtue of a warrant of attachment or an execution, or in obedience to a precept issued by commissioners appointed to inquire concerning the incompetency of a person to manage himself or his affairs, in consequence of idiocy, lunacy, or habitual drunkenness, or in any case not provided for in the last preceding subdivision of this section, including the making and return of the inquisition when required, for each juror notified, twenty-five cents. For attending a jury, when required, in such a case, two dollars.

6. For receiving an execution against property, entering it in his books, searching for property, and postage on the return, when made through the post-office, fifty cents. If required by the sheriff, that fee, together with his fee for returning the execution, must be paid, by the person in whose behalf the execution is issued, at the time when it is delivered to the sheriff, who is not bound to execute it unless the fee is so paid. For mileage upon an execution, for each mile, going only, ten cents; to be computed as prescribed in subdivision first of this section.

7. For collecting money by virtue of an execution, a warrant of attachment, or an attachment for the payment of money in an action or a special proceeding; or by virtue of a warrant for the collection of money, issued by the comptroller, or by a county treasurer; in any county except New York, Kings, or Westchester, three per centum upon the sum collected, not exceeding two hundred and fifty dollars, and two per centum upon the residue of the sum collected; and in either of the counties of New York, Kings, or Westchester, two and one-half per centum upon the sum collected, not exceeding two hundred and fifty dollars, and one and one-quarter per centum upon the residue of the sum collected; and also, where an execution is stayed after a levy, by order of the court or otherwise, or where a levy is upon a live animal, or speedily perishable

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property, such additional compensation, for his trouble and expenses in taking care of and preserving the property, as the court or a judge thereof allows. Where a settlement is made after a levy by virtue of an execution, the sheriff is entitled to poundage upon the value of the property levied upon, not exceeding the sum at which the settlement is made, and to the additional compensation, if any, provided for in this subdivision.

8. For advertising real or personal property for sale, by virtue of an execution, warrant of attachment, or other warrant specified in the last preceding subdivision, two dollars, unless it is stayed or settled before sale; and in that case, one dollar.

9. For making duplicate certificates of the sale of real property, by virtue of an execution, twenty-five cents for each folio. For drawing and executing a conveyance, upon a sale of real property, two dollars, to be paid by the grantee. The sheriff is also entitled to the printer's fees, as prescribed by law, paid by him for the publication, not more than six weeks, of a notice of the sale of real property, and he may require the party directing the sale to advance the printer's fees, in which case he must repay the same out of the proceeds. Where the notice is published more than six weeks, or the sale is postponed, the expense of continuing the publication, or of publishing the notice of postponement, must be paid by the person requesting it. Where two or more executions against the property of one judgment debtor are in the hands of the sheriff, at the time when the property is first advertised, the sheriff is entitled to printer's fees upon only one execution, and he must elect upon which execution he will receive the same.

10. For returning any mandate, which he is required by law to return, twelve cents. For a certified copy of an execution, and of the return of satisfaction thereupon, delivered as prescribed in section 1266 of this act, twenty-five cents.

11. For posting and publishing the notice of sale, selling, and conveying real property, in pursuance of a direction contained in a judgment, the like fees, as for the same services upon the sale of real property by virtue of an execution; but where real property is sold under a judgment in an action to foreclose a mortgage, the sheriff's entire compensation cannot exceed fifty dollars.

12. For taking a bond for the liberties of the jail, one dollar. For taking any other bond, or any undertaking, which he is authorized to take, fifty cents. For a certified copy of such a bond or undertaking, twenty-five cents.

13. For executing any mandate, requiring him to put a person into possession of real property, other than a warrant specified in subdivision eighteenth of this section, and removing the person in possession, one dollar and fifty cents, and the same travel fees as upon the service of a summons.

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14. For each person committed to or discharged from prison, in an action or a special proceeding, one dollar, to be paid by the person at whose instance he is imprisoned. For attending before an officer, for the purpose of surrendering a prisoner, or receiving into custody a prisoner surrendered, in exoneration of his bail, including all his services upon such a surrender or receipt, one dollar.

15. For attending a view, two dollars for each day, and for traveling, going and returning, eight cents for each mile.

16. For bringing up a prisoner, upon a writ of habeas corpus to inquire into the cause of detention, one dollar and fifty cents; and for traveling to and from the jail, twelve cents for each mile. For bringing up a prisoner, upon any other writ of habeas corpus, the same fees; and for attending the court or judge thereupon, one dollar for each day. The sheriff is entitled, in addition to the sums specified in this subdivision, to his actual and necessary expenses.

17. For any services, which may be rendered by a constable, other than those specially provided for in this section, the same fees, as are allowed by law to a constable for those services.

18. For executing a warrant to remove any person from lands belonging to the people of the state, or to Indians, such a sum as the comptroller audits, and certifies to be a reasonable compensation.

19. For giving notice of any general or special election, to all the officers, to whom he is required by law to give such a notice, one dollar for each town or ward, in addition to the expense of publishing the notices, as required by law; payable from the county treasury.

20. For notifying constables to attend a court, fifty cents for each constable notified.

21. For attending a term of a court, which he is required by law to attend, for each day, three dollars.

From chap. 415 of 1871, § 1 (9 Edm. 87), as amended by chap. 26 of 1872; 2 R. S. 644, § 38, and subsequent sections; also chap. 225 of 1850, § 1 (4 Edm. 698).

Subd. 2 amended by chap. 462 of 1884, and subd. 4 amended by chap. 407 of 1894 and chap. 253 of 1907.

The act of 1907 amending subd. 4 goes into effect Sept. 1, 1907, and provides that "this act shall not affect the right of any sheriff now in office to receive the fees provided for herein until the end of his term of office, provided he is now lawfully entitled to receive the same."

a. Although the salary of the sheriff of Ontario is fixed by chap. 380 of 1902, yet he is entitled to collect and retain for his own, all fees in civil actions and proceedings as specified in § 3307, subd. 4: People ex rel. Flynn v. Leech, 43 Misc. 435; 34 Civ. Pro. R. 20.

b. **Foreclosure.**—Where the plaintiff in an action to foreclose a mortgage bids in the premises, and the amount of his bid is applied upon the judgment without being paid to the referee, the commissions of the referee are under § 3297 the sum of ten dollars; § 3307, subd. 6, does not authorize a referee, appointed to sell real property in an action to foreclose a mortgage, to charge fifty cents for receiving the judgment of sale: Kant v. Bergman, 97 App. Div. 118.

c. The fees of a referee appointed to sell in an action of foreclosure triable in the county of New York, are governed solely by § 1088 of the Consolidation Act, chap. 410 of 1882, and not by § 3307 of the Code of Civil Procedure; the referee is also entitled to commissions and these are fixed by § 3297: Harring-

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ton v. Bayles, 40 Misc. 388; 82 N. Y. Supp. 379.

a. **Attachment.**—Under § 655, the rights of the sheriff to collect and receive debts attached by him do not survive the attachment itself and cannot be invoked after the attachment is discharged, and though upon the discharge of an attachment the sheriff may retain property "levied upon" until his fees and poundage are paid, yet such right exists only as to property actually reduced to possession by the sheriff and does not furnish grounds for an action for poundage against one indebted to an attachment debtor when the sum due has not been turned over to the sheriff; after an attachment is vacated such debtor may pay to the former attachment debtor: O'Brien v. Manhattan Railway Co., 45 Misc. 643.

b. After an attachment has been discharged, and the attached property returned to the defendant, the court has no authority under § 709 to order either party to the action to pay the sheriff's fees: Miller v. Miller, 108 App. Div. 310; 95 N. Y. Supp. 763.

c. **Bankruptcy.**—A sheriff should not be required to deliver attached property to the trustee in bankruptcy, except upon payment of his charges for preserving the property up to the time of the trustee's appointment and also his legal fees: Wilkinson v. Raymond, 80 App. Div. 378; 81 N. Y. Supp. 82.

§ 3308. The last section qualified.

d. Right of sheriff of New York county to recover from the city the costs of an unsuccessful appeal in an action to collect fees: Dos Passos v. City of New York, 45 Misc. 394.

§ 3311. Coroner's fees.

See § 83 et seq., ante, Stenographer's fees generally.

§ 3312. Compensation of deputy sheriffs and constables attending courts.

A constable or a deputy sheriff is entitled, for attending a sitting of a court of record, pursuant to a notice from the sheriff, to the following fees: For each day's actual attendance, in any county in the state, two dollars, except that in the counties of Albany, Wyoming, and Genesee the compensation shall be three dollars, and mileage as allowed by law to trial jurors in courts of record, and except also in the county of Westchester, where the compensation shall be three dollars per day, and except also that in the counties of Orange, Cayuga, Wayne, Orleans and Ontario, the board of supervisors may allow to such constables and deputy sheriffs for attending a sitting of a court of record pursuant to such notice not exceeding three dollars per day and mileage as aforesaid. Those fees must be paid by the county treasurer, upon the production of the certificate of the clerk, stating the number of days that the constable or deputy sheriff attended. But the provisions of this section shall not be applicable to the counties of Kings, New York and Erie. All other acts or section of acts conflicting herewith are hereby repealed.

2 R. S. 647, § 40; chap. 427 of 1860, chap. 371 of 1864, chap. 165 of 1873.

Amended by chap. 122 of 1881, chap. 48 of 1889, chap. 420 of 1896, chap. 525 of 1899, chap. 487 of 1903, chap. 162 of 1904, chap. 304 of 1905 and chap. 117 of 1906.

§ 3314. Supervisors may make allowance to grand and trial jurors.

In the counties within the city of New York the board of aldermen, and in any other county the board of supervisors, may direct that a sum, not exceeding three dollars in addition to the fees prescribed in the last section, or in any other statutory provision, be allowed to each grand juror, and each trial juror for each day's attendance at a term of a court of

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record, of civil or criminal jurisdiction, held within their county. If a different rate is not otherwise established as herein provided, each juror is entitled to five cents for each mile necessarily traveled by him in going to and returning from the term; but such board of aldermen or board of supervisors may establish a lower rate. A juror is entitled to mileage for actual travel once in each calendar week during the term, except that in the counties of Queens, Rockland and Orange grand and trial jurors may be paid four cents a mile for each mile necessarily traveled in going to and returning for each day of actual travel during the term in lieu of any other mileage. The sum so established or allowed must be paid by the county treasurer upon the certificate of the clerk of the court, stating the number of days that the juror actually attended, and the number of miles traveled by him in order to attend. The amount so paid must be raised in the same manner as other county charges are raised.

2 R. S. 643, § 37, chap. 307 of 1866.

Amended by chap. 23 of 1897, chap. 393 of 1898, chap. 439 of 1899, chap. 585 of 1900, chap. 247 of 1903, chap. 161 of 1904, chaps. 77, 334 of 1906 and chap. 148 of 1907.

§ 3318. Witnesses' fees generally.

a. A witness's fees for the attendance at the trial of co-defendants who were not subpoenaed should not be allowed where it does not appear that they attended as witnesses and not as parties: Fuller Buggy Co. v. Waldron, 49 Misc. 278.

b. A third person ordered to testify as a witness in supplementary proceedings, who is not personally served with the order and tendered his legal fees, cannot be punished for contempt in failing to obey it: Matter of Depue, 185 N. Y. 60.

c. **Excise agents.**—The plaintiff is entitled to tax disbursements for witnesses even though they are special excise agents: Cullinan v. Union Surety Co., 51 Misc. 643.

§ 3320. Receiver's commissions; cost of bonds; trustee's commissions.

A receiver, except as otherwise specially prescribed by statute, is entitled, in addition to his necessary expenses, to such commissions, not exceeding five per centum upon the sums received and disbursed by him, as the court by which, or the judge by whom, he is appointed allows. But if in any case the commissions of a temporary or permanent receiver, so computed, shall not amount to one hundred dollars, said court or judge may in its or his discretion, allow said receiver such a sum, not exceeding one hundred dollars, for its commissions as shall be commensurate with the services rendered by said receiver. Any receiver, assignee, guardian, trustee, committee, executor, administrator or person appointed under section 91 of the real property law or under section 8 of the personal property law required by law to give a bond as such may include, as part of his necessary expenses, such reasonable sum, not exceeding one percentum per annum upon the amount of such bond paid his surety thereon, as such court or judge allows. A trustee of an express trust is entitled, and two or more trustees of such a trust are entitled,

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to be apportioned between or among them according to the services rendered by them respectively, as compensation for services as such, over and above expenses, to commissions as follows: For receiving and paying out all sums of principal not exceeding one thousand dollars, at the rate of five per centum. For receiving and paying out any additional sums of principal not exceeding ten thousand dollars, at the rate of two and one-half per centum. For receiving and paying out all sums of principal above eleven thousand dollars, at the rate of one per centum. And for receiving and paying out income in each year, at the like rates. In all cases a just and reasonable allowance must be made for the necessary expenses actually paid by such trustee or trustees. If the value of the principal of the trust estate or fund equals or exceeds one hundred thousand dollars, each such trustee is entitled to the full commission on principal, and on income for each year, to which a sole trustee is entitled, unless the trustees are more than three, in which case three full commissions at the rates aforesaid must be apportioned between or among them according to the services rendered by them respectively. If the instrument creating the trust provides specific compensation for the services of the trustee or trustees, no other compensation for such services shall be allowed unless the trustee or trustees shall, before receiving any compensation for such services, by a written instrument duly acknowledged, renounce such specific compensation.

Co. Proc., § 244, subd. 4.

Amended by chap. 465 of 1892, chap. 94 of 1899, chap. 404 of 1902, and chap. 755 of 1904.

a. A receiver, appointed in an action brought by the personal representative of a deceased partner to compel the surviving partner to render an accounting of all partnership property, as may be necessary to satisfy plaintiff's judgment, should have the commissions allowed by § 3320 upon the total value of the property acquired by him in endeavoring to discharge that duty in good faith, even though it proved to be somewhat more than was required; the payment of brokerage for procuring the receiver's bond is not a lawful charge as an expense of the receivership, as it is not a sum paid to his surety under § 3320; there is no statutory authority for an entire allowance to the attorney for the receiver as an extra allowance "in lieu of costs:" Adams v. Elwood, 104 App. Div. 138.

b. Specific securities.—By virtue of the amendment to this section, made by chap. 755 of 1904, trustees to whom specific securities are bequeathed in trust are entitled to one-half commissions, payable out of the corpus of the estate, for receiving the principal thereof; the words "all sums of principal," as used in this section as amended, apply as well to securities in bulk as to money received: Robertson v. Brulatour, 111 App. Div. 882.

c. Where a trustee year after year pays over the entire income of a trust fund without claiming any commissions, his right thereto will be deemed waived and he cannot, upon his final accounting, be awarded commissions upon past income, payable either out of the trust fund or present or future income: Matter of Haskin, 49 Misc. 177.

d. **Principal.**—The value of unsold real estate held by trustees of an express trust cannot be considered in determining whether the principal of the estate amounts to $100,000 so as to entitle each of two trustees to full commissions under § 3320, as amended by chap. 755 of 1904, or under § 2730, for the word "principal," as used in said sections, means principal consisting of personal property, or its equivalent in securities, only: Chisolm v. Hamersley, 14 App. Div. 565; 43 N. Y. Supp. 1052.

e. Trustees are entitled to commissions for receiving and paying out all sums of principal, including the value of the securities forming part of the *corpus;* a life beneficiary may act as trustee with

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others in the management of the trust, and is entitled to the same commissions as a co-trustee upon the *corpus* of the trust: Robertson v. De Brulatour, 188 N. Y. 301, aff'g 111 App. Div. 882.

§ 3321. Fees of county treasurer and chamberlain of New York.

a. Where the board of supervisors of Steuben county fixed the salary of the county treasurer at a specified sum, intending that sum to be in lieu of all compensation from the state or otherwise in the way of fees, a subsequent incumbent of the office is not entitled, in addition to his salary, to collect and receive fees for the collecting and paying over the state, school and court funds: People ex rel. Conine v. Steuben County, 183 N. Y. 114, aff'g 93 App. Div. 604; 97 N. Y. Supp. 1129.

§ 3322. Fees of a justice of the peace.

A justice of the peace is entitled, for the services specified in this section, to the following fees:

1. In an action brought before a justice of the peace:

For a summons, twenty-five cents.

For an order of arrest, twenty-five cents.

For a warrant of attachment, twenty-five cents.

For a requisition in an action for a chattel, twenty-five cents.

For a subpoena, including all the names inserted therein. twenty-five cents.

For the acknowledgment of a power of attorney, twenty-five cents.

For taking an affidavit, or administering an oath, ten cents.

For drawing an affidavit, application, or notice, required by statute, five cents for each folio.

For drawing a bond or an undertaking, twenty-five cents.

For hearing an application for a commission to examine one or more witnesses, fifty cents.

For an order for such a commission, and attending, settling, and certifying interrogatories, fifty cents.

For hearing an application to discharge a defendant from arrest, or to vacate or modify a warrant of attachment, or increase the plaintiff's security thereupon, fifty cents.

For an adjournment, except where it is made by the justice upon his own motion, twenty-five cents.

For a venire, twenty-five cents.

For empanelling and swearing a jury, twenty-five cents.

For hearing the plaintiff's evidence, where the defendant does not appear, twenty-five cents.

For the trial of a demurrer, twenty-five cents.

For the trial of an issue of fact, where the defendant appears, seventy-five cents for each day actually spent in the trial.

For receiving and entering the verdict of a jury, twenty-five cents.

For entering judgment, twenty-five cents.

For filing each paper required by statute to be filed, five cents.

For a transcript of a judgment, twenty-five cents.

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For a copy of any paper for which a fee is not expressly prescribed by law, six cents for each folio.

For an execution or the renewal of an execution, twenty-five cents.

For making a return upon an appeal from a judgment, two dollars.

For an order, directing an action or a special proceeding to be continued before another justice, twenty-five cents.

For services when associated with another justice, in any case where a fee therefor is not expressly prescribed by law, for each day actually spent, two dollars.

2. In a special proceeding, or an action not brought before a justice of the peace:

For a warrant, in a case where a fee therefor is not expressly prescribed by law, twenty-five cents.

For a warrant for the apprehension of a person charged with being the father of a bastard, fifty cents; for indorsing a warrant, issued from another county, twenty-five cents.

For services when associated with another justice, in any case where a fee therefor is not expressly prescribed by law, for each day actually spent, two dollars.

For a precept or other mandate, whereby a special proceeding is commenced, in a case where a fee therefor is not specially prescribed by law, twenty-five cents.

For a view of real property, in a case where it is required by law, fifty cents.

For a warrant of attachment to arrest a delinquent juror or witness, twenty-five cents.

For drawing, signing and depositing with the clerk, a minute or record of conviction of such a juror or witness, or of any person for contempt, in any case where a fee therefor is not specially prescribed by law, fifty cents.

For an execution upon such a conviction before him, twenty-five cents.

For drawing, copying, and certifying a bond, an undertaking, a recognizance or other written security, and filing the same with the county clerk, or other officer with whom it must be filed, twenty-five cents.

For a warrant of commitment for any cause, twenty-five cents.

For a subpoena, including all the names inserted therein, twenty-five cents.

For a precept to notify a jury, fifty cents.

For empanelling and swearing a jury, twenty-five cents; except in proceedings to alter or lay out a highway, in which case he is entitled to two dollars.

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For hearing the matter, concerning which a jury is called, seventy-five cents for each day actually spent.

For receiving and entering the verdict of the jury, and the order, if any, thereupon, twenty five cents.

For any service for which a fee is not expressly allowed by this subdivision, and for which, if rendered in an action before a justice, a fee is allowed by the first subdivision of this section, the fee allowed in such an action for the same service.

For taking the deposition of a witness, upon an order made, or commission issued, by a court of record of the state, or a court in another state or a territory, or a foreign country, ten cents for each folio.

For making the necessary return and certificate thereto, fifty cents.

For taking an affidavit or administering an oath, ten cents.

2 R. S. 264, § 228; L. 1831, c. 287; L. 1857, c. 775; L. 1860, c. 131, § 13; Id., c. 493; L. 1866, c. 692; Co. Proc., § 53; L. 1841, c. 141; L. 1875, c. 334; 2 R. S. 637, § 29; L. 1861, c. 11; L. 1873, c. 146 and c. 315.
Amended by chap. 282 of 1904.

§ 3333. Definition of "action."

a. This section authorizes the reading on a second trial of the testimony of a deceased witness in a criminal action of the testimony taken at the first trial, since the word "action" as defined in § 3333 refers to both civil and criminal actions: People v. Elliott, 172 N. Y. 146, aff'g 66 App. Div. 179; 73 N. Y. Supp. 279.

b. **Mandamus.**—An application for mandamus is a special proceeding: People ex rel. Ehrlich v. Grant, as Late Sheriff, 61 App. Div. 238; 32 Civ. Pro. R. 73.

c. **Highway.**—A proceeding under the Highway Law to lay out a highway is a special proceeding within the meaning of § 3334, and the petitioner, if successful, is entitled, in the discretion of the court, to recover costs and disbursements at the rate allowed in an action under § 3240 which provides that costs in a special proceeding may be awarded at the rates allowed for similar services in an action; costs, referred to in § 152 of the Highway Law, only relate to costs of motions made in such a proceeding, as distinguished from costs of the proceeding itself, and does not prevent the court, in its discretion, from awarding the latter costs pursuant to § 3240: Matter of Peterson, 94 App. Div. 143.

d. **Investigation.**—A proceeding, instituted by freeholders of a town for an investigation into its financial affairs, under § 3 of the General Municipal Law, is a "special proceeding," and when begun before a justice of the supreme court who is subsequently disqualified, may, by virtue of § 52, be continued before a justice of the supreme court of an adjoining county: Matter of Town of Hadley, 44 Misc. 265.

e. An order in supplementary proceedings, requiring the judgment debtor to attend for examination, is an order in an action: Deane v. Sire, 48 Misc. 606.

§ 3334. Id.; "special proceeding."

f. A motion made by the foreign committee of a lunatic life beneficiary for an order directing the transmission of surplus income to said committee is a special proceeding: Matter of Mankowski, 49 Misc. 606.

g. An application to cancel a liquor tax certificate under the provisions of § 28 of the Liquor Tax Law is a special proceeding: Matter of Lawson, 109 App. Div. 195; 96 N. Y. Supp. 33; appeal dis. 184 N. Y. 614.

h. An order in supplementary proceedings, requiring the judgment debtor to attend for examination is an order in an action: Deane v. Sire, 48 Misc. 606.

i. **Commitment.**—An application for the commitment of an insane person to the state hospital, brought under chap. 545 of 1896, as amended, is not a special proceeding as defined by § 3334; the application is *sui generis* and not governed by the general provisions of the Code of Civil Procedure relating to special proceedings: Matter of Murtaugh, 117 App. Div. 302.

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§ 3339. Only one form of civil action.

a. **Encroachment.**—An action to recover a strip of land, upon which the adjoining owner has unlawfully encroached with a brick wall, is founded upon a single wrong, and creates but one cause of action. In such an action, brought under chap. 14, tit. 1, art. 1 of the Code of Civil Procedure, the plaintiff may have all the relief, both legal and equitable, to which he is entitled, and he cannot maintain an action at law to prove his title and right to possession and then bring a separate suit in equity to remove the encroachment. Under §§ 481 and 3339 a plaintiff must join and plead in one action all the elements of his cause of action, upon which he seeks either legal or equitable relief, or both: Hahl v. Sugo, 169 N. Y. 109, rev'g 46 App. Div. 632; 61 N. Y. Supp. 770.

b. **Insurance.**—In an action to recover damages upon an alleged policy of insurance, the defendant alleged in his answer an award of damages made by appraisers, to which plaintiff replied denying the making of an award, and that if made it was fraudulent, the plaintiff, although his reply was unnecessary, has a right to establish the facts alleged in his reply: Sullivan v. Traders' Insurance Co., 169 N. Y. 213, rev'g 45 App. Div. 631; 61 N. Y. Supp. 1149.

§ 3342. Id.; as to county court.

c. Under this section, a county court may grant a reargument of an appeal from a judgment rendered by a justice of the peace: Bumpus v. Anderson, 49 Misc. 417.

§ 3343. Miscellaneous general definitions and rules of construction.

d. **Subd. 12.**—The entry of an order vacating an attachment of the property of a foreign corporation does not annul the warrant of attachment, and, upon an appeal from the order, a stay of proceedings is properly granted: Norden v. Duke, 47 Misc. 473; 95 N. Y. Supp. 940.

e. **Judge.**—Although the term "judge," as defined in § 3343, subd. 3, includes a justice of the peace, yet the term "judge," as used in § 1778, refers only to a judicial officer authorized to preside over a court of record as defined by the Statutory Construction Law, chap. 677 of 1892, § 6; Center v. Hoosick River Pulp Co., 43 Misc. 247; 88 N. Y. Supp. 548.

f. The word "judge," as used in § 3343, includes a justice of the peace: Truesdale v. Winne, 44 Misc. 451; 90 N. Y. Supp. 155.

g. **City court.**—The power of a court to stay executions of its own judgment is recognized by §§ 772 and 1005, and made applicable to the city court by § 3343, subds. 4, 6 and 7: Margolies v. Ernst, 34 Misc. 405.

h. **Malicious prosecution.**—An action to recover damages for malicious prosecution is for a personal injury, within the definition of § 3343, subd. 9, and hence, under § 191, subd. 2, no appeal lies to the court of appeals from an unanimous affirmance, unless permitted in the way provided for in this section: Parr v. Loder, 180 N. Y. 531, dismissing appeal 97 App. Div. 218; 89 N. Y. Supp. 823.

i. **Libel.**—"Personal injury" includes libel, slander, etc.: Morse v. Press Publishing Co., 63 App. Div. 61; 71 N. Y. Supp. 348.

j. **Personal injury.**—By § 3343, subds. 9 and 10, a personal injury is defined to include an actionable injury to the person, and an injury to property is defined as an actionable act whereby the estate of another is lessened, etc.: People ex rel. Harris v. Gill, 85 App. Div. 192; 83 N. Y. Supp. 135.

k. **Attachment.**—A warrant of attachment cannot be granted in an action to recover damages for the death of plaintiff's intestate as it is not an action to recover damages for an injury to property within the meaning of § 635, construed with § 3343, subd. 10: James v. Signell, 60 App. Div. 75; 69 N. Y. Supp. 680; 32 Civ. Pro. R. 38.

l. **Conversion.**—The conversion to defendant's own use of money collected by him as an agent constitutes an "injury to property" within the meaning of § 1215, and in an action based upon such conversion the court has no power to order a reference upon defendant's default: Fullerton v. Young, 46 Misc. 292.

m. **False representations.**—False representations made in relation to shares of stock constitutes "an actionable act whereby the estate of another is lessened" under § 3343, subd. 10: Stewart v. Lyman, 62 App. Div. 182; 70 N. Y. Supp. 936.

n. **Deceit.**—An action for deceit is one for an injury to property as defined in § 3343, subd. 10, and is within the jurisdiction of the municipal court of the city of New York: Levenson v. Briggs, 95 App. Div. 94; 88 N. Y. Supp. 507.

o. **Verification.**—A complaint which is verified has all the force of an affidavit in establishing the facts alleged in § 3343, subd. 11: Levenson v. Briggs, 95 App. Div. 94; 88 N. Y. Supp. 507.

p. **Domestic corporation.**—§ 3343, subd. 11, declares that a domestic cor-

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poration is one located in the state and created by or under the laws of the United States: Matter of Cushing, 40 Misc. 505; 82 N. Y. Supp. 795.

a. **Special proceeding.**—A special proceeding terminates not in a judgment but in a final order: Fenlon v. Paillard, 46 Misc. 151.

b. **Injury to property.**—The term "injury to property," used in subd. 10 of this section, is to be given a broad and unrestricted meaning, so as to include every invasion of one's property rights by actionable wrong: Ghiglone v. Friedman, 115 App. Div. 606.

§ 3344. Short title of this act.

See statutory Const. Law, chap. 677 of 1892, § 29.

§ 3347. Application of certain portions thereof regulated and qualified.

c. § 723, which, by subd. 6 of § 3347, is made applicable to all courts was not intended to limit the broad powers of amendment of pleadings conferred upon municipal courts by § 2944, but on the contrary to make their powers of amendment more definite: Shirtcliffe v. Wall, 68 App. Div. 375; 74 N. Y. Supp. 189.

d. **City court.**—The city court of the city of New York has power to remove to itself and consolidate with an action pending in it, an action brought in the municipal court of said city, and should exercise the power where the parties in both actions are the same, the causes of action identical, arise out of the same transactions, are provable by the same evidence and are contested upon the same defenses: Curley v. F. & M. Schaefer Brewing Co., 35 Misc. 131.

e. The city court of New York has power to grant an order of interpleader as § 820, authorizing the granting of such an order, is expressly made applicable to the city court of New York by § 3347; consequently the fact that after the granting of such an order, the action becomes one of equitable cognizance is not fatal to the right of the city court of New York to grant such an order, as it is competent for the legislature to confer equitable jurisdiction on the city court of New York, either expressly or by necessary implication: Krugman v. Hanover Fire Ins. Co., 45 Misc. 346.

f. **Deposit of funds.**—Unless it appears to the contrary, it will be presumed that an agreement pursuant to § 813, in regard to deposit of trust funds and their withdrawal contained a provision that they might be withdrawn by an order of the court without the consent of the surety, the surrogate is given jurisdiction by § 3347, subd. 6, to make orders for the payment of trust funds deposited with the trust company pursuant to an agreement made between trustees and their sureties, under § 813, upon notice to the surety: Matter of Chesterman, 75 App. Div. 573.

g. **Jurors.**—§ 1166, in respect to the disqualification of jurors related by consanguinity, etc., with the part limiting the time within which the objection to such disqualification must be taken, is made applicable to justices' courts by § 3347. subd. 14: Bradt v. Peck, 81 App. Div. 295.

h. The supreme court and the appellate division of the supreme court are enumerated separately in the Constitution as courts of record, and as a general rule any reference in the Code is to the special or trial terms thereof: O'Neil v. Mansfield, 47 Misc. 516.

i. **Consolidation Act.**—Although it was formerly held that the Consolidation Act only allowed personal judgment in case the lien were established, when that act was repealed subsequent to the commencement of an action to foreclose a lien thereunder, the effect of such repeal was to make applicable the general provisions of the Code of Civil Procedure, which allow a personal judgment although the lien fails: McDonald v. Mayor, etc., of New York, 113 App. Div. 625.

§ 3357. Title.

j. § 3357 et seq., provides that the court is to try any issue made upon proceedings for the condemnation of property or it may refer the same, and, if the petitioner prevails, the judgment shall be entered adjudging that the condemnation of the property described is necessary for the public use: Citizens' Sav. Bank v. Town of Greenburgh, 173 N. Y. 215 at 229.

k. **Street railroads.**—Street surface railroads may condemn easements in streets: Adee v. Nassau Electric R. R. Co., 72 App. Div. 404; aff'd 177 N. Y. 548; 76 N. Y. Supp. 589.

l. **Highway.**—Proceedings to declare a river a public highway, when consitutional: Matter of Wilder, 90 App. Div. 262; 85 N. Y. Supp. 741.

m. **Change of grade.**—Provisions under § 169 of the Village Law, to change the grade of a street, considered: Matter of Comesky, 83 App. Div. 137; 81 N. Y. Supp. 1049.

n. **Trespass.**—A private corporation which constructs a dam across a river,

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which dam in times of high water causes the water to back up and overflow the property of the upper riparian proprietor, is guilty of a trespass and may be required to lower the dam so as to terminate the trespass: Brown v. Ontario Talc Co., 81 App. Div. 273; 80 N. Y. Supp. 837.

a. **Water works.**—The consent of the state water commission is not necessary where a municipality seeks to condemn a fully equipped system of water works: Village of Waverly v. Waverly Water Co., 117 App. Div. 336.

b. **Sufficiency of petition.**—While there is no specific provision in the Condemnation Law for questioning the sufficiency of a petition by objection on the part of the property owner, such method of procedure has been sanctioned by the courts for many years: Bell Telephone Co. v. Parker, 187 N. Y. 299; rev'g 115 App. Div. 920.

c. **Eminent domain.**—Judicial jurisdiction and revision in relation to the exercise of the power of eminent domain considered: Matter of Delavan Ave., 167 N. Y. 256, at 260.

d. **Appeals.**—§§ 3357-3384 clearly point out how appeals may be taken in proceedings for the condemnation of real property: Village of St. Johnsville v. Smith, 61 App. Div. 380; 70 N. Y. Supp. 880.

e. **Parties.**—It is only by virtue of the provisions of §§ 3357-3384, relating to condemnation, that a party seeking to acquire lands for public purposes may join parties whose interests are separate and diverse: Schenectady Railway Co. v. Lyon, 44 Misc. 275; 89 N. Y. Supp. 908.

f. **Costs.**—Land taken under the provisions of the charter for cities of the second class, providing that it shall be taken in the method prescribed when the act took effect, was, under the charter of the city of Rochester, taken as prescribed by §§ 3357-3384 and the owner of such land is entitled under § 3372 to recover from the city the costs of the proceeding: Matter of City of Rochester, 181 N. Y. 322.

g. **Purpose.**—It was the purpose of the legislature in enacting the Condemnation Law to supplement all laws with reference to the taking of private property for public purposes: County of Orange v. Ellsworth, 98 App. Div. 275; 90 N. Y. Supp. 576.

h. Costs prior to the appointment of commissioners in a proceeding under § 159 of the Village Law, relative to the recovery of damages resulting from changing the grades of village streets, are in the discretion of the court to be allowed under § 3240 of the Code, and the provisions of §§ 3357-3384 do not affect in any manner the costs incurred by a petitioner prior to the appointment of commissioners: Matter of Bley v. Village of Hamburg, 84 App. Div. 23.

§ 3358. Definitions.

i. The term "person," defined to include natural persons, "the state and a political division thereof:" County of Orange v. Ellsworth, 98 App. Div. 275; 90 N. Y. Supp. 576.

j. **Owner.**—Under § 3361, providing that the petition and notice of presentation "must be served upon all the owners of the property at least eight days prior to its presentation," and under § 3358, which defines the term "owner" to include "all persons having any interest, etc., in the property to be taken," it is not necessary that the municipal authorities be made parties to the proceedings, as no public right is sought to be taken, and as the municipality has no estate in the property to be taken, and is not an "owner" within the meaning of said section: New Union Telephone Co. v. Marsh, 96 App. Div. 122; 89 N. Y. Supp. 79.

§ 3359. Proceeding to be taken as prescribed in this title.

k. Where an entry has been made upon land against the objection of the owner, by the authorities of a village, and such authorities have constructed a reservoir and pipes for the purpose of supplying the village with water, the village and its agents are mere trespassers although a survey of the land has been made and filed before condemnation proceedings were instituted: Village of St. Johnsville, 184 N. Y. 341.

l. An appraisal of property of waterworks company made by commissioners in condemnation proceedings is illegal and erroneous, when based upon an invalid contract of purchase: Matter of Water Works Comrs. of White Plains, 176 N. Y. 239.

m. **Village commissioners.**—Condemnation of water company's franchise on the petition of the village water commissioners: Matter of Board of Water Comrs., 71 App. Div. 544; 76 N. Y. Supp. 11.

n. Condemnation by a village of necessary water supply: Village of Fultonville v. Fonda W. W. Co., 35 Misc. 426; 71 N. Y. Supp. 1009.

o. **Street railroad.**—Condemnation by street railroad of real property in a city; what constitutes inability "to agree for the purchase:" Schenectady Railway Co. v. Lyon, 41 Misc. 506; 85 N. Y. Supp. 40.

p. The appropriation by an electric street railway company of a street, the fee of which is in the abutting owners,

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constitutes a taking of private property: Peck v. Schenectady Railway Co., 67 App. Div. 359, aff'd 170 N. Y. 298; 73 N. Y. Supp. 794.

a. **Right of way.**—Right of street surface railroads to obtain, by condemnation, a right of way on a street, the fee of which is vested in the abutting owners, considered: Schenectady Railway Co. v. Peck, 88 App. Div. 201.

b. **Mill right.**—Condemnation of a mill right for a city water supply: Matter of Daly, 72 App. Div. 394; 76 N. Y. Supp. 28.

c. **Railroads.**—The use of a city street for the purposes of a street surface railroad, operated by electric power, imposes an added burden upon the property rights of the owners of the fee, subject to the public easement for street purposes: Peck v. Schenectady Ry. Co., 170 N. Y. 298.

d. **Railroads.**—To justify the taking of lands for railroad purposes *in invitum* the owner, not only the necessity for the land must exist, but that necessity must be recognized by statute and be provided for in some plain grant of power, and when the right to exercise the power is claimed, the corporation must make out a case within the statutory delegation of power: Erie Railroad Co. v. Steward, 170 N. Y. 172.

e. **Easements.**—The right of an abutting owner to easements and access in a street is protected by the Constitution: Egerer v. N. Y. Central & H. R. R. Co., 70 App. Div. 421; 75 N. Y. Supp. 476.

f. **Appeal.**—No appeal lies from an order appointing commissioners: Stillwater, etc., R. Co. v. B. & M. R. R., 67 App. Div. 367; 73 N. Y. Supp. 744.

§ 3360. Petition to be presented; contents thereof.

g. Under the provisions of the Code requiring the petition in condemnation proceedings to allege the use for which the property is required, allegations on the part of such that the property was to be taken for a public park and that the people in that part of the city are desirous of a place for recreation, are insufficient even where no answer has been interposed, as the petition should show the situation of the neighborhood, the population, that there is no other sufficient place for recreation and such other facts as bear upon the necessity of the use for public purposes of the land which is sought to be taken: Matter of Meagher, 35 Misc. 601.

h. § 3360 provides that a proceeding shall be by petition to the supreme court setting forth certain facts enumerated under seven subdivisions, including a specific description of the property to be condemned and its location by metes and bounds, in substantial harmony with the provisions of chap. 240 of 1901, § 3: County of Orange v. Ellsworth, 98 App. Div. 275; 90 N. Y. Supp. 576.

i. § 3360, subd. 3, is satisfied by the allegation that the street is "unnecessary and useless as a public street and is a menace to the health of the residents of the city;" the petition in a proceeding is not defective because it fails to allege, as required by subd. 7 of § 3360, that the city intends "in good faith to complete the work or improvement for which the property is to be condemned:" Matter of City of Rochester (In re Neun), 102 App. Div. 99.

j. **Telephone.**—A petition asking the condemnation of easements for the erection of a telephone line should definitely describe the easement to be taken in order that the amount of damages may be determined and the petitioner in the future be confined to the specifications of the petition. The defendant is entitled to know the size, number and location of the poles, and at what height and in what manner the wires are to be strung: Suffolk County Telephone Co. v. Gammon, 113 App. Div. 764.

k. **Sufficiency of petition.**—While there is no specific provision in the condemnation law for questioning the sufficiency of a petition by objection on the part of the property owner, such method of procedure has been sanctioned by the courts for many years: Bell Telephone Co. v Parker, 187 N. Y. 299, rev'g 115 App. Div. 920.

l. **Navigation.**—In a proceeding for condemnation of the bed of Buffalo river in order to improve navigation it is unnecessary for the petitioner to show facts establishing the necessity for acquisition of land as required in § 3360: Matter of City of Buffalo, 189 N. Y. 163, rev'g 116 App. Div. 555.

m. **Railroad.**—A railroad not seeking to change its present route or to lay out a new one, but simply taking lands by condemnation for additional terminal accommodations for its present line, is not required to comply with No. 6 of the Railroad Law and file a map and profile of the route adopted: N. Y. C. & H. R. R. Co. v. Ernst, 114 App. Div. 874.

§ 3361. Notice annexed to petition; when petition and notice served.

n. **Owner.**—Under § 3361, providing that the petition and notice of presentation "must be served upon all the owners of the property at least eight days prior to its presentation," and under § 3358, which defines the term "owner" to include "all persons having any interest, etc., in the property to be taken," it is not necessary that the municipal authorities be made parties to the pro-

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ceeding as no public right is sought to be taken, and as the municipality has no estate in the property to be taken, and is not an "owner" within the meaning of said section: New Union Telephone Co. v. Marsh, 96 App. Div. 122; 89 N. Y. Supp. 79.

a. § 3361 requires that there must be annexed to the petition a notice of the "time and place" at which it will be presented to a special term of the supreme court held in the judicial district where the property is situated: Mott v. Eno, 97 App. Div. 580, at 617; 90 N. Y. Supp. 608.

b. **Railroad.**—Although § 12 of the Railroad Law requires that the commissioners shall "be appointed by the court as is provided in the Condemnation Law," the Condemnation Law does not govern the proceeding; and the fact that such a proceeding was instituted upon a petition and an order to show cause, returnable in less than the eight days prescribed by the Condemnation Law, § 3361, does not deprive the court of jurisdiction: Oneonta, C. & R. S. R. Co. v. C. & C. V. R. R. Co., 85 App. Div. 284.

§ 3364. Appearance of parties generally.

c. § 3364 provides for the appearance of parties, conforming the practice to that of actions in the supreme court: County of Orange v. Ellsworth, 98 App. Div. 275; 90 N. Y. Supp. 576.

§ 3365. Answer; contents thereof.

d. Where a railway company seeks to condemn, under the Condemnation Law, real property held in severalty by the defendants, and some of them default in the proceeding, some appear and consent to condemnation, others appear and object to the jurisdiction and still others answer under § 3365, but not by the same attorneys, the proceeding constitutes, in effect, as many distinct proceedings as there are owners of distinct parcels, and justifies a separate judgment as to each and entitles each successful owner to costs: Schenectady Railway Co. v. Lyon, 44 Misc. 275; 89 N. Y. Supp. 908.

§ 3366. Verification of petition or answer.

See § 523 et seq., ante, Verification of pleadings.

§ 3367. Trial; case; exceptions.

e. **Necessity.**—A reference may be granted to determine the necessity of condemnation of lands granted, although they were not included in the map of the route: Hudson & Manhattan R. Co. v. Wendel, 112 App. Div. 822; 98 N. Y. Supp. 341, aff'd 186 N. Y. 535.

f. The proceeding under the Condemnation Law is in court all the time, and the order of reference in this distinctly statutory proceeding must be granted by the court: Owasco Lake C. Co. v. Teller, 110 App. Div. 450.

g. **Damages.**—In an action to recover damages to the rental value of premises by the maintenance of a railroad viaduct in Park avenue in the city of New York, it appeared that there had been no diminution in the rental value of the upper portion of the building, and that the vacancy of the lower portion antedated the period for which damage was claimed, and was not caused by the building of the viaduct but by the passage of the Raines Law, which affected the value of the premises for saloon purposes. On all the evidence, *held*, that an award of damages was not warranted: Bremer v. N. Y. C. & H. R. R. Co., 118 App. Div. 139.

h. **Tenant.**—On the condemnation of property, a tenant under a lease entitling him to renewals is entitled to compensation for the taking of such permanent machinery as has been built into the building and used in connection with the leasehold for business purposes, and which has little or no value when separate from the property; a tenant's right of renewal is appurtenant to the property, and when destroyed on condemnation the tenant is entitled to compensation therefor: Matter of City of New York (North R. Water Front), 118 App. Div. 865.

i. **Value.**—The award of commissioners of estimate and appraisal for lands taken by the city of New York by eminent domain considered and confirmation refused; on the appraisal of such land it is error to exclude evidence of the actual rents received upon the question of value. The rental of improved realty is relevant on the question of fee value: Matter of City of New York, 118 App. Div. 272.

j. **Title to realty.**—As the title to real estate remains in the owner until it is actually taken by eminent domain, the owner may recover compensation for the taking of buildings erected thereon by him after the beginning of the condemnation proceedings, even though they were built for the purpose of recovering compensation from the city: Matter of City of New York, 118 App. Div. 224.

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§ 3368. Certain provisions applicable.

a. **Amendment.**—A petition in condemnation proceedings which wrongly describes property, may, under § 721 made applicable by § 3368, be amended so as to properly describe the premises: Matter of Lake Shore & Michigan S. R. R. Co., 53 Misc. 340.

§ 3369. Judgment; costs to defendant; commissioners.

b. Under the provisions of the Code requiring the petition in condemnation proceedings to allege the use for which the property is required, allegations on the part of a city that the property was to be taken for a public park, and that the people in that part of the city are desirous of a place for recreation, are insufficient, even where no answer has been interposed, as the petition should show the situation of the neighborhood, the population, that there is no other sufficient place for recreation, and such other facts as bear upon the necessity of the use for public purposes of the land which is sought to be taken: Matter of Meagher, 35 Misc. 601.

c. **City of Rochester.**—Land taken under the provisions of the charter for cities of the second class, providing that it shall be taken in the method prescribed when the act took effect, was, under the charter of the city of Rochester, taken as prescribed by §§ 3357-3384, and the owner of such land is entitled under § 3372 to recover from the city the costs of the proceeding: Matter of City of Rochester, 181 N. Y. 322.

d. **Default.**—Where default is made in answering the petition, the petitioner may take judgment for the relief demanded in accordance with the provisions of § 3369: Matter of City of Gloversville, 42 Misc. 559; 87 N. Y. Supp. 612.

e. **Costs.**—§§ 3369 and 3372 relate to the "trial" only, that is, the trial of an issue raised by an answer to the petition; that is the only "trial" that is had in a condemnation proceeding, and the word does not relate to or designate the hearing before the commissioners at all; under § 3372 costs are allowed upon the hearing before the commissioners, if no offer has been made by the plaintiff, the defendant recovers costs without regard to the amount of the award; if such an offer has been made, he recovers costs only if the award be larger than the offer; and the costs allowed are costs before and after notice of trial and a trial fee: Padden v. City of New York, 45 Misc. 516.

f. **Damages.**—A person who has formerly acted as agent for a railroad in procuring rights of way for a proposed route is not eligible as a commissioner to award damage in condemnation proceedings brought by said railroad: Rochester, Syracuse & Eastern R. R. Co. v. Tolan, 116 App. Div. 696.

g. In determining the award to be paid for lands taken by eminent domain, the benefits, direct or consequential, received by the petitioner should not be considered, but the award should be based upon the value to the owner of the property and the rights taken from him. The commissioners should also consider the adaptability of the lands taken for particular uses by the owner: Matter of East River Gas Co., 119 App. Div. 350.

§ 3370. Powers and duties of commissioners.

h. Where the state of New York, by proceedings *in invitum*, takes a tract of woodland for the purposes of the Adirondack forest preserve, the measure of damages of a person who, under a contract with the owner of the fee of the land so taken, owned all the standing spruce and hemlock upon such land over a certain diameter, is the value of the spruce and hemlock owned by him as it was upon the stump, with interest on the amount from the time the same was appropriated; if such property has no market value at the place of the appropriation, the measure of damages is its value at the nearest market place, less the expense of moving it to such market place: Turner v. State of New York, 67 App. Div. 393; 73 N. Y. Supp. 372.

i. **Appeal.**—A special term order, which modifies and corrects a final order in a special proceeding thereby becomes the final order in that proceeding, and an order of the appellate division reversing it is reviewable by the court of appeals: Matter of Board of Education, 169 N. Y. 456.

j. **Landlord and tenant.**—Where tenants lease property expressly subject to the contingency that the landlord might, by proceedings under a statute in behalf of a municipality be deprived of the title or right to the possession of the property, they are not entitled to have the value of their unexpired terms ascertained and deducted from the total award to the landlord in such proceedings, representing the value of the property at the time it was made: Matter of Mayor, etc., of New York, 168 N. Y. 254.

k. **Assessment.**—An assessment of fee damages must be of the date of the award, and where the report of the commissioners found the damages as existing at a date nearly a year prior to the award, the court refused to confirm the

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report: Matter of Manhattan R. Co. v. Comstock, 35 Misc. 326, aff'd 74 App. Div. 347; 77 N. Y. Supp. 614.

a. **Tenants.**—Where tenants and subtenants of property taken in condemnation proceedings are entitled to an award, such award must be deducted from the value of the fee: Matter of Pier, 62 App. Div. 271, aff'd 168 N. Y. 254; 70 N. Y. Supp. 1127.

b. On the condemnation of property, a tenant under a lease entitling him to renewals, is entitled to compensation for the taking of such permanent machinery as has been built into the building and used in connection with the leasehold for business purposes, and which has little or no value when separated from the property; a tenant's right of renewal is appurtenant to the property, and when destroyed on condemnation the tenant is entitled to compensation therefor: Matter of City of N. Y. (North R. Water Front), 118 App. Div. 865.

c. Commissioners are not entitled to an extra allowance in a proceeding to open a street: Matter of the City of New York, 49 Misc. 609.

d. An award will ordinarily be sustained unless the commissioners have clearly gone astray or adopted erroneous principles in the assessment of damages: Waterford El. L. H. & P. Co. v. Reed, 47 Misc. 406.

§ 3371. Confirmation or setting aside of report; deposit, when deemed a payment.

e. An award will ordinarily be sustained unless the commissioners have clearly gone astray or adopted erroneous principles in the assessment of damages: Waterford El. L. H. & P. Co. v. Reed, 47 Misc. 406.

f. There is no appeal authorized from an order of the special term refusing to confirm the report of commissioners in condemnation proceedings and sending the report back with directions requiring a further report in accordance therewith: Matter of Commissioner of Public Works, 111 App. Div. 285; 97 N. Y. Supp. 503; aff'd 185 N. Y. 391.

g. An order made at special term, setting aside the report of commissioners of appraisal appointed in a condemnation proceeding, and ordering a rehearing before the same commissioners unless the defendants would stipulate to reduce the award, is appealable to the appellate division, notwithstanding the peculiar provisions of §§ 3371 and 3375; if the special term deems the award excessive, it should set the report aside, but it has no power to modify the award for such a cause; the special term has no power to receive affidavits tending to show that the award was excessive: Matter of Town of Guilford, 85 App. Div. 207.

h. **Proceeds.**—Where real estate is sold under condemnation proceedings, the proceeds thereof become personal estate, as if the sale had been voluntary, and the devisee of such real estate under a will made by the owner before such sale is not entitled to the proceeds thereof: Ametrano v. Downs, 170 N. Y. 388.

i. **Plottage.**—The owner may elect between "plottage" value of several lots and several value of each: Matter of Armory Board, 73 App. Div. 152; 76 N. Y. Supp. 766.

j. **Discontinuance of proceeding.**—Where, by reason of the inability of the city of New York to condemn lands of the Woodlawn Cemetery for a public street, an irregular strip of land, designed to be used in connection with lands taken from the cemetery, becomes valueless to the municipality, the city has the right and should be allowed to discontinue the proceeding so far as it relates to such strip, without being compelled to abandon its proceeding *in toto:* Matter of Mayor, 52 Misc. 319.

k. **Reversion.**—When a portion of premises has been taken by a municipality for widening a street, leaving only a possible reversion in the owner, his right to an award to be paid for the lands taken does not pass to his subsequent grantee unless there be a definite assignment thereof: Harris v. Kingston Realty Co., 116 App. Div. 704.

§ 3372. Offer to purchase; costs; additional allowance.

l. §§ 3369 and 3372 relate to the "trial" only, that is, the trial of an issue raised by an answer to the petition; that is the only "trial" that is had in a condemnation proceeding, and the word does not relate to or designate the hearing before the commissioners at all; under § 3372, costs are allowed upon the hearing before the commissioners, if no offer has been made by the plaintiff, the defendant recovers costs without regard to the amount of the award; if such an offer has been made, he recovers costs only if the award be larger than the offer, and the costs allowed are costs before and after notice of trial and a trial fee: Padden v. City of New York, 45 Misc. 516.

m. **Costs.**—When the amount awarded the owner of real estate by commissioners in a condemnation proceeding under § 3372 exceeds the amount offered by the corporation taking the lands with interest from date of offer, the landowner is entitled to the amount of costs awarded to defendant under § 3251 when

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defendant prevails in an action in the supreme court after a trial; ten dollars costs for proceedings before notice of trial and fifteen dollars after notice of trial, with thirty dollars costs for trial of issue of facts and ten dollars for trial occupying more than two days: Matter of Brooklyn Union El. R. R. Co., 176 N. Y. 213, rev'g 82 App. Div. 567; 81 N. Y. Supp. 527.

a. **Different owners.**—A proceeding under the Condemnation Law becomes a distinct proceeding as to each owner, justifying a separate judgment as to each and to each successful owner costs as a matter of right: Schenectady Ry. Co. v. Lyon, 44 Misc. 275; 89 N. Y. Supp. 908.

b. **Costs.**—A defendant in a condemnation proceeding, who, after an assessment of damages by the commissioners, is awarded a greater sum than was offered to him by the corporation is not entitled under § 3372 to recover costs as though a trial had been had: Matter of Brooklyn Union El. R. R. Co., 82 App. Div. 567; 81 N. Y. Supp. 527.

c. **City of Rochester.**—Land taken under the provisions of the charter for cities of the second class, providing that it shall be taken in the method prescribed when the act took effect, was, under the charter of the city of Rochester, taken as prescribed by §§ 3357-3384, and the owner of such land is entitled, under § 3372, to recover from the city the costs of the proceeding: Matter of City of Rochester, 181 N. Y. 322.

d. **Disbursements.**—In condemnation proceedings, the award should include counsel fee, taxable costs and other disbursements, and a reasonable counsel fee is five per cent. upon the amount of the award to each owner, not exceeding $1,000 in any case: Matter of the Board of Rapid Transit Railroad Comrs., 117 App. Div. 160.

e. **Confirmation of report.**—Where the confirmation of the report of commissioners, determining the compensation to property owners for land taken for railroad purposes, is opposed on the ground that the award for land, claimed to have a special value other than for farm purposes by reason of a sand pit and muck bed located thereon, is inadequate; and the evidence, though justifying a considerably larger award, is sufficient to sustain the findings of the commissioners, the report will be confirmed and the defendants awarded an extra allowance of five per cent: N. Y. C. & H. R. R. Co. v. Sayles, 52 Misc. 601.

§ 3374. Abandonment and discontinuance of proceeding.

f. The phrase in § 3374 relative to a discontinuance, "and upon such other terms and conditions as the court may prescribe," does not authorize it to compensate parties who, while the proceeding was pending during a period of three months, incurred counsel fees and expenses, lost tenants and rents, and in some cases hired other property in expectation of being compelled by the county to vacate their own: County of Onondaga v. White, 38 Misc. 587.

§ 3375. Appeal from final order; stay of proceedings.

g. There is no appeal authorized from an order of the special term refusing to confirm the report of commissioners in condemnation proceedings and sending the report back with instructions requiring a further report in accordance therewith: Matter of Commissioner of Public Works, 111 App. Div. 285; 97 N. Y. Supp. 503, aff'd 185 N. Y. 391.

h. **Notice.**—A notice of appeal from an order confirming the report of commissioners of appraisal must be served on a railroad liable for one-half the award: Matter of Grade Crossing Commissioners, 68 App. Div. 560; 74 N. Y. Supp. 205.

i. **Excessive award.**—An order made at special term, setting aside the report of commissioners of appraisal appointed in condemnation proceedings, and ordering a rehearing before the same commissioners unless the defendants would stipulate to reduce the award, is appealable to the appellate division notwithstanding the peculiar provisions of §§ 3371 and 3375; if the special term deems the award excessive, it should set the report aside, but it has no power to modify the award for such a cause; the special term has no power to receive affidavits tending to show that the award was excessive: Matter of Town of Guilford, 85 App. Div. 207.

j. **Interlocutory judgment.**—Defendants in proceedings to condemn lands cannot appeal from an interlocutory judgment of condemnation, but may, under § 3375, review such interlocutory judgment on an appeal from the order confirming the report of the commissioners as to the amount to be paid by the plaintiff: Village of St. Johnsville v. Smith, 61 App. Div. 380; 70 N. Y. Supp. 880.

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§ 3379. Plaintiff in possession may have stay of proceedings on giving security.

a. The Condemnation Law, § 3379, does not authorize the court to restrain owners of premises, sought to be condemned from maintaining a right of action, which accrued prior to the commencement of the condemnation proceedings: Wait v. Hudson Valley Railway Co., 43 Misc. 304.

§ 3380. Temporary possession pending proceedings.

b. Under this section the court has not power to permit a railroad company to take immediate possession of real estate, pending condemnation proceedings unless the amount deposited is the amount stated in the answer as the value of the property: Matter of New York W. & Boston R. Co., 51 Misc. 333.

c. This section does not violate § 6 of art. I of the Constitution by authorizing the taking of lands without due compensation; the section is intended to insure to the owner the payment of the value; public interests will be delayed by delay, upon the petitioner paying the proper value of the lands into court, even though the answer of the respondent in the proceedings to condemn lands fails to state the value of the lands as contemplated by this section: Matter of Niagara Power Co., 111 App. Div. 686; 97 N. Y. Supp. 853.

§ 3382. Practice in cases not herein provided for.

d. If the conduct of the defendant, whether in good faith, inadvertently or maliciously, renders a strict compliance with § 3280 impossible, the general authority conferred upon the court by § 3382 is sufficiently comprehensive to enable the obvious purpose of the Condemnation Law to be accomplished: Matter of Niagara Power Co., 111 App. Div. 686; 97 N. Y. Supp. 853.

§ 3383. Repealing clause; limitations.

e. A park is a "public place," within the meaning of the repealing clause in the Condemnation Law, which excepts from the operation of § 3383 "such acts and parts of acts as prescribe a method for procedure for the condemnation of real property for public use as a highway, etc.;" Matter of City of Rochester (In re McLean), 102 App. Div. 181.

§ 3384. When act takes effect.

f. Costs prior to the appointment of commissioners in a proceeding, under § 159 of the Village Law, relative to the recovery of damages resulting from changing the grades of village streets, are, in the discretion of the court, to be allowed under § 3240, the provisions of §§ 3357-3384 do not affect in any manner the costs incurred by a petitioner prior to the appointment of commissioners: Matter of Bley v. Village of Hamburg, 84 App. Div. 23.

§ 3391. Petition to be presented; contents thereof.

g. It is only when the interests of a religious corporation will be thereby promoted that a sale of its real estate can be made: Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12.

§ 3398. Purpose of title; definitions.

h. The proceedings for the enforcement of liens for public or private improvements are provided for in the same title under § 3398 et seq.: Terwilliger v. Wheeler, 81 App. Div. 460; 81 N. Y. Supp. 173.

i. **Construction.**—This section is to be construed in connection with article one of the Lien Law: Jackson Co. v. Haven, 87 App. Div. 236; 84 N. Y. Supp. 356.

j. **Assignment.**—Where an assignment is made for the benefit of creditors of a contractor, the assignee takes title to moneys due such contractor subject to liens filed by laborers, etc., subsequent to the assignment but within the ninety days fixed by the statute: John P. Kane Co. v. Kinney, 174 N. Y. 69, rev'g 68 App. Div. 163; 74 N. Y. Supp. 260.

k. **Evidence.**—In an action to foreclose a mechanic's lien, where it is shown that the contractor had failed to carry out his agreement, in which he warranted plumbing for one year and agreed to keep it in repair, it is proper to exclude questions tending to show the reasonable cost of keeping the plumbing in repair for one year, where it was not shown that witness knew the extent of the repairs: Schultze v. Good-

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stein, 180 N. Y. 248, rev'g 82 App. Div. 316; 81 N Y. Supp. 946.

The contractor cannot give evidence to show that the materials used in the work are better than those specified in the contract. Id.

a. **Notice of lien.**—A notice of lien which fails to state when the first item of work was done, or anything from which that time may be inferred, as required by subd. 6 of § 9 of the Lien Law (L. 1897, ch. 418), is insufficient, notwithstanding the notice substantially complies with the other provisions of the statute; since the provision thereof that the law shall be construed liberally does not authorize the court to dispense with what the statute says the notice shall contain: Mahley v. German Bank, 174 N. Y. 499, rev'g 66 App. Div. 623; 73 N. Y. Supp. 1140.

b. **Justice's Court.**—§§ 3398-3419 prescribe proceedings for the enforcement of mechanics' liens on real property, and authorize an action in a justice's court where the amount of the debt, upon which the lien is founded, does not exceed $200: Faville v. Hadcock, 39 Misc. 397; 80 N. Y. Supp. 23.

§ 3399. Enforcement of a mechanic's lien on real property.

c. Where there is a substantial performance of a contract to install an elevator, a mechanic's lien may be enforced by the contractor, even though slight variations from the original specifications exist; a lienor is also entitled to recover for installing an extra elevator when the work was performed at the owner's request and was extraneous to the contract: Otis Elevator Co. v. Dusenbury, 47 Misc. 450.

d. In an action to foreclose a mechanic's lien, one who is liable for the debt upon which the lien is founded may be joined as a defendant though his liability arises upon a separate instrument guaranteeing the performance of the contract: Whisten v. Kellogg, 50 Misc. 409.

e. The assignee of a general contractor for the benefit of creditors takes title to funds due the assignor subject to liens of a special contractor furnishing work and materials: John P. Kane Co. v. Kinney, 174 N. Y. 69.

f. **Details to be supplied.**—Where the contractor has, except in some slight details, completed his contract to do work on the premises, he may recover of the owner the balance due, less the cost of supplying the details: Holl v. Long, 34 Misc. 1; 68 N. Y. Supp. 522.

g. Where a building contractor, acting in good faith, quits work in the belief that he has completed his contract, when, in fact, slight omissions exist therein which may be readily supplied or remedied, the rule of substantial performance obtains in equity, and the contractor may recover from the owner the contract price less a proper deduction for the omissions: McGrath v. Horgan, 72 App. Div. 152; 76 N. Y. Supp. 412.

h. **Sub-contractor.** — Sub-contractor's liens are necessarily dependent on the right of their principal to recover under his contract: Person v. Stoll, 72 App. Div. 141; 76 N. Y. Supp. 324.

i. **Invalid lien.**—Where a lien is invalid, no judgment can be given in an action for its enforcement against the owner personally or against a surety upon a bond given to discharge the lien: Gallick v. Engelhardt, 36 Misc. 269; 73 N. Y. Supp. 309.

j. **Judgment.**—When the court has jurisdiction, its judgment cannot be attacked collaterally: Glen Cove Granite Co. v. Costello, 65 App. Div. 43; 72 N. Y. Supp. 531.

k. **Improvements.**—The proceedings for the enforcement of liens for public or private improvements are provided for in the same title under § 3398 *et seq.*, the former are enforced against the funds provided for by the improvement, the latter against the property improved: Terwilliger v. Wheeler, 81 App. Div. 460; 81 N. Y. Supp. 173.

l. **Quantum meruit.**—Where the owner defaults in payments, the contractor need not continue the work, but may maintain an action against the owner to recover upon a *quantum meruit* for the work done and materials furnished: White v. Livingston, 69 App. Div. 361; 75 N. Y. Supp. 466.

m. **Work abandoned.**—The lien of a special contractor is not enforcible where the contractor abandons the work and the owner completes it: Hawkins v. Burrell, 69 App. Div. 462; 74 N. Y. Supp. 1003.

n. **Personal judgment.**—In an action to foreclose a mechanic's lien, filed by a person who furnished material to a contractor, the plaintiff, if he fails to establish a valid lien, is not entitled to recover a personal judgment against the owner of the premises under §§ 3399 and 3412, where the complaint does not allege the existence of any contract between the plaintiff and the owner, or any liability on the part of the owner to the plaintiff, and does not contain any demand for a personal judgment against such owner: Kane v. Hutkoff, 81 App. Div. 105; 81 N. Y. Supp. 85.

o. **Justice's Court.**—§§ 3398-3419 prescribe proceedings for the enforcement of mechanics' liens on real property, and authorize an action in a justice's court where the amount of the debt upon which the lien is founded does not exceed $200: Faville v. Hadcock, 39 Misc. 397; 80 N. Y. Supp. 23.

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§ 3400. Enforcement of a lien under contract for a public improvement.

A lien for labor done or materials furnished for a public improvement may be enforced against the funds of the state or the municipal corporation for which such public improvement is constructed, to the extent prescribed in article one of the lien law, and against the contractor or subcontractor liable for the debt, by a civil action, in the same court and in the same manner as a mechanic's lien on real property.

Chap. 419 of 1897.

Amended by chap. 255 of 1906.

a. Prior to the amendment of the Code by chap. 255 of 1906, the provisions of the Code for the enforcement of liens relative to public improvements did not confer upon the supreme court power or authority to enforce the same against the state: Mason v. Board of Trustees, 50 Misc. 40.

b. Where a contractor has abandoned his building contract by reason of a wrongful demand that he do over work which was defective because of the default of another contractor, and through no fault of his own, and, in an action to foreclose a mechanic's lien, alleges that because of the failure of the defendant to pay installments earned and due for work performed, he abandoned the contract, he cannot recover under such allegation unless he shows that he substantially performed the other work which completed his contract and made the payment due thereunder: Brandt v. City of New York, 110 App. Div. 396; 97 N. Y. Supp. 280, aff'd 186 N. Y. 599.

c. The proceedings for the enforcement of liens for public or private improvements are provided for in the same title under § 3398 et seq.: the former are enforced against the funds provided for by the improvement, the latter against the property improved: Terwilliger v. Wheeler, 81 App. Div. 460; 81 N. Y. Supp. 173.

d. **Preference.**—Under the Lien Law (chap. 418 of 1897), laborers for daily or weekly wages on contracts for public improvements have a preference over all other lienors without reference to the time when such laborers filed their notice of lien: McDonald v. Village of Ballston Spa, 34 Misc. 496; 70 N. Y. Supp. 279.

e. **Filing assignments.**—The requirement of filing assignments of contracts and orders for money due applies to public contracts: Brace v. City of Gloversville, 167 N. Y. 452.

§ 3401. Action in a court of record; consolidation of actions.

See § 1626 et seq., ante, Action to foreclose a mortgage.

f. Two actions should be consolidated where one was brought presumably in ignorance of the commencement of the other: Hawkins v. Mapes-Reeve Const. Co., 82 App. Div. 72; 81 N. Y. Supp. 794.

g. **Abatement.**—An action brought to foreclose a mechanic's lien does not abate by the death of the owner of the premises during the pendency thereof, and may be revived against the successors in interest of the deceased owner without prejudice to proceedings already had: Perry v. Levenson, 82 App. Div. 94; 81 N. Y. Supp. 586.

h. **Foreclosure.**—When in an action to foreclose a mechanic's lien certain work has been left undone by the contractor, the costs of completing which affects the amount of plaintiff's recovery, his claim is not unliquidated and an allowance of interest on his recovery is not proper: Fox v. Davidson, 111 App. Div. 174.

§ 3402. Parties to an action in a court of record.

In an action in a court of record the following are necessary parties defendant:

1. All lienors having liens against the same property or any part thereof.

2. All other persons having subsequent liens or claims against the property, by judgment, mortgage or likewise, and

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3. All persons appearing by the records in the office of the county clerk or register to be overseers of such property or any part thereof. Every defendant who is a lienor shall, by answer in the action, set forth his lien, or he will be deemed to have waived the same, unless the lien is admitted in the complaint, and not contested by another defendant. Two or more lienors having liens upon the same property or any part thereof, may join as plaintiffs.

4. The state, in the same manner as a private person, when the lien is one filed against funds of the state for which public improvement is constructed. In such a case, the summons must be served upon the attorney-general, who must appear in behalf of the people.

Added by chap. 419 of 1897.

Subd. 4 added by chap. 255 of 1906.

a. Prior to the amendment of the Code by chap. 255 of 1906, the provisions of the Code for the enforcement of liens relative to public improvements did not confer upon the supreme court power or authority to enforce the same against the state: Mason v. Board of Trustees, 50 Misc. 40.

b. If the plaintiff lienor makes another lienor a party defendant and the latter serves a copy of his answer on his co-defendants, the owners of the premises, such defendant lienor is entitled to have his claim determined in the action: Hinkle v. Sullivan, 108 App. Div. 316.

c. A sub-lienor who has furnished material to such contractor and has been made a party defendant, who merely endeavors to enforce his rights in subordination to those of the plaintiff, should not be charged with the costs of such action: Condon v. Church of St. Augustine, 112 App. Div. 168.

d. **Judgment.**—A party is entitled to such judgment as the proof warrants whether he moved formally for such judgment or not: Schultze v. Goodstein, 82 App. Div. 316; 81 N. Y. Supp. 946.

§ 3403. Equities of lienors to be determined.

e. § 3403 is merely a substantial reenactment of § 17 of chap. 342 of 1855: Nussberger v. Wasserman, 40 Misc. 120; 81 N. Y. Supp. 295.

f. **Personal judgment.**—Where the plaintiff in an action brought to foreclose a lien for a public improvement, fails to establish a valid lien, the court may, under §§ 3403 and 3412, proceed to determine the rights of the parties in the fund in controversy and grant the plaintiff a personal judgment against such of the defendants as are indebted to him: Terwilliger v. Wheeler, 81 App. Div. 460; 81 N. Y. Supp. 173.

Issues.—The court may, in an action to enforce liens, adjust and determine the equities of the parties and the order or priority of the liens, and determine all issues raised by any defense or counterclaim: Id.

g. If the plaintiff lienor makes another lienor a party defendant and the latter serves a copy of his answer on his co-defendants, the owners of the premises, such defendant lienor is entitled to have his claim determined in the action: Hinkle v. Sullivan, 108 App. Div. 316.

h. **Legal claim.**—The power of the court under § 3403 to determine the equities between all parties does not authorize an adjudication upon a legal claim: Maneely v. City of New York, 119 App. Div. 376.

§ 3404. Action in a court not of record.

i. Even though the Mechanic's Lien Law is to be liberally construed, yet in an action to foreclose such a lien where timely objection is made the recovery must follow the allegations of the pleading; where a contractor has abandoned his building contract by reason of a wrongful demand that he do over work which was defective because of the default of another contractor, and through no fault of his own, and, in an action to foreclose a mechanic's lien, alleges that because of the failure of the defendant to pay installments earned and due for work performed, he abandoned the contract, he cannot recover under such allegation unless he shows that he substantially performed the other work which completed his contract and made the payment due thereunder: Brandt v. City of New York, 110 App. Div. 396; 97 N. Y. Supp. 280.

j. The municipal court of the city of New York has jurisdiction, under § 3404, to foreclose a mechanic's lien: Eadie v. Waldron, 64 App. Div. 424; 72 N. Y. Supp. 233.

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§ 3407. Issue, how tried; judgment.

a. When, in an action to foreclose a mechanic's lien, certain work has been left undone by the contractor, the cost of completing which affects the amount of plaintiff's recovery, his claim is not unliquidated and an allowance of interest on his recovery is not proper: Fox v. Davidson, 111 App. Div. 174.

§ 3411. Costs and disbursements.

b. In an action brought to foreclose several mechanics' liens filed by different persons, it is improper to allow the owner separate bills of costs against unsuccessful lienors who filed separate liens; only one bill of costs can be allowed to one party: Woolf v. Schaefer, 103 App. Div. 567.

c. **Application of § 3228.**—The provisions of § 3228, subd. 4, do not apply to an action to foreclose a mechanic's lien or limit the costs in such an action: Faville v. Hadcock, 39 Misc. 397.

d. **Prevailing party.**—The prevailing party is the one who succeeded upon the issues which were litigated: Harvey v. Brewer, 82 App. Div. 589; 81 N. Y. Supp. 846.

e. A sub-lienor who has furnished material to such contractor, and has been made a party defendant, who merely endeavors to enforce his rights in subordination to those of the plaintiff, should not be charged with the costs of such action: Condon v. Church of St. Augustine, 112 App. Div. 168.

f. **Award of costs.**—A referee may award costs in favor of lienors payable from a sum due from the owner to a defaulting contractor. When an owner who completes a contract on the default of the contractor admits his liability for the amount due the defaulting contractor, and makes no defense, he should not personally be charged with costs; when a defendant lienor takes no active part in the action, save to prove his lien or observe some other formality, he should not be awarded costs: Ottman v. Schen. Co-Operative Realty Co., 119 App. Div. 736.

§ 3412. Judgment in case of failure to establish lien.

g. There can be no recovery under this section without establishing some portion of the lien: Thompson-Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358.

h. A lienor who establishes his lien is not entitled to a personal judgment: Murphy v. City of Watertown, 112 App. Div. 670.

i. While, in an action to foreclose a mechanic's lien, a personal or money judgment is proper as against the owner or contractor who has promised to pay the consideration for the work and labor, there is no basis for such a judgment against a subsequent grantee who has made no such promise nor assumed the obligation of the grantor: Gilmour v. Colcord, 183 N. Y. 342, mod'g 96 App. Div. 358; 89 N. Y. Supp. 689.

j. The recovery of a judgment for the foreclosure of a lien for a smaller sum than the amount offered is more favorable to the plaintiff: McNally v. Rowan, 101 App. Div. 342; 92 N. Y. Supp. 250, aff'd 181 N. Y. 556.

k. Where the complaint in an action to foreclose a mechanic's lien not only demands the foreclosure of the lien but also "that the plaintiffs have judgment against the defendant for any deficiency after the sale," if the action cannot be maintained as one to foreclose a mechanic's lien it may be maintained to obtain a personal judgment against the defendant under § 3412: Ryan v. Train, 95 App. Div. 73; 88 N. Y. Supp. 441.

l. **Claim not filed.**—§ 3412, providing for the personal judgment in an action to foreclose a mechanic's lien, if the lienor fails to establish a valid lien applies only where the party claiming the personal judgment has filed a mechanic's lien and such lien has become unenforcible; no personal judgment can be rendered in favor of a party who has not filed for any part of his claim; this section was not designed to permit a personal judgment to be entered upon a simple contract obligation without regard to the provisions of law to enforce liens, as there would thus be brought into a court of equity the final adjudication of a claim which might be enforced at common law and triable by a jury: Deane Steam Pump Co. v. Clark, 87 App. Div. 459.

m. In an action to foreclose a mechanic's lien, where none of the parties establish a valid lien, the court has no power, under § 3412, to render a judgment establishing an equitable lien in favor of a defendant contractor for a part of his claim, and to award him a personal judgment against the owner for the entire amount of his claim, without decreeing the enforcement of the lien in the first instance, where such defendant did not file a mechanic's lien, nor demand in his answer a personal judgment against the owner: Deane Steam Pump Co. v. Clark, 84 App. Div. 450; 82 N. Y. Supp. 902.

n. **Contract.**—§ 3412, which allows the lienor to recover any sum due him even if he failed to establish a valid lien, affords the lienor a privilege and does not make it compulsory upon him to en-

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force in the foreclosure action claims under the contract not covered by a valid lien: Koeppel v. Macbeth, 97 App. Div. 299.

a. **Public improvement.**—Where the plaintiff in an action brought to foreclose a lien for a public improvement fails to establish a valid lien, the court may, under §§ 3403 and 3412, proceed to determine the rights of the parties in the fund in controversy and grant the plaintiff a personal judgment against such of the defendants as are indebted to him: Terwilliger v. Wheeler, 81 App. Div. 460; 81 N. Y. Supp. 173.

b. **Demurrer.**—In an action for foreclosure of a mechanic's lien, where the complaint states a cause of action for work, labor and services, and demands a personal judgment, the plaintiff's demurrer to the contractor's defense that the lien is invalid must be sustained, as, under § 3412, the plaintiff is entitled to a personal judgment: Clapper v. Strong, 41 Misc. 184; 83 N. Y. Supp. 935.

c. **Owner.**—In an action to foreclose a mechanic's lien, filed by a person who furnished material to a contractor, the plaintiff, if he fails to establish a valid lien, is not entitled to recover a personal judgment against the owner of the premises under §§ 3399 and 3412, where the complaint does not allege the existence of any contract between the plaintiff and the owner, or any liability on the part of the owner to the plaintiff, and does not contain any demand for a personal judgment against such owner: Kane v. Hutkoff, 81 App. Div. 105; 81 N. Y. Supp. 85.

d. **Work incomplete.**—Where the work is incomplete when an action is brought to foreclose a mechanic's lien, but is subsequently completed, a personal judgment is improper: Alex v. Allen, 107 App. Div. 182.

e. **Contractor.**—Right to personal judgment against contractor: Nussberger v. Wasserman, 40 Misc. 120; 81 N. Y. Supp. 295.

f. **Jury trial.**—§ 3412, providing that, in an action to foreclose a mechanic's lien, the court may, if the lien is invalid, award the plaintiff a personal judgment against the defendant, does not impair the defendant's right to a jury trial, and the right may be preserved either by having the issues settled and tried in advance of the trial at special term or by trying the issue as to the validity of the lien at special term, and if the lien be declared invalid, to enter an interlocutory judgment to that effect, and have the issues as to the personal judgment tried at the trial term. Defendant is deemed to have waived his right to a jury trial unless he takes one of these methods: Steuerwald v. Gill, 85 App. Div. 605; 83 N. Y. Supp. 396.

g. § 3412 may be given effect without depriving the parties of their constitutional right to a jury trial in case the validity of the lien is not established, and either party is entitled to have issues framed for trial by a jury, as a matter of right under §§ 970 and 974 of the Code, or, if the court determines that the lien is invalid, by introducing an interlocutory judgment to that effect and allowing the remaining issues to be sent to a jury for trial: Hawkins v. Mapes-Reeve Construction Co., 82 App. Div. 72; 81 N. Y. Supp. 794.

h. In an action to foreclose a mechanic's lien, in which it is determined that the plaintiff never had, and never could have acquired, a valid mechanic's lien, the court has no power under § 3412 to grant the plaintiff a personal judgment against the defendant; if § 3412 granted a judgment in such a case, it would be unconstitutional in that it deprived his adversary of a jury trial: Mowbray v. Levy, 85 App. Div. 68; 82 N. Y. Supp. 959.

§ 3413. Offer to pay into court.

At any time after an action is brought under the provision of this title, the owner may make and file with the clerk with whom the notice of lien is filed, if in a court of record, and if in a court not of record, with the court, an offer to pay into court the sum of money stated therein, or to execute and deposit securities which he may describe, in discharge of the lien, and serve upon the plaintiff a copy of such offer. If a written acceptance of the offer is filed with such clerk, or court, within ten days after its service, and a copy of the acceptance is served upon the party making the offer, the court, upon proof of such offer and acceptance, may make an order, that on depositing with such clerk, or court, the sum so offered, or the securities described, the lien shall be discharged, and that the money or securities deposited shall take the place of the property upon which the lien existed, and shall be subject to the lien. If

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the offer is of money only, the court, on application and notice to the plaintiff may make such order, without the acceptance of the offer by the plaintiff. If such action is brought in a court not of record, such order may be made by the county court of the county where such action is brought upon notice, and upon filing such order and depositing such sum of money or securities with the county clerk of such county, he shall forthwith discharge said notice of lien, by writing upon the margin of the record thereof, the words "discharged by payment." Money or securities deposited upon the acceptance of an offer pursuant to this section shall be held by the clerk or the court until the final determination of the action, including an appeal.

Amended by chap. 395 of 1907.

a. Where a mechanic's lien is filed against property, consisting of two lots owned separately, for work, labor and materials furnished thereon to a person, who has contracted to buy both lots, it is not necessary that all three of the "owners" should execute the undertaking required by the Lien Law to discharge the lien, and any one of them may do so: Miller v. Schmitt, 35 Misc. 231; 71 N. Y. Supp. 771.

§ 3416. Judgment for deficiency.

b. Where a sufficient amount is not realized to discharge the lien, judgment may be directed for the deficiency against any person liable who shall be adjudged to pay the same: Orr v. Wolff, 71 App. Div. 614; 75 N. Y. Supp. 845.

§ 3417. Vacating of a mechanic's lien, by order of court.

c. **Public improvement.**—When a mechanic's lien is filed upon property which is not of the nature of a public improvement the discharge thereof is governed by §§ 18, 19 and 23 of the Lien Law and by § 3417; the lien upon an undertaking, given to discharge an original lien, should not be discharged for a failure to bring an action within thirty days after the notice to do so was served under § 3417: Matter of Uris v. Brackett Realty Co., 114 App. Div. 29.

d. **Canceling lien.**—§ 3417 does not make it compulsory upon the court to order the cancellation of a lien, because the lienor has failed to begin his suit within the time specified in the notice, but is a permissive statute giving the court discretionary power to order that the lien be cancelled if the action is not brought within a specified time; where the lienor served the summons and complaint upon one of the defendants within the time specified, but was unable to make service on the owner of the premises, the court may properly refuse to direct the cancellation of the lien: Jackson Co. v. Haven, 87 App. Div. 236; 84 N. Y. Supp. 356.

e. The only authority to discharge a mechanic's lien on motion is that contained in the statute, and a municipal lien cannot be canceled on motion on the ground that an action has not been brought to enforce the same within the time prescribed by statute: Matter of Rudiger, 118 App. Div. 86.

§ 3418. Judgment in action to foreclose lien on account of public improvement.

If, in an action to enforce a lien on account of a public improvement, the court finds that the lien is established, it shall render judgment directing the state or the municipal corporation to pay over to the lienors entitled thereto for work done or material furnished for such public improvement, and in such order of priority as the court may determine, to the extent of the sums found due the lienors from the contractors, so

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much of the funds or money which may be due from the state or municipal corporation to the contractor, as will satisfy such liens, with interest and costs, not exceeding the amount due to the contractor.

Chap. 419 of 1897.

Amended by chap. 255 of 1906.

a. Prior to the amendment of the Code by chap. 255 of 1906, the provisions for the enforcement of liens relative to public improvements did not confer upon the supreme court power or authority to enforce the same against the state: Mason v. Board of Trustees, 50 Misc. 40.

b. Under § 3418, the entire recovery by the lienors, including the costs awarded to them, must not exceed the amount due to the contractor: Rockland Lake Co. v. Port Chester, 102 App. Div. 360; 92 N. Y. Supp. 631, aff'd 185 N.Y. 590.

§ 3419. Enforcement of liens on vessels.

c. A contractor furnishing materials for the construction of a vessel is not entitled to a lien on such vessel under § 30 of the Lien Law for materials furnished which were not actually used in the construction of the vessel; § 1 of the Lien Law does not apply to liens on vessels, which, being in derogation of the common law, must be strictly construed: Matter of Froment, 110 App. Div. 72; 96 N. Y. Supp. 1061, aff'd 186 N. Y. 599.

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